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THE LAWYERS REPORTS ANNOTATED

BOOK LXIX.

ALL CURRENT CASES OF GENERAL VALUE AND
IMPORTANCE, WITH FULL ANNOTATION.

BURDETT A. RICH AND HENRY P.

FARNHAM, EDITORS.

ROCHESTER, N. Y.

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LAWYERS' REPORTS

ANNOTATED.

KENTUCKY COURT OF APPEALS.

R. B. COWPER, *Appt.*,

v.

D. B. WEAVER'S ADMINISTRATOR.

(.....Ky.....)

A court order annulling a judicial sale, and directing a resale of the property, without accepting the bid, or directing any proceedings against the bidder, or any confirmation of the sale, relieves him from all liability upon his bid.

(January 10, 1905.)

NOTE.—*Relief of purchaser upon annulling judicial or execution sale.*

- I. *Release from bid*, 33.
- II. *Release from bid and return of deposit*, 36.
- III. *Relief by reimbursement or subrogation.*
 - a. *Generally*, 39.
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 - d. *Probate, guardians', and administrators' sales.*
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I. *Release from bid.*

It is a necessary result that a purchaser is released from his bid on the sale being set aside. So the converse is also true, and a release from the bid will, in effect, set the sale aside. This rule is only intended to include such cases as show, in effect, that the sales were set aside or treated as invalid. In many cases a resale was had because the purchaser failed to comply with his bid, and proper steps were taken to hold him for a deficiency where the sale was not set aside. The reason for holding him liable is on the theory that his purchase is binding, and he has caused loss by his delinquency. The rule is that where proper steps are not taken to fix the purchaser's liability, and a resale is had, he will be released; and it may be stated that where he is led to believe that the first sale has been abandoned, and another sale is had, he will not be liable. This was the rule adopted 69 L. R. A.

A PPEAL by defendant from a judgment of the Circuit Court for Livingston County holding him responsible for a bid made at a judicial sale. *Reversed.*

The facts are stated in the opinion.

Messrs. Hendrick & Miller and J. C. Hodge for appellant.

Messrs. Bush & Wilson and C. C. Grassham for appellee.

Hobson, J., delivered the opinion of the court:

D. B. Weaver died a resident of Living-

in COWPER v. WEAVER'S ADMR. As to whether or not he may claim release if the sale is not confirmed, the case of COWPER v. WEAVER'S ADMR. holds that he is released, saying: "The purchaser at the first sale was only a preferred bidder until his bid was accepted by the court confirming the sale." But in a case in the United States Supreme Court (*Camden v. Mayhew*, 129 U. S. 73, 32 L. ed. 608, 9 Sup. Ct. Rep. 246), he was held not released; but the court offered to confirm the sale if he would pay, and an order was made to fix his liability when the subsequent sale was ordered. Judicial sales differ from execution sales, in that in the former a confirmation is necessary to fix the liability of the purchaser. Some states have a statutory provision for the confirmation of all sales. The purchaser will be released if the conditions in the second sale vary from those in the first sale. If the sale is void the purchaser will be released from his bid (see subdv. III.). He will be released by the court in judicial sales which are set aside on the ground that the title is doubtful (see subdv. II.). He has been released on the ground of poverty.

So, where no notice was given or rule taken against the purchaser at a sheriff's sale, that a resale would be at his risk, he was held justified in regarding his purchase as abandoned. *Galpin v. Lamb*, 29 Ohio St. 529.

The same was held in *Girard L. Ins. Co. v. Young*, 8 Phila. 16, the court saying: "Surely if, after such a sale, the property is again put up without any demand on the part of the sheriff or anyone else for the performance of the contract, and without any notice or intimation that the purchaser is to be held responsible for the loss, on a resale, he may fairly infer that his bid is not insisted on, that his compliance with it has been waived."

In *Makemson v. Braun*, 100 Ky. 88, 37 S. W. 495, the purchaser refused to execute bonds, and the commissioner, without reporting to the

ston county, and his administrator brought this suit to sell the land owned by him for the payment of debts, and for the settlement of his estate. At the April term, 1903, a judgment was entered directing a sale of the real estate. The sale was made on June 1st, and at it appellant, R. B. Cowper, bid in lots 67, 68, 69, 70, and a part of lot 17, for \$265. After the sale he seems to have concluded that the title of the intestate to the land was not good, and refused to execute a bond for the price. The commissioner on September 9th filed his report of sale, stating that Cowper had purchased the property at the sale, and had refused to execute a sale bond. On this report on September 25th the court, without taking any proceedings against Cowper or confirming the sale, entered the following order: "It

appearing to the court by report of the master commissioner, W. I. Clarke, that he sold to R. B. Cowper lots 67, 68, 69, 70, and 71, and a part of outlot No. 17, as appears on the town plat of Smithland, Kentucky, and said Cowper having failed and refused to execute bonds therefor, and said fact being made known to this court as aforesaid, the said commissioner is here directed to treat said sale to Cowper as if it had not been made, and readvertise said property for sale, and sell same in the full way and manner set out and directed in the judgment filed herein, and will in all respects comply with said judgment in taking bond, making report, and so forth and so on, as herein set out; and this cause is continued." The resale was made on November 2, 1903, and at it the property brought the sum of \$32.

court, readvertised and sold the property, which sale was confirmed. Subsequently a rule was issued against the first purchaser to show cause why he should not be required to pay a deficiency arising between the sales. It was held that, as the commissioner had elected to treat the first purchase as a nullity, and reported all his acts to the court, and no steps were taken to compel the purchaser to comply with his purchase, but, instead, the last sale was confirmed, the rule was taken too late, and the purchaser was released.

And in *Stout v. Philippi Mfg. & M. Co.* 41 W. Va. 330, 56 Am. St. Rep. 843, 23 S. E. 571, where, by consent of the parties, it was agreed that there should be a resale, and the same purchaser purchased at the second sale at a less price, and the first sale was not confirmed, or reported until after the second sale, it was held that he was not liable for the deficiency. In this case the property was injured by a freshet between the sales, although this was not pleaded in the proceedings to hold the purchaser liable. The court said: "But, without report of this bid, or its acceptance by the court, or intimation of a purpose to hold him to his bid, the property is resold, by mere act of the attorneys of the parties, without advertisement. As all parties consented to a resale, Douglass could fairly infer that they recognized the injustice of confirming the sale, and agreed to dis regard it."

In *Mississippi* it was held that no liability attaches to the first purchase until after the sale is confirmed; that, if the purchaser refuses to pay, and the commissioners advertise and resell at a lower price, without reporting to the court until after a second sale, which is confirmed, the purchaser will not be held liable for the deficiency. *Campe v. Saulcer*, 68 Miss. 278, 24 Am. St. Rep. 273, 8 So. 846.

In regard to the necessity of a confirmation to hold the purchaser, in *Virginia F. & M. Ins. Co. v. Cottrell*, 85 Va. 857, 17 Am. St. Rep. 108, 9 S. E. 132, the court said: "Until the sale has been confirmed the proceeding is *in fieri*; the bidder is not considered as a purchaser, and he is therefore not liable for loss to the property, by fire or otherwise, in the interim; nor is he compellable, before confirmation, to complete his purchase."

So, in *Neal v. Andrews*, 53 Ark. 445, 14 S. W. 646, the court said: "In a judicial sale the

court is the vendor, and there is no completed sale until confirmation by the court, which is the acceptance of the bidder's offer."

And a motion that a person reported best purchaser should complete his purchase by a certain day was refused; the report not being absolutely confirmed. *Anonymous*, 2 Ves. Jr. 335. The lord chancellor said: "He felt a difficulty; as until confirmation, the purchaser is always liable to have the biddings opened; until that, *non constat* that he is the purchaser."

And in *Campbell v. Johnston*, 4 Dana, 178, the court said: "Although in general the purchaser under an erroneous decree in chancery may not be affected by the reversal of the decree, yet, as was determined by this court in the case of *Forman v. Hunt*, at the last spring term, 3 Dana, 614, such sales are not complete until they are sanctioned by the court."

So, in *Harwood v. Cox*, 26 Ill. App. 374, the court said: "The accepted bidder at a master's sale acquires no independent right to have his purchase completed, but is nothing more than a preferred bidder, who proposes for the purchase of the property, depending upon the sound, equitable discretion of the chancellor for a confirmation of the sale by his ministerial agent."

And in *Gowan v. Jones*, 10 Smedes & M. 164, the court said: "In chancery, some reports are conclusive, and others require confirmation. Among the latter, is the report allowing the highest bidder at a sale under a decree to be the purchaser."

So, in *Mebane v. Mebane*, 80 N. C. 34, the court said: "The bid is but a proposition to buy, and, until accepted and sanctioned by the court, confers no right whatever upon the purchaser. The sale is consummated when the sanction is given and an order for title made and executed."

In *Forman v. Hunt*, 3 Dana, 614, the commissioner in a foreclosure sale, supposing that the estate would be subject to redemption, had the estate valued, which depressed the sale, and the property did not bring its fair value. The court set the sale aside on condition that the purchaser be paid costs and expenses. The court said: "Those who purchase at a chancellor's sale purchase subject to this revising power and control, exercised by the chancellor over the sale; and their right to the purchase

thereupon, at the December term of the court, the court awarded a rule against Cowper to show cause, if any he could, why he should not pay the difference between the bid made by him and the bid made at the second sale, which the court then confirmed. Appellant, Cowper, in response to the rule, set out that the intestate had no interest in the property, and also relied on various irregularities in the proceedings. He also set up the order above quoted, by which the sale to him was ordered to be treated as nullity, and pleaded it in bar of the rule, in connection with the subsequent orders of the court confirming the second sale, and conveying the property to the purchaser in treat.

In *Makemson v. Braun*, 100 Ky. 88, 18 S. W. 2d 584, 37 S. W. 495, the commis-

sioner sold a tract of land, and, the purchaser failing to execute bond, readvertised the property, and made a second sale at the next county court. He then reported to the court both the sales. The court confirmed the second sale, and ordered the property conveyed to the purchaser. After this a rule was taken out against the purchaser at the first sale to show cause why he should not pay the deficiency. It was held that he was not liable. The court said: "While an accepted bidder at a judicial sale who fails to comply with his bid may, by proper proceedings, be required to pay the damage resulting from such failure, which would include the difference between the bid, if any, and the amount realized on the final sale, if the property sold for less on that sale [than at the former sale], yet, where the

at execution sale to make a necessary memorandum in writing. *Linn Boyd Tobacco Warehouse Co. v. Terrill*, 13 Bush, 463.

In *Harvey v. Adams*, 9 Lea, 289, it was held that the purchaser at the first sale, where there had been a resale, could not be held liable by the judgment creditor for the difference in the first and last bid, the court saying: "There is no privity of contract between the complainants and the defendant. The defendant's contract was with the sheriff, and the liability to him."

In *Grier v. Yontz*, 50 N. C. (5 Jones, L.) 371, a purchaser was held released from liability for a deficiency on a resale where a new process was issued to sell the land. The court said: "By suing out the *venditioni exponas*, the creditor treats the debtor as still the owner of the land, and he relies upon that for the payment of his debt."

Under S. C. act 1839, § 58, providing that, if the purchaser at sheriff's sale shall fail to comply with the terms, the sheriff shall proceed to resell at the risk of the defaulting purchaser, either on the same or some subsequent sale day, as the plaintiff may direct, and, in the absence of any directions, shall resell on the same day if practicable, and, if not, on the next succeeding sale day, making in every such case proclamation that he is reselling at the risk of such defaulting former purchaser,—it was held, in *Yongue v. Cathcart*, 2 Strobb. L. 221, that the purchaser was released where the sheriff failed at the resale to make the proclamation required by the statute. On a subsequent trial of this case (3 Strobb. L. 304) it was held that, if the sheriff did not sell on the same day, or the succeeding sale day, the purchaser would be released from a deficiency unless the sheriff showed that the second sale was by the direction of the plaintiff.

And where the sheriff before the return day returned on his writ that the purchaser had not paid, and the property was unsold for want of bidders, and made no demand, it was held that the bidder was not liable for the difference in the price. *Holdship v. Doran*, 2 Penn. & W. 9. There seems to be some difference in the practice in such cases. In this case the court suggested that the sheriff should sue if the money was not ready at the return day, without tendering a deed, or he might make a special return "that the property was knocked down to A B for so much,—that said A B has

ends upon and awaits his sanction and confirmation." In *Camden v. Mayhew*, 129 U. S. 73, 32 Fed. 608, 9 Sup. Ct. Rep. 246, the purchaser was held to pay his cash bid. A rule was awarded against the purchaser to show cause why he should not pay the sum bid by him for the property, or why the sale should not be set aside and a resale had at his risk and costs, if the exceptions to the report of the sale were sustained. The sale was set aside, and the commissioners were directed to resell the property at the cost of the purchaser, for cash, reserving for future "determination in this case the question whether the said Camden will be required to pay the deficiency." He was held liable for the deficiency on a proceeding by rule. The setting aside of the sale in this case was mainly because of noncompliance with the bid, though the reasons are not given, and the purchaser was not released, because the same was provided for his liability being retained. The chief question discussed was the right to proceed by rule or attachment without the sale having been confirmed. On ordering the resale, the court had offered the first purchaser the choice of paying his bid, which was held tantamount to a confirmation.

A purchaser will be discharged from liability on a resale where proper steps to fix his liability are not taken.

A purchaser was held released from the deficiency caused by a resale, where such resale was on different terms from those on which he purchased. *Ray v. Adams*, 28 Misc. 664, 59 N. Y. Supp. 1047; *Riggs v. Pursell*, 74 N. Y. 2d 100; *James v. Gordon*, 9 Pa. 426; *Weast v. Derwent*, 509 Pa. 509; *Labauve v. McCabe*, 34 La. 221; *Zimmerman v. Eckert*, 2 Pennyp. 221; *Brown v. Husband*, 77 Pa. 389; *Paul v. L. 2 Rawle*, 326; *Hare v. Bedell*, 98 Pa. 107, 73 Am. Dec. 726, holding, also, that where property must be resold, and resold to the property of the identical defendant, as the property it had been bid off to the first bidder.

A purchaser was held released from liability on a deficiency on second sale where, on a return of the execution, made by the sheriff of the defaulting bidder. The court held that it was the duty of the sheriff

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commissioner has elected to treat the bid as a nullity, and has proceeded to advertise and sell again, and the second sale has been confirmed without objection, it is then too late to proceed against the first purchaser for failure to comply with the terms of the sale." The commissioner, in making the sale, is the agent of the court. His powers are limited by the orders of the court. He has no power to treat a sale as a nullity, and in the case cited the judgment of the court turned, not on the action of the commissioner, but on the order of the court confirming the action of the commissioner, for the act of the agent amounted to nothing until it was ratified by the court. The commissioner is simply ordered to sell

the property. He is without power to release the purchaser from his obligation. The liability of the purchaser depends upon the action of the court. In the case at bar the court ordered the sale to be treated as a nullity. He directed the land to be resold, and, when that sale was made, he confirmed it, and directed the property to be conveyed to the purchaser. The purchaser at the first sale was only a preferred bidder until his bid was accepted by the court by confirming the sale. The contract was not complete, and, when the court decided not to confirm the sale, but to treat it as though it had not been made, the purchaser stood simply as any other person who makes a proposition which is not accepted. When the purchaser

not paid the purchase money, and that, therefore, the property remains unsold." But that the sheriff could not, unless the purchaser was notoriously insolvent, return that the purchaser has not paid long before the return day, and that the property was, therefore, unsold for want of bidding; and "where he does so, and has made no demand, and no evidence to justify him in so doing, the bidder is not liable for the difference in prices."

In *Miller v. Collyer*, 36 Barb. 250. It was held that the purchaser was not liable to the assignee of the sheriff under a foreclosure sale, where the terms of sale were that, if any purchaser shall fail to comply with the conditions, the premises so struck down will be put up for sale upon the same terms without notice to the purchaser, and such purchaser shall be held liable for any deficiency; that the remedy against a purchaser was by application to the court to compel him to complete it, or to resell, and hold him liable for the loss.

Purchasers have been released from liability on the ground of mistake, or want of authority in their agent to bid, or defects in the property or title.

So, in *Clay v. Kagelmacher*, 98 Ga. 149, 26 S. E. 493, it was held that a bidder would be released from liability on a resale, where he had refused to comply with his bid by reason of the statements of the auctioneer causing him to make a mistake as to the identity of the lot purchased.

In *Harder v. Sayle-Stegall Commission Co.*, 61 Ark. 66, 31 S. W. 979, it was held that, if a second sale was made because an alleged purchaser refused to ratify a bid made by his agent, and the authority of the agent was limited, and the sheriff knew that he was exceeding his authority, the purchaser would be released from the deficiency arising from the second sale.

Executors of a mortgagor were misled and induced to believe that a sale of the premises would not take place. It was held that the sale should be set aside on the ground of surprise, on their paying to the purchaser his costs and expenses; and, if this was not complied with, the plaintiff could cause the property to be exposed again for sale. *Williamson v. Dale*, 3 Johns. Ch. 290.

And where an administrator's sale was void, it was held that an action for specific performance could not be maintained by the heir against the purchaser. *Kertchem v. George*, 78 Cal. 597, 21 Pac. 372.

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And where a sheriff's sale was set aside and quashed, it was held that the sale bond also was properly quashed, and the purchaser released. *Wilson v. Percival*, 1 Dana, 419.

So, a bidder was held released from his purchase as adjudicatee of a succession, where it appeared that there was probability of litigation on the title. *Rogge v. Municipal Improv. Co.*, 49 La. Ann. 37, 21 So. 170; *Bachino v. Coste*, 35 La. Ann. 570; *Nash's Succession*, 48 La. Ann. 1573, 21 So. 254.

And in *Duncomb v. Holst*, 13 Fed. 11, where the title was such that the purchaser was not bound to accept, an order was made relieving him from complying with his bid, and directing a resale.

A sale was void where the vendor, having a purchase-money lien, had an execution sale thereon of the land without having his deed securing such lien put on record. It was held that the purchaser should be released from his bid. *McCord v. McGinty*, 99 Ga. 307, 25 S. E. 667. This sale was void under a statute. (See *Upchurch v. Lewis*, 53 Ga. 621, subdiv. III. b.)

So, where an administrator fraudulently represented that the land sold was the property of his intestate by virtue of the location of a head right, where he knew that it had been located upon another tract, it was held that the judgment upon the sale note for the purchase money should be enjoined. *Coombs v. Lane*, 17 Tex. 280.

In *Deaver v. Reynolds*, 1 Bland, Ch. 50, a purchaser in partition sale was released by order of court, where he was unable to comply with the requirements of the sale in regard to executing bonds, and asked that the sale be set aside; but he was held chargeable with the costs and expenses of the first sale, to be retained out of any share coming to him.

For other cases where the purchaser at a judicial sale was released on account of the title, see next subdiv., where sales were set aside and deposit returned.

II. Release from bid and return of deposit.

In England, Ireland, and Canada the practice is that on a report of sale the purchaser may suggest doubts upon the title, whereupon reference is had to ascertain and report, and if the master reports that there is a cloud on the title, the purchaser is released, and is entitled to a return of the purchase money paid and is usually allowed interest and costs. The question of practice is stated to be as follows:

als to execute his bond, it may be that the parties prefer another sale, thinking that the property will sell for more, and in this event the court may so order without making any proceedings against the purchaser. But if it is desired to hold the purchaser, then his bid must be accepted by the court, and, if he still refuses to give the bond, a resale may be ordered, or the purchaser may be dealt with as in cases of contempt; and, in this state of case, if the bid on the second sale sells for more than the first, the surplus will belong to the purchaser. The court cannot, however, treat the sale as a nullity, and thus keep the surplus, if the land on the second sale sells for more than on the first, and at the

same time hold the purchaser responsible for the deficiency if on the second sale it sells for less. In *Shirley v. Sheumaker*, 23 Ky. L. Rep. 452, 63 S. W. 11, the first sale was confirmed by the court and a rule was taken against the purchaser to show cause why he should not give bond, which was made absolute. *Brassfield v. Burgess*, 10 Ky. L. Rep. 660, 10 S. W. 122, is in effect the same, and so is *Tyler v. Guthrie*, 17 Ky. L. Rep. 1193, 33 S. W. 934. But in none of the cases is the court allowed to treat the sale as a nullity, and still proceed to hold the purchaser liable.

Judgment reversed and cause remanded, with directions to discharge the rule against appellant.

Kirwan v. Blake, 1 Hogan, 151: First, that the adding binds the bidder, while it is open to the court to receive an out bid and order a resale, until the conditional order of confirmation becomes absolute; second, that the condition cannot be entered until the bidder has deposited one fourth of the purchase money; third, that the order to confirm absolutely cannot be done until the remaining three fourths of the purchase money is paid; fourth, if the bid is not good, the purchaser will be paid back his purchase money at 6 per cent without being involved in any of the consequences of the investment or disposition of the funds between the parties; fifth, that the purchaser has a right to have his purchase money included in the stocks at his own risk, or to transact at his own risk to the amount of the purchase money, but in that case he will be held to make good the full amount of the purchase money when the transaction is completed, and to gain or lose the difference himself.

In the following cases, on the sale being set aside, the purchaser was held entitled to a refund of his deposit with costs. There is not much difference in the facts in these cases to be setting them out in full: *Ward v. Johnson*, 14 Sim. 82; *Reynolds v. Blake*, 2 Sim. 117; *Calvert v. Godfrey*, 6 Beav. 97, without interest; *Feely v. Kilkenny*, Flan. K. 466; *Lachlan v. Reynolds*, Kay, 52; *McCullagh v. Gregory*, 1 Kay & J. 286.

And where a purchaser under a decree was refused because the title was encumbered by a right to cut timber, it was held that the purchase was justified in withholding payment until the objection was removed, and, if it could not be removed, the purchaser would be entitled to be discharged from his purchase and to have his deposit refunded, or to an allowance of an amount in the purchase money. *Street v. Smith*, 6 Ont. Pr. Rep. 312. The court did not allow costs because the application was premature.

In the following cases the purchaser was refused the return of his purchase money with interest and costs: *Lineham v. Cotter*, 8 Ir. Eq. Rep. 344; *Gower v. Hill, Hayes & J.* 127; *Roberts v. Roberts*, 2 Molloy, 507.

Where a purchaser under a decree was discharged upon a report of bad title, and it was held that his deposit should be paid back without prejudice to his applying for interest and costs when there should be a fund in court. A fund was realized from which the personal representative was held entitled to 60 L. R. A.

be paid interest and costs. *Mackay v. Orr*, 3 Ir. Eq. Rep. 499.

In *Hill v. Kirwan*, 1 Hogan, 175, where the purchaser was discharged because a good title could not be made, and there was no fund in court to pay his interest and costs, the purchase money having already been paid back, it was held that he was entitled to have a receiver appointed over the lands, with direction to apply the rents in the discharge of his interest and costs.

A person who had made a deposit as the highest bidder under a decree, and who was outbid at a subsequent sale, was held entitled to have his deposit paid back immediately; but as to his interest and costs he was required to wait until the sale was completed. *Archdall v. Montgomery*, Vern. & S. 302.

And where the title to land sold under a decree was defective, and the purchaser was discharged, he was held entitled to the full amount of his purchase money, interest and costs. It was further held that, where such interest and costs were to be paid out of a fund chargeable with the usher's poundage, the loss should be borne by the funds in the cause, and not by the discharged purchaser. *Johnson v. Reardon*, 3 Ir. Eq. Rep. 200.

A sale in partition was invalid because it took place before the certificate in answer to the inquiries directed by the decree was made. It was held that the purchaser was entitled to his costs arising from the deposit, which had been paid into court and invested, with the dividends thereon, or the actual amount of deposit and produce, with costs, charges, and expenses. *Powell v. Powell*, L. R. 19 Eq. 422. The court said: If he insisted upon the return of the money itself, he was entitled to it and all the dividends which have arisen from its investment.

But where the purchaser lodged stock instead of money in court, and the sale was set aside by the House of Lords for want of title, on a motion by the purchaser to have the stock returned *in specie*, and not merely the money ordered deposited with 6 per cent interest, as the funds had risen in the interim, it was held that, as it was not shown that he undertook the risk of a fall in the prices, he was not entitled to the benefit of the advance; and his money, with interest, was returned. *Kirwan v. Blake*, 2 Molloy, 506.

In New York the practice is for the purchaser to have the title examined before confirmation, and, if his objection to the proceedings, or to

the title, are sustained, the sale will be set aside, and the deposit or purchase money paid will be refunded to him, with the expenses of examining the title and costs.

So, a purchaser was held entitled to be relieved from his purchase, and to be repaid his deposit upon the sale with interest, and all his proper expenses of examining the title, with costs, where there was a question affecting the title as against heirs who were not made parties in a partition sale. *Toole v. Toole*, 112 N. Y. 333, 2 L. R. A. 465, 8 Am. St. Rep. 750, 19 N. E. 682.

And purchasers were held entitled to have the amount paid on their bids refunded, and the auctioneer's fees and costs, where the sale was made in partition, and there was a question as to the lien of legatees, which could not be determined, as they were not parties. *Jordan v. Poillon*, 77 N. Y. 518.

In *Campbell's Estate*, Tucker, 240, the surrogate held that a sale was so irregular that it should be set aside, and that the purchaser was entitled to be paid his deposit and the auctioneer's fees. But he further held that a surrogate had no power to allow counsel fees on this proceeding, or on examining the title.

And under N. Y. Code Civ. Proc. §§ 2752 and 2754, providing, in a petition to sell decedent's real estate to pay debts, that the petition should state the names of the heirs and devisees, and that they should be cited, where the petition omitted the same, and the heirs were not cited, a purchaser was held entitled to a return of the purchase money paid, and the auctioneer's fees, and the expenses incurred in the examination of the title, in an application to be relieved from sale. *John's Estate*, 21 N. Y. Civ. Proc. Rep. 326.

So, it was held that the purchaser was entitled to have the purchase price refunded, with the expenses, including searching of title, and this was apportioned between the parties procuring the sale. *Muller v. Struppman*, 6 Abb. N. C. 343. In this case a partition sale was held invalid on the ground that the supreme court had no inherent original authority to order a sale of the real estate of an infant.

And in an action for partition a sale was held to pass an insufficient title, and the purchaser was held entitled to be discharged from his bid, and to the return of his deposit of 10 per cent, and to interest, out of the rents and profits in the hands of the receiver, and expenses of investigating the title. *Rogers v. McLean*, 10 Abb. Pr. 306. In this case an infant lunatic, who was a necessary party, was not served with summons.

And a purchaser under a sale to pay debts under an order of surrogate's court was held released, and the return of his deposit granted, and costs of examining the title, where the proceedings were invalid, and creditors were not parties, and the title was doubtful. *Mahoney v. Allen*, 18 Misc. 134, 42 N. Y. Supp. 1127. In this case the referee moved to compel the purchaser to comply with his bid, and the purchaser moved to be released from his bid, and to have his deposit returned, and to be reimbursed expenses, and to set aside the final judgment and order confirming the sale.

And a sale under a mechanic's lien was set aside because the purchaser was ignorant that the defendant's wife had an interest in the property. It was held that the court had power to set aside the sale, and to reimburse the purchaser from the proceeds. It was held that the 69 L. R. A.

sale was properly set aside, and the purchaser was allowed \$50 expenses for examination of title, to be paid from the proceeds of the sale. *Rogers v. Menton*, 21 Misc. 535, 47 N. Y. Supp. 1147. This evidently was to be refunded from a second sale, but the case does not show this.

So, a purchaser at a mortgage foreclosure was held entitled to have his bid canceled, and to a return of the purchase money paid, with \$102, the expense of examining the title, where the sale was made subject to a mortgage having eighteen months to run, when in fact such other mortgage was already in process of foreclosure. *Bradley v. Leahy*, 54 Hun, 390, 7 N. Y. Supp. 461.

And a purchaser was held entitled to be relieved from his bid, and to have the 10 per cent deposit refunded, and the costs and expenses of searching the title paid to him, where the sale was made by the receiver of an insurance company on a foreclosure, and infant owners were not made parties to the action. *People v. Globe Mut. L. Ins. Co.* 33 Hun, 393.

In the following cases, where the sale was set aside, a return of the deposit was allowed: *Re Whitlock*, 32 Barb. 48; *Hirsch v. Livingston*, 3 Hun, 9; *Beckenbaugh v. Nally*, 32 Hun, 160; *Collier v. Whipple*, 13 Wend. 224.

And a sale of a decedent's estate in an action for partition was objected to on the ground that there was a mortgage on the premises, and that there were no advertisements for creditors, and that the administrator could have a resale to pay debts. It was held that the purchaser could not be compelled to take the property, but was entitled to be refunded his 10 per cent deposit with interest. *Hall v. Partridge*, 10 How. Pr. 188.

On a bill against devisees to subject property in their hands to a debt of the testator, judgment creditors were not made parties. The sale was set aside, and it was held that the purchaser should be discharged from his purchase and the deposit returned to him, and that he was also entitled to the interest on his deposit, and to the costs to which he had been subjected. *Morris v. Mowatt*, 2 Paige, 586, 22 Am. Dec. 661. The court said: "At present, there is no fund under the control of the court out of which the interest and costs can be paid; and, as all the parties have acted in perfect good faith in relation to this sale, the expenses must be paid out of the fund hereafter to be raised, if a second sale takes place. If no sale of the property is had, and no other way is provided for the payment, the charge must fall on the complainants personally."

And where a plaintiff guardian of an infant in a foreclosure action was also appointed guardian *ad litem* without disclosing that he was guardian, the sale was held voidable, so that the purchaser was entitled to be relieved from the purchase and to have the money paid in refunded, with costs. *Hecker v. Sexton*, 43 Hun, 593.

So, a purchaser at a partition sale was held entitled to be released, and to have the money paid returned, with his disbursements, where the property was encumbered by a condition limiting the buildings to be erected at a certain cost, which was not disclosed at the sale. *Knee v. Kuykendall*, 6 N. Y. S. R. 1.

So, where the complainant in a partition suit was a *feme covert*, and her husband was not joined as a party, it was held to be fatal to the title of the purchaser; and it was held that, if the title could not be perfected, the pur-

chasers were to be discharged and their deposits returned, including costs, out of the proceeds of the lots directed to be sold. *Spring v. Sandford*, 7 Paige, 550.

In *Aspinwall v. Balch*, 4 Abb. N. C. 193, it was held that, if the property bought at a foreclosure sale was materially damaged by fire before the deed was delivered, the purchaser would not be obliged to accept it. In this case the damage was not material, but it was held that, if the plaintiffs in the foreclosure action did not repair the building within a reasonable time, or give adequate compensation, the purchaser could renew his motion to be discharged, and for a return of his deposit.

And a purchaser was relieved from his bid in a sale under partition instituted under the Revised Statutes, when such proceedings had been abolished by the Code. It was held that the purchaser was entitled to have his deposit repaid, and to an order directing the petitioners to pay costs and expenses, to be a charge upon the petitioners' interest in the land. *Re Cavanagh*, 14 Abb. Pr. 258.

In other states, where the sale is set aside the practice is to direct the return to the purchaser of the purchase money paid, where it has not been distributed. This was held in the following cases: *Levy v. Riley*, 4 Or. 302; *Dula v. Seagle*, 98 N. C. 458, 4 S. E. 549; *Shields v. Allen*, 77 N. C. 375; *Smith v. Brittain*, 38 N. C. (3 Ired. Eq.) 347, 42 Am. Dec. 175; *Dumestre's Succession*, 40 La. Ann. 571, 4 So. 328; *Lee v. Texas & N. O. R. Co.* 22 Tex. Civ. App. 501, 55 S. W. 976; *Hyman v. Smith*, 13 W. Va. 744; *Edney v. Edney*, 80 N. C. 81; *State Bank v. Green*, 10 Neb. 130, 4 N. W. 942; *Preston v. Fryer*, 38 Md. 221.

After a decretal sale a deficiency execution was issued without authority of law, because there was on file a supersedeas bond staying proceedings, and the execution was invalid. The purchasers of the property were held entitled to a return of the purchase money paid, with legal interest. *State Bank v. Green*, 10 Neb. 130, 4 N. W. 942.

And a purchaser at a master's sale which was confirmed appealed from the order of confirmation. The sale was set aside on appeal, and the purchaser in the meantime had paid her bond. It was held that she was entitled to have the purchase money returned with interest, and that she was not liable for the fees of the appellant's attorneys, the commissioner and the clerk. *Hall v. Dineen*, 26 Ky. L. Rep. 1017, 83 S. W. 120.

On a bill to enforce a mechanic's lien against the separate real estate of a woman, a decree of sale was made. The decree was reversed on the ground that against a separate estate it should have provided for the application of rents and profits, and not for a sale of the corpus, and the sale set aside. It was held that the purchaser should receive back her bonds executed for the purchase money, and the cash payment should be refunded, but that she should be charged with the rents and profits, less taxes paid, and, if the rents and profits should exceed the cash payment, a personal execution should be rendered against her for the balance. *Charleston L. & M. Co. v. Brockmeyer*, 23 W. Va. 635.

III. Relief by reimbursement or subrogation.

a. Generally.

The general rule, according to the weight of 33 L. R. A.

authority, is that a judicial or execution sale will not be set aside at the instance of the debtor, or the purchaser will not be ousted from possession without refunding to him his purchase money which has been applied to the benefit of the debtor. This is on the ground that "he who seeks equity must do equity." And the same relief has been had in common-law cases where the distinction between common law and equity has been abolished. This principle is derived from the Roman law, as shown by Justice Story in the case of *Bright v. Boyd*, 1 Story, 478, Fed. Cas. No. 1,875, saying: "Where a bona fide possessor or purchaser of real estate pays money to discharge any existing encumbrance or charge upon the estate having no notice of any infirmity in his title, he is entitled to be repaid the amount of such payment by the true owner, seeking to recover the estate from him. Dig. lib. 8, title, 1, L. 65; Pothier Pand. lib. 6, title 1, note 43.

So, the purchaser losing title is allowed by subrogation a lien on the interest of the debtor in the land, on the principle that equity will subrogate the party extinguishing the lien to the rights of the lien holder, and will protect him to that extent. The question of reimbursement or subrogation arises from the nature of the relief sought, the pleadings in the case, and the possession of the land.

The exceptional cases in regard to the restitution to the purchaser of the purchase money, or his right to subrogation, occur in probate or guardian sales, where the purchase money was not used to extinguish liens, in some cases applying the principle of *caveat emptor* where subrogation was denied.

In some cases relief was denied where the proceedings were void, as in attachment proceedings, or a personal judgment on publication only, and there was no judgment to support the lien.

There were other cases where relief was denied on account of the pleadings or parties, or where another remedy was suggested.

b. Reimbursement.

The weight of authority is that reimbursement to the purchaser will be imposed as a condition precedent in actions to set aside execution and judicial sales, and in actions of ejectment in states allowing equitable defenses, where the money of the purchaser has extinguished debts which were a charge on the land. This is on the principle that he who seeks equity must do equity, or on the principle of compensation, or on what is known as an equitable lien allowed the purchaser to secure his advances. Keeping these principles in view, the courts have established a broad equitable principle that the purchaser will not be compelled to restore the property under a void sale, where he is not in fault, without being compensated for his purchase money.

This was held where a mistake was made by the auctioneer in confusing the numbers of two lots, thereby sacrificing a valuable lot for a small amount. The purchaser was held entitled to the amount paid and interest and taxes, subject to rental value. *Howlett v. Garner*, 50 S. C. 1, 27 S. E. 533.

So where a sheriff's sale under execution of an indefinite interest in an estate was held void. *L'enu v. Spencer*, 17 Gratt. 85, 91 Am. Dec. 375.

A purchaser under a title bond brought suit

against the purchaser of the same land under execution sale for the deferred payments where the deed had not been put upon record. This execution sale was void under Ga. act 1847, § 3, providing that when any judgment shall be given on a purchase-money note, where titles have not been made, but bond for titles has been given, the obligor of the bond may file a deed of conveyance, and thereupon the same may be levied on and sold under said judgment. It was held that the purchase should be set aside on complainant paying to the purchaser the amount paid by him. *Upchurch v. Lewis*, 53 Ga. 621.

In another case arising under this statute, a vendor of a title bond, where part of the money was paid, obtained a judgment against the vendee on his purchase-money notes, although the purchaser was willing to pay provided he could obtain the title that he had contracted for. An execution sale was had of the property to a purchaser, combining with the vendor to defraud the holder of the title bond. In an action by the holder of the title bond to set aside the sale, and for a specific performance, the court said: "If the purchaser has paid his bid, and it has been appropriated to the payment of the debt due by complainant to his vendor, he is entitled to be reimbursed, and he should be protected to that extent in any decree that may be rendered." *Brunson v. Grant*, 48 Ga. 394.

So, on the principle that "he who seeks equity must do equity," it was held that the complainants would be required, as a condition precedent, to refund to the purchaser so much of the purchase money as came into their hands. This was a suit by heirs against the purchaser to set aside a sale made in partition under a decree by a court having no jurisdiction of their persons, and for an accounting of rents. It was also held that the purchaser was entitled to be refunded taxes paid by him. *Chambers v. Jones*, 72 Ill. 275. The court said: "They are seeking relief against defendant, and, if they have his money in their possession, arising out of the same transaction, it is but just they should restore it to him. The court will not assist them to recover the possession of their land, and give them an account of the rents and profits, while they still retain in their hands the purchase money. The case of *Kinney v. Knoebel*, 51 Ill. 112, is an authority for this view of the law, and the principle of that case would authorize the imposition of conditions upon which relief will be granted. . . . If it shall appear that either of the heirs has received any portion of the proceeds of the sale, the court, with great justice, may decree a restoration of the amount before adjusting the equities between the parties. The same may be said of the taxes."

So, an offer to reimburse was held to be a condition precedent in an action by heirs to have a sale made in partition set aside, where the money had been distributed. *Byars v. Spencer*, 101 Ill. 429, 40 Am. Rep. 212.

And the defendant in the execution was held entitled to relief only on condition that within thirty days he pay into court for the benefit of the purchaser the amount of the judgment, costs, and interest, where a sale on execution of a homestead was held void for failure to follow the requirements of the statute, and conveyed no title. *Bullen v. Dawson*, 130 Ill. 633, 20 N. E. 1038.

And a sheriff's deed to the purchaser, and the deed from the purchaser to his wife, were set

aside on condition that the debtor pay to the purchaser the amount of the bid with 8 per cent interest, and the money which the purchaser paid, and the interest on an existing mortgage, and improvements, taxes, and insurance, less the rents. *Lurton v. Rodgers*, 139 Ill. 554, 32 Am. St. Rep. 214, 29 N. E. 866. This was an action to set aside and redeem because lots valued at \$2,000 were sold on execution sale for \$60, and because sold *en masse*.

And where a levy was void for uncertainty, and the sale passed no title, it was held that, if the defendant was incompetent to consent to the sale, and was not thereby estopped, his administrator could not cancel the sheriff's deed and recover the land without accounting for so much of the purchase money as the intestate had the benefit of, with interest. *O'Kelley v. Gholston*, 89 Ga. 1, 15 S. E. 123.

So, reimbursement was made a condition precedent in a suit against the purchaser under execution to enforce liens. It was held that, as no judgment sustaining the execution was produced, on account of a mistake in the execution reciting a different judgment, the sale should be set aside; but, as the proceeds arising from the sale of slaves were applied to the discharge of the judgment debts of the plaintiff, it was held that he could not recover until he had repaid that money. *Dufour v. Camfranc*, 11 Mart. (La.) 607, 13 Am. Dec. 360.

The same was held in a similar case. *Donaldson v. Rouzan*, 8 Mart. N. S. 162.

And a purchaser in good faith, who paid the money in discharge of the judgment, was held entitled to reimbursement before the relief sought by the bill would be granted, in an action by an infant to set aside a sale under execution issued after the death of the defendant without revivor. *Cook v. Toumbs*, 36 Miss. 685. The court said: "But this is rather a matter of defense, than a part of the complainant's case; and it would be entirely competent for the court, under the bill as now framed, to decree that the deed of the sheriff to Cook be set aside and delivered up to be canceled, upon the appellant paying to him the sum of money paid by him in discharge of the judgment. Such a course is not inconsistent with the scope and prayer of the bill, and the court, in granting the relief sought, is competent to do so upon such equitable terms as may be shown to be just and proper."

And in a suit in equity to avoid a judgment and sale on the ground of false claims by creditors and an irregular sale, there being no fraud charged against the purchaser, it was held that relief would not be granted where the complainants did not offer to refund the money that had been paid for the property by innocent purchasers. *Wilson v. Bellows*, 30 N. J. Eq. 282.

An order granted a new trial on payment of costs. An execution for costs and a sale thereunder was void. In a suit by the defendant against the purchaser to cancel the deed as a cloud on the title, it was held that he should pay the purchaser the money appropriated for his benefit. *Herndon v. Rice*, 21 Tex. 455. In this case the court draws a distinction between an action by the purchaser to cancel his deed and recover the purchase money, and an action by the defendant to remove the ground of possible attack upon his title. The court said the latter "is a remedy *ex gratia*, dependent upon the sound discretion of the court, and will never

be exercised without doing ample justice to both sides, so far as it is practicable."

A sale was made of the equity of redemption, and the holder of the first mortgage became the purchaser. The sale was set aside on account of the ignorance and age of the defendant, who tendered the purchaser all the money due on his decree, and the costs. *Campbell v. Gardner*, 11 N. J. Eq. 423, 69 Am. Dec. 598.

The same rule was held to apply in actions to enjoin a judgment in ejectment where the recovery was had by reason of a void sale.

A purchaser at an execution sale was defeated in an action of ejectment by the debtor, the sheriff's deed being void. It was held, in an action to enjoin this judgment, that the purchaser had an equitable right to retain possession of the land as security for his purchase money, and the injunction should not be dissolved until he was reimbursed. *Shepherd v. McIntire*, 5 Dana, 574.

So, in an action to enjoin a judgment in ejectment, it was held that the defendant should be required to refund to the purchaser the amount paid. *Henderson v. Overton*, 2 Yerg. 394, 24 Am. Dec. 492. In this case after the levy of an attachment the defendant died. A *sci. fa.* was run against the executor, and judgment was taken by default. A *sci. fa.* was run against heirs without naming them, and a judgment rendered against the heirs. The land was sold to this purchaser. The plaintiff in the original proceedings acquired the title of the heirs, and then brought ejectment against the purchaser. The court said: "It is said defendant did not receive from the sheriff the whole amount. It is his misfortune. Had he let his void judgment rest it would not have happened."

In *Andrews v. Richardson*, 21 Tex. 287, the purchaser at judicial sale brought suit to enjoin a writ of possession against his tenant, issued by a justice, and the defendants sought to avoid the sale on the ground that there had been no appraisal. The plaintiff in replication asked that, if the sale was invalid, he should be reinstated in his original decree of foreclosure, and have execution. The court held the sale was valid, but said that, if it was not, the plaintiff would be entitled to the relief sought if he was the owner of the judgment, and, if not, he would be entitled to be reimbursed the money he had paid.

In some states the practice is to administer equitable relief in common-law courts; and so it is held in Missouri and Texas that a recovery of the property from the purchaser on a void sale will be granted only on condition that the purchaser is reimbursed the purchase money applied to plaintiff's debt.

An execution sale was made after the execution became dead and no vend. exp. issued. In an action of trespass to try title, by the purchaser, the equitable doctrine was applied, and it was held that he was entitled to recover the purchase money paid, in the absence of fraud. *Johnson v. Caldwell*, 38 Tex. 217. The court held that the equitable doctrine that a purchaser should not be compelled to restore property without being reimbursed was applicable, and should have been applied when the sheriff's deed was ruled out in evidence.

So, in an action by the heir the defendant was allowed possession until the payments could be ascertained by a reference. *French v. Grenet*, 57 Tex. 273. In this case, after a member of a firm died, and his estate was being administered

by executors, a bankruptcy court having no jurisdiction ordered the sale of the individual property of the deceased member. The purchaser acquired no title. He had paid the assignee, who applied the purchase money to the judgment lien.

In an action by heirs to recover land sold at a sheriff's sale, the court said: "The sale, if valid, divested the title of their ancestor, and they cannot recover. But, whether valid or not, it was averred in the answer, and appears in proof, that the ancestor of the plaintiffs received the benefit of the proceeds of the sale, applied to the satisfaction of the execution against him. And, under the decision of this court in the case of *Howard v. North*, 5 Tex. 290, 51 Am. Rep. 769, the plaintiffs cannot recover the property without reimbursing the purchase money paid, which went to the satisfaction of the judgment against their ancestor. This is according to the plainest dictates of reason and natural justice; and this they have not done, nor offered to do." *Morton v. Welborn*, 21 Tex. 772.

In *Henry v. McKerie*, 78 Mo. 416, holding that the purchaser acquired title, the court said: "When the sale has not been approved, no title, either legal or equitable, passes to the purchaser. The equity open to him proceeds upon the assumption of a void sale, and is for a return of the purchase money, and reimbursement for the benefits received by the heirs, and for improvements which enhance the value of their land; the extent of this equity to be ascertained by an account of his expenditures and receipts. This equity suspends the right of recovery until the amount coming to him shall be ascertained and paid. It is administered upon the theory that the title has not passed to the purchaser, but that he has a charge or lien for his outlays and improvements incurred by him in good faith."

And reimbursement to the purchaser was held a condition precedent in an action by an administrator of one partner against the purchaser to recover the property, where there was a valid judgment against partners and after the death of one of the partners there were an execution levied upon the estate of the deceased partner and a sale. *Balley v. White*, 13 Tex. 114. The court said: "Under the circumstances of this case, the court, on general equity principles and in the discharge of equity jurisdiction, clearly had a right to make the decree, and could have prescribed the time within which it should be paid, and that plaintiff should not have execution of his writ of possession until it was paid."

But reimbursement was denied in the following cases on account of the pleadings, or the failure to follow the proper practice:

Executors made a mortgage without procuring an order of the probate court, and a foreclosure sale failed to pass title. In an action against the vendee of the purchasers to recover the property the court said: "If the money bid for the land on sale made on foreclosure was actually paid, and a valid debt of the estate thus satisfied, appellants cannot be permitted to recover the land without refunding the money, although the sale was null. No question as to the right of appellee to have such money as may have been so paid was made by pleadings or the evidence, and, as the judgment will be reversed, and the cause remanded, on account of matters before referred to, such pleadings may hereafter be filed, and such an issue tried as will enable the court below to ad-

just any equities that may exist between the parties." *Smithwick v. Kelly*, 79 Tex. 564, 15 S. W. 486.

Three executions of different priority were in the sheriff's hands, and he sold the property levied upon to the third execution creditor, who paid off the first judgment and credited his debt, and the sheriff returned the execution unsatisfied for failure to pay the bid. A sale was then had on the second execution, and it was held that the first purchaser was entitled to an injunction to restrain a deed until reimbursed what he had paid on the first execution. *Carnahan v. Yerkes*, 87 Ind. 62. The court said: "The payment of the Potts judgment operated for the benefit of the appellees. It removed a lien which was prior to the Cook judgment, under which they purchased, and, had it not been so removed, they would have been compelled to pay it. Under the circumstances, equity would, perhaps, keep this judgment and its lien on the land alive for the benefit and security of the appellant. But the pleadings and record are not in such a condition as that the appellees can in this action be compelled to pay the sum so advanced by the appellant for their benefit, as the condition upon which the deed to the appellant for said land should be enjoined. It would be granting to the appellant relief which he has not asked, and which the facts set up in the answer would not justify. Had the appellant disclaimed any right to the land by virtue of the sale made by the sheriff to him, and asked that the money advanced by him for the purpose of paying off the Potts judgment should be refunded, he might, perhaps, have been entitled to affirmative relief."

So, in *Kuddell v. Sparks*, 79 Tex. 308, 15 S. W. 239, it was said that, if the purchaser had a claim for purchase money which had been applied to the payment of the judgment, and thereafter lost his property in an ejectment suit because the levy was on a homestead, he should have set up his claim there for reimbursement. It was held that he could not thereafter set it up as a set-off against an execution for officer's costs in a suit to try title, as they have no connection.

A sale of land under execution eight years after the death of the defendant was void because there was no administrator. In an action of trespass to try title, where no equitable relief was asked by either of the parties, it was held that the rule that the purchase money paid for the land at the void sale must be repaid before title will be decreed to the heirs did not apply. *Fleming v. Ball*, 25 Tex. Civ. App. 209, 60 S. W. 985. The court said: "Whoever showed the superior legal title to the land was entitled to a judgment, notwithstanding facts may have existed which, if properly pleaded and proved, would have entitled plaintiffs to some affirmative equitable relief should it appear that appellee held the superior legal title."

A tract of land was levied on under execution, and only part was sold, sufficient to satisfy the execution. It was held that the sale was void, as the statute authorizing a sale of less than the whole tract levied on had been repealed. In an action of ejectment against the purchaser the court said: "We have repeatedly determined that the legal and equitable rights of parties litigant, in relation to the subject-matter of a controversy, should, as far as practicable, be set up and determined in a single suit. In the due order of pleading, under our 59 L. R. A.

blended system, the plaintiffs should have averred their willingness to pay the amount of the execution, with interest thereon; or the defendant should have claimed, provided his title were declared invalid, that he should not be compelled to restore possession until the purchase money which he had paid for the benefit of the plaintiffs, and by which the judgment against them had been discharged, should be reimbursed, and he indemnified." *Howard v. North*, 5 Tex. 290, 51 Am. Dec. 769.

So, where an advance bid on a master's sale was made, and a resale was ordered, it was held that the purchaser was entitled to have his original bid canceled, and the cash paid refunded, and his notes given up and canceled, and he should have taken an order to that effect; but where he allowed the money to remain in the hands of the commissioner, and it was lost by the death of the commissioner and insolvency of his estate, he must bear the loss and look to that estate for reimbursement. *Head v. Moore*, 98 Tenn. 358, 34 S. W. 518.

The exceptional cases where restitution was denied are those relating to probate sales, proceedings against nonresidents, and fraudulent sales, for which see *infra*.

c. Subrogation.

1. Generally.

The weight of authority is that a purchaser at a void judicial sale is entitled to be subrogated to the lien of the creditor where the sale is set aside. The doctrine of subrogation is also derived from the civil law. See *Domat, Civil Law*, pt. 1, book 3, § 6, art. 1785: "The purchaser of an estate, employing the price of his purchase for the payment of the creditors to whom the estate was mortgaged, is substituted to their right to the value of what he pays them. For, by paying them with the price of their pledge in order to secure it to himself, he preserves it to himself for the value of what he pays them, against other subsequent creditors, although they be prior to his purchase."

So, a sale of property of an insolvent corporation to a reorganized corporation under a decree in equity was held void because there was no service on any officer of the corporation. *St. Louis & S. Coal & Min. Co. v. Sandoval Coal & Min. Co.* 111 Ill. 32.

After this decision a bill was filed (116 Ill. 170, 5 N. E. 370), alleging that the new company had advanced money to pay off the debts of the old, and asking that the ejectment suits be enjoined, and that equitable claims of the new company be adjusted. It was held that the new company was entitled to be subrogated to the rights of creditors notwithstanding its deed was void.

Attention is here called to *Milwaukee & M. R. Co. v. Soutter*, 13 Wall. 517, 20 L. ed. 543, which was a trustee's sale, and therefore not within the scope of this note, and which was a similar case, except that the purchase by the new corporation was held fraudulent as to creditors, and it was denied subrogation which it claimed for having paid \$450,000 on a prior mortgage.

In *Bruschke v. Wright*, 166 Ill. 183, 57 Am. St. Rep. 125, 46 N. E. 813, a foreclosure sale was set aside at the instance of heirs, and a resale was ordered. It was held that a purchaser at foreclosure sale and his assignee would be subrogated to the rights of the mortgagee.

Subrogation is also allowed on the ground that the purchaser has paid a debt under a colorable obligation, and that he should be protected. This was held where a mortgage sale by school commissioners was void for want of notice, and the heirs of the mortgagor recovered from the subvendee, who recovered on his warranty from the purchaser. *Muir v. Berkshire*, 52 Ind. 149.

So, on the ground that it was the policy of the law to protect bidders at public sales, a purchaser was held entitled to be subrogated to the rights of the state in the mortgage, where a sale made by an auditor under a school-fund mortgage was set aside. *Willson v. Brown*, 52 Ind. 471. The court said: "The principal objection urged against the sufficiency of the complaint, which is that the plaintiffs were volunteers, occupying no such relation either to the mortgage debt or the property sold as to entitle them to be subrogated to the rights of the state, may be regarded as fully answered by the case of *Muir v. Berkshire*, 52 Ind. 149. We are not disposed to restrict the scope of the decision in that case. A sound public policy forbids that a purchaser at a public sale, who has in good faith paid the amount of his bid, in discharge of the decree, judgment, or other lien by virtue of which the sale was made, should be deemed a mere volunteer, and should be denied any equitable relief in case the sale proved to be invalid, merely because he had no personal interest to protect, and made the purchase for the sake of the investment only. Bidding should be encouraged, to the end that property may not be sacrificed for less than its worth."

So, subrogation was allowed on the ground that the bidding was itself a meritorious act, and created an equity, and it was the policy of the law to give the greatest security to bidders at judicial sales compatible with the equities of the parties, where a purchaser was held to have a prior lien on the land for the purchase money paid by him before an appeal, and the judgment thereafter was appealed from and reversed, and the sale set aside. *Miller v. Hall*, 1 Bush, 229.

So, under the principle that the policy of the law and the rules of equity will protect the purchaser, he was held entitled to be subrogated to the mortgagee to the extent of the purchase money applied to the mortgage debt, where, under a decree of foreclosure, the mortgaged property was sold and the sale confirmed, and the decree was subsequently vacated for defects in the order of publication. *Johnson v. Robertson*, 34 Md. 165. The court said: "The purchaser should be protected so far that, if he has paid the purchase money, and it has been applied to the payment of the mortgage debt, or so far as he has paid and applied the purchase money, he should be subrogated to the mortgagee, and the mortgage, to the extent of such payment, treated as assigned to him. This plain justice and equity would seem to require."

And a purchaser was held entitled to be substituted to the lien of the plaintiff to the extent and for the amount he had paid to the plaintiff on his deed, subject to a credit of rents and profits, where a decree enforcing a vendor's lien was void because the debtor resided within the Confederate lines, and the creditor within the Federal lines, and a sale thereunder was void. *Raymond v. Camden*, 22 W. Va. 180.

And it is held that the purchaser on execution sales which are void, is entitled to be subro-

gated to the lien of the judgment paid with the purchase money.

So, the assignee of the purchaser was held entitled to subrogation where the defendant in an execution sale on liens died on the day of sale, and the sale was held void because the revivor was premature. The executrix of the defendant became the assignee of the purchaser, and paid the judgment and debts, and in a suit by the heirs the sale was held void. *Forst v. Davis*, 101 Ky. 343, 41 S. W. 27.

A sheriff represented that land would be sold subject to redemption, under Indiana act 1861 (which was afterwards held inoperative), and the land only brought one third of its value. It was held that the sale should be set aside at the instance of the execution defendant, and the purchaser was allowed a lien upon the land to be enforced by execution. *Seller v. Lingerman*, 24 Ind. 264. The court said: "The case of *Banks v. Bales*, 16 Ind. 423, cited by the appellee, is not in conflict with this authority. The power possessed by the court to secure to the purchaser the return of his money, by decreeing a lien for the same upon the land struck off by the sheriff, would seem to render a tender of repayment of the sum by the execution defendant unnecessary."

In *Banks v. Bales*, 16 Ind. 423, land worth \$300 was sold under an execution not exceeding \$35. In an action to set aside a sheriff's sale because the entire tract was sold without being offered in parcels, the complainant had tendered the amount paid by the purchaser before he commenced his suit, but he failed to bring the money into court. It was held that a tender was not necessary in a suit to set aside a sheriff's sale. This was because the court had the power to decree a lien in favor of the purchaser. See *Seller v. Lingerman*, 24 Ind. 264, *supra*.

And where a sheriff's sale was set aside because of sale *en masse*, it was held that the purchaser satisfying the judgment was entitled in equity to be subrogated to the lien of the judgment. *Mellany v. Schenk*, 83 Ill. 357.

An execution sale was made after appeal bond was filed. The judgment was valid, but the execution and sale were invalid. The purchaser, who was attorney for the plaintiff in the proceedings, and who was guilty of no fraud, was held not entitled to hold the property until reimbursed, but was held entitled to subrogation. *Burns v. Ledbetter*, 54 Tex. 374. The court said: "Owing to the manner in which *Ledbetter* came into the possession of the property, and the fact that he was attorney of record for the plaintiff, in the judgment, and the further fact that the money paid by him only liquidated the judgment in part, we are of the opinion that he is not entitled to hold possession of the property until he is reimbursed. It is more consonant with justice and right to subrogate him to the lien of the original judgment, with order of sale, for the amount he is entitled to recover of appellee *Burns* on account of the payment on the judgment made with his money."

On a subsequent appeal in this case (56 Tex. 282) the court said: "*Ledbetter* was the attorney of the judgment plaintiff, but was not for that reason precluded from recovering back money paid without consideration. His position can scarcely be such as to give him less rights than the plaintiff. The cases are numerous in this state in which equitable relief, predicated on these rights of the judgment plain-

tiff or the purchaser, has been liberally extended."

And in an action to try title, the purchaser of the land at sheriff's sale under a valid judgment which was a lien on the land was held entitled to be subrogated to the lien of the original judgment where the sale was ineffective for want of proper description. *Jones v. Smith*, 55 Tex. 383. In this case the purchaser was liable on his warranty to the defendant. The court said: "Under such circumstances, Smith had the right to be subrogated to the lien of the original judgment upon the land, for the amount he had paid in the discharge of the same. Nor were his rights materially affected by the fact that he did not get possession of the land under his purchase. If he or his vendee was in possession, the appellants could not disturb that possession until they had refunded the money paid by him in discharging the judgment; and, if not in possession, he would be entitled to be subrogated to the lien of that judgment."

And the purchaser was allowed the money and a lien on the land where the execution was irregular because issued on a judgment which had been destroyed by fire without substitution, and the property brought but a small proportion of its value, and the sale was set aside. *Beckham v. Medlock*, 19 Tex. Civ. App. 61, 46 S. W. 402.

So, where a judgment was reversed on appeal, and the debtor recovered the land from the purchaser's grantee, it was held that the latter was entitled to a lien upon the land for the amount paid to the sheriff, with interest. *O'Brien v. Harrison*, 59 Iowa, 686, 12 N. W. 256, 13 N. W. 764. In this case the plaintiff had tendered the defendant this sum. Iowa Code, § 3199, provided that property acquired by a purchaser in good faith under a judgment subsequently reversed shall not be affected by such reversal; but it was held that the purchaser, not having paid the full amount of his purchase money, was not a purchaser in good faith.

But subrogation was denied where suit was not brought by the proper party.

A receiver of a firm had a judgment against a member of the firm. A levy was made on land notwithstanding he had conveyed the same. The purchaser's heirs brought a suit to set aside the conveyance as fraudulent. The same was set aside, and also the sheriff's sale to the purchaser. It was held, on a prayer for subrogation, that the voluntary purchase discharged the creditor's judgment, and there could be no substitution. It was held, also, that the administrator could not be subrogated to the lien, but that the heirs might, on proper procedure, obtain relief. *Richmond v. Marston*, 15 Ind. 134.

In *Mulr v. Berkshire*, 52 Ind. 149, the court said: "We are aware that there are some dicta in the case of *Richmond v. Marston*, 15 Ind. 134, which would seem to take a narrower view of the right of subrogation than we have expressed in this opinion; but that case differed in its premises from this; besides it was decided upon another ground. Subsequent decisions of this court, however, fully support, as we think, the principles governing us in this opinion."

See *Boggs v. Fowler*, 16 Cal. 559, 76 Am. Dec. 561; *Abadie v. Lobero*, 36 Cal. 390,—subdiv. V.

The exceptional cases where subrogation was denied are those relating to probate sales, proceedings against nonresidents, and fraudulent sales, for which cases see *infra*.

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2. Out of proceeds of resale.

In some cases the sale was set aside, and the purchaser was protected, by simply directing that out of the proceeds of the second sale his purchase money be returned to him. This was under the general principle that equity will afford relief, and will protect the purchaser. But it must have been upon the theory that the purchaser is subrogated to the lien of the creditor for his advances, although this equitable principle is only noticed in one of the cases explaining a prior decision in the same state.

A sale was void because made without notice to occupants as required by Iowa Rev. 1860, § 3318, providing that, if a defendant is in possession of part of land levied on, the officer having execution shall serve the defendant with written notice mentioning time and place of sale, and sales made without the notice may be set aside. It was held that a resale should be ordered, and, if an advance bid was made, the property should be resold, and the amount paid by the first purchaser refunded to him. *Jensen v. Woodbury*, 16 Iowa, 515.

In *Fleming v. Maddox*, 32 Iowa, 493, referring to the case of *Jensen v. Woodbury*, 16 Iowa, 515, it was said: "This order can be explained and justified only upon the theory that the purchasers had acquired an interest in the judgment, and been subrogated to the rights of the creditor. And this doctrine is just and reasonable, and to our minds entirely applicable to this case."

Applying the doctrine of subrogation, a purchaser was held entitled to have the credit on the judgment set aside to the extent of his bid, and a resale of the land for the purpose of indemnifying him, where an execution debtor after a sale paid off the judgment, and then had the sale set aside on the ground of irregularity. *Fleming v. Maddox*, 32 Iowa, 493. The court said: "It is said by the counsel that defendant had a right to pay off the judgment, and prevent a further sale of his property. This we concede. But he should have paid to the purchasers the amount of their bids, and not to the plaintiff, who already had received satisfaction."

And in a foreclosure judgment an interpleader was adjudged to have a prior lien. An order of sale was issued by him without notice to plaintiff. A new sale was ordered, and it was held that out of the proceeds of that sale there be paid to the prior purchaser the amount paid by him as purchase money of the land, and that the balance due the interveners be then satisfied, and the remainder be paid to plaintiff in the judgment below. *Elam v. Donald*, 58 Tex. 316.

A judicial sale was set aside where the master withdrew the land from sale and readvertised without order of the court or consent of the parties. It was held that, the purchase money having been appropriated to pay charges on the land, the purchaser should be protected, and that a second sale should not be had unless a greater bid was made, and, if so, he should be repaid what he had paid in, and his deed, bond, and mortgage should be canceled. *Tompkins v. Tompkins*, 39 S. C. 537, 18 S. E. 233. The court said: "The purchaser has paid into court \$1,625 of his money, a large part of which has been appropriated to the purposes of the action under the decree of court. Now, if there is one thing over others in our system of jurisprudence

that merits the commendation of all, it must be the flexibility of the principles adopted by courts of equity, by which they are made to subserve the needs of each particular case. Ought not those principles to be applied here? It seems so to us. Under our law, William R. Parks, by being a successful bidder at the sale provided for by a decree in this cause, has, to a certain extent, become a party to this action. His money has been paid into court and used for the purpose of the action, under an honest mistake, it is true. Only one party to the action seeks any relief against him. The circuit judge orders a new sale, without any provision being made for his (Parks') protection. This is error, and must be rectified."

Property of infants was sold under foreclosure for half of its value. It was held that a resale should be ordered upon security that the property should produce 50 per cent advance, and that the purchaser would be entitled to be paid out of the amount of such advance the interest of his deposit and of the whole purchase money which he had kept on hand, together with all reasonable costs and expenses. *Duncan v. Eodd*, 2 Paige, 90.

And a sale was set aside on the ground of material errors which, if allowed to stand, would permit the purchaser to enjoy "an unconscionable advantage" by the sacrifice of the property through the mistake of the receiver as to the number of cattle and the value thereof that were sold. A resale was ordered, and it was held that out of the purchase money the former purchaser should be repaid the purchase price, with interest at 6 per cent and expenses. *Horse Springs Cattle Co. v. Schofield*, 9 N. M. 136, 49 Pac. 954.

So, in an action by infants claiming that a sale was for \$10,000, and was reported only for \$5,000, the sale was set aside, and the assignee of a purchaser at mortgage foreclosure was held entitled to be subrogated to the lien of the mortgage paid by his money. But the decree was that a resale be had, and the holder of the purchaser's certificate at the first sale be paid his purchase money. *Bruschke v. Wright*, 166 Ill. 183, 57 Am. St. Rep. 125, 46 N. E. 813.

But where the confirmation was set aside, and the officer did not pay into court all of the proceeds, relief out of the proceeds of a second sale was denied the purchaser. In this case a sale of real estate was confirmed, and afterwards, on proof of fraud, was vacated, and the trustee was removed and required to pay into court the proceeds, but had defaulted to the extent of \$1,000. It was held that the purchaser, who had paid his money to the trustee, and received only a part of it back, was not entitled to have the balance due him paid from the proceeds of a second sale made by another trustee. *Kenaday v. Waggaman*, 3 App. D. C. 412. The court said: "As to Kenaday, the decree denies his right to property of which he claims to be owner, and which is of the value of \$11,000. He paid that sum for it in cash to Green as trustee. It is true that there are funds in the registry of the court below, which, in the event of the affirmance of the decree, can be paid over to him, and he be thus far reimbursed for what he paid to Green on the purchase of the property." *Kenaday v. Edwards*, 134 U. S. 123, 33 L. ed. 856, 10 Sup. Ct. Rep. 523. The decree of the general term having been affirmed, the appellant did receive the money that was in the registry of the court, and was to that extent re-

imbursed. And, if the balance of the \$11,000 could be reached and made subject to the direction of the court, the appellant would be entitled to receive that also. But clearly he has no enforceable claim whatever against the fund realized on the last sale of the property, and now in the hands of the present trustees to serve the purposes of the trust under the will of Mrs. Macpherson."

See *Elchelberger v. Hawthorne*, 33 Md. 588, and *Re Dickerson*, 111 N. C. 108, 15 S. E. 1025, subdiv. III. d. 1; *Martin v. Turner*, 2 Helsk. 384, subdiv. III. d. 2.

d. *Probate, guardians' and administrators' sales.*

1. *Guardian's sales.*

The weight of authority is that the purchaser at a guardian's or partition sale of infant's land, where the sale is set aside as void, is entitled to be reimbursed or subrogated to the amount of the purchase money paid.

So, in an action by a ward to set aside a guardian's sale it was held that the minors were bound by the acts of the guardian, and that it would be inequitable to set the sale aside unless the consideration paid should be refunded. *Kendrick v. Wheeler*, 83 Tex. 247, 20 S. W. 44. The court said: "The acts of the guardian in dealing with innocent purchasers, under lawful orders of the court, are binding upon the minors, in so far as they affect the rights of such purchasers. *Dancy v. Stricklin*, 15 Tex. 557, 65 Am. Dec. 179; *Clayton v. McKinnon*, 54 Tex. 211. The purchaser at the guardian's sale is not required to see to a proper application of the purchase money, or that the guardian executes his trust in a legal way in dealing with the fund after it goes into his possession."

A sale made in orphans' court was ratified by an order nisi, but never by final order. The executors made a deed, and charged themselves with the purchase money, and distributed the surplus. Subsequently one of the distributees had the sale set aside on the ground that the executor was interested in the purchase. It was held that the original purchaser was entitled to be reimbursed out of the purchase money arising from the second sale to the full amount he had paid the executors on the original purchase. *Elchelberger v. Hawthorne*, 33 Md. 588. The court said: "There is certainly nothing to be found in this record tending to induce a court of equity to deny to this complainant and purchaser the benefit of these equitable doctrines, or those of like character announced in *Jones v. Jones*, 4 Gill, 87, and in the more recent case of *McLaughlin v. Barnum*, 31 Md. 425. He purchased at a public sale for a fair price, has paid the purchase money, and made improvements under the impression he had obtained a good title, and the sale has been vacated for no other conceivable reason than because he agreed at the time, the executors, or one of them, should become interested in the purchase, or have some part of the land."

A sale of an infant's land in partition was made *ex parte* instead of publicly. A resale was ordered, and the purchaser having conveyed his interest, it was held that an account should be taken of the amount paid to the guardian by the purchaser, and of the rents and profits since the attempted sale and the possession of the purchaser and those claiming under him, and that the balance of the sum so paid, after

deducting the rents and profits, be a charge upon the fund arising from the second sale then ordered. *Re Dickerson*, 111 N. C. 108, 15 S. E. 1025.

And the purchaser was held entitled to have such sum as was paid to the mother as guardian of the children repaid to him in an action brought against him to set aside the sale, where a guardian's sale was void, under Tenn. Code, § 3339, providing that no guardian, next friend, or witness, shall purchase at administrator's sale, and, if they purchase, the sale shall be void, and the infant or married woman may bring ejectment as if no sale had been made. *Starkey v. Hammer*, 1 Baxt. 438. In this case the purchaser was one of the witnesses to show that it was for the interest of the minors that the land should be sold.

See *Bone v. Tyrrell*, 113 Mo. 175, 20 S. W. 798, and *Douglas v. Bennett*, 51 Miss. 680, *infra*, holding that the purchaser must show that the guardian has made a proper application of the fund.

Some cases grant relief to the purchaser on a void sale, where it is shown that the ward was benefited.

So, the purchaser was held entitled to reimbursement where a life tenant and guardian of an infant remainderman obtained an order of sale for a part of the property to improve the remainder. The remainderman, who was not a party, after the death of the life tenant, brought a suit to recover. The sale was void because the chancellor had only jurisdiction to sell for reinvestment. *Hays v. Bradley*, 15 Ky. L. Rep. 387; 23 S. W. 372. This was on the ground of benefiting the remainderman's estate.

A guardian's sale was void, and the heirs brought ejectment, and the purchaser filed a bill to restrain the prosecution of the ejectment until the purchase money and improvements were paid for. It was held that the complainant in equity had the burden of tracing the fund to some appropriation or use beneficial to the wards. *Douglas v. Bennett*, 51 Miss. 680. The court said: "The doctrine of a court of equity is, that the heir, who has received the price of his real estate, sold by his guardian, cannot hold on to the money and at the same time recover the land on account of some defect in the judicial proceeding under which it was sold. The circumstances put him under an equitable estoppel, and he must come to a fair account with the purchaser respecting the money. If he will refund the money, he may recover the land, or the chancellor may treat the money as an equitable charge upon the land. *Short v. Porter*, 44 Miss. 534; *Jayne v. Boisgerard*, 39 Miss. 799."

And the purchaser was held entitled to reimbursement where the proceeds were applied to the payment of proper debts.

In an action by a widow and heirs to set aside a guardian's sale of real estate belonging to the children, where the sale was set aside because competition had been prevented, and the purchaser had paid off the mortgage bearing 10 per cent interest, it was held that the purchaser was only entitled to 6 per cent. *Devine v. Harkness*, 117 Ill. 145, 7 N. E. 52. In this case the court said: "Paying the mortgage debt to the mortgagee was no more than paying the amount of it to the guardian, and was but paying appellant's bid for the land. The payment was one made in wrong, in the carrying out of a wrongful purchase, and presents no case for the application of the equitable doctrine of subrogation."

application of the equitable doctrine of subrogation."

So it was held that the minors were entitled to recover, subject to the purchaser's claim for reimbursement, where a guardian's sale of sheep under an order of the county court was invalid because not confirmed, and the purchase money was applied to the payment of established claims. *Harrison v. Ilgner*, 74 Tex. 86, 11 S. W. 1054.

And a sale of real estate of a ward was made while she was insane, and when there was sufficient personal property. On leave obtained by the ward to redeem, it was held that the vendee of the purchaser should be reimbursed by the redemptioner the amounts paid by the purchaser to satisfy judgments which were claims against the judgment debtor. *Cosgrove v. Merz* (R. I.) 37 Atl. 704. It was also held that the vendee was entitled to be reimbursed for repairs and improvements.

Guardians refunded the purchase money on the heirs recovering from the purchaser in ejectment because the sale was void, and then the guardians sought to hold the heirs responsible for the purchase money for which they had accounted on a settlement. It was held that the heirs could not retain the property and hold the guardians liable on a settlement, and, if the new guardian refused to ratify the sale, the former guardians might recover their money. *Burleigh v. Bennett*, 9 N. H. 15, 31 Am. Dec. 213.

And the purchaser at a guardian's sale which was void was held entitled to relief where the ward had received his full share. *Summers v. Howard*, 33 Ark. 490; *Hatcher v. Briggs*, 6 Or. 31.

So, a subvendee was held entitled to maintain a suit in equity against the plaintiff in ejectment for so much of the purchase-money fund as came to her hands, and to hold the guardian personally responsible for the residue if the sale was set aside. *Trousdale v. Maxwell*, 6 Lea. 161. In this case a guardian's sale of infant's land was void because the county court ordering the sale had no jurisdiction. After the infant became of age she brought an action of ejectment against the subvendee. The court said: "The party ejected by the infant would be entitled, by right of subrogation, to the extent of the purchase money paid by him, with interest, to the original purchase money, and to have the amount used for the infant's benefit, or paid to the infant, declared a lien upon the land."

But in guardians' sales which are void some cases hold that the purchaser is not entitled to relief where the sale is unnecessary, or the guardian has wasted the proceeds; and others refuse relief where the money is not used for the benefit of the ward. It is held in Illinois that there is a difference in a suit in equity by an heir to set aside a sale and a suit in ejectment, as in the former the maxim that he who seeks equity must do equity is applied. This equitable doctrine is applied in Texas in common-law cases if the purchaser asserts an equitable lien.

So, in *Reynolds v. McCurry*, 100 Ill. 356, where a guardian, under a void decree of partition, sold the land of his ward and appropriated the money to his own use, it was held that the ward could maintain an action to set the sale aside without returning the purchase money. In this case there were ample assets to pay all the debts out of the personality, and there was

no occasion for selling the land. The court said: "The land is sold, and the proceeds divided between the mother and guardian, and the guardian has long since squandered his share of the spoils. Not a cent of the money now remains to be returned to appellees, and no part of it was ever expended for appellant's benefit, and yet it is insisted that, unless this money is returned by appellant, equity will afford him no relief."

And it was held that the purchaser could not recover the purchase price in an action of ejectment brought by the ward, as it was not shown that the purchase money was used for the benefit of the ward, where a guardian's sale was void because it was not approved by the court. *Bone v. Tyrrell*, 113 Mo. 175, 20 S. W. 796.

Chambers v. Jones, 72 Ill. 275, held that an infant defendant in partition, who received a part of the proceeds, seeking to set aside a sale, must tender to the purchaser the purchase money, on the ground that he who seeks equity must do equity. Referring to the purchaser, the court said: "On the failure of the title, as in this case, he would have no right to relief, as against the heirs; nor could he have a decree against the land itself for the purchase money. This is settled by *Bishop v. O'Conner*, 69 Ill. 441, and need not now be discussed as a new question; but the defendant is asking no relief on a bill or otherwise."

At the suit of the holder of a life estate, a county court ordered the sale of the remainder estate. The judgment was void for want of jurisdiction, and the infant remainderman received no benefit. After coming of age, the infant recovered in ejectment. It was held that the purchaser could not maintain a bill in equity for the purchase money, and for a lien, where the infants had received no benefit. *Abernethy v. Phillips*, 82 Va. 709, 1 S. E. 113. The court said: "The record clearly shows that William H. Phillips, who was only seven years old when the land was sold under the decree of the county court, nor the then unborn child B. Phillips, ever made any contract, directly or indirectly, with either of the appellants in reference to the land in question, or ever received even one cent of the price paid. They cannot, therefore, on any principle of justice or equity, be called on to make restitution."

And a purchaser was denied a lien where he only pleaded estoppel against the wards.

A guardian's sale was void because the record failed to show that he had taken the required statutory oath, and no title passed by the deed. It was contended that the wards, who were infants at the time of the sale, and for whose benefit it was claimed the land was sold by the guardian and the proceeds applied for their support and education, were estopped from questioning the title. The appellate court affirmed the judgment of ejectment. The chief justice noted that since the opinion there were no cases found that minors could be estopped. *Blason v. Filby*, 24 Wis. 441.

Referring to this case in *Blodgett v. Hitt*, 29 Mo. 169, the court said: "The defendant offered to show that the purchase money, paid for the land to the guardian, was expended by him for the benefit of the plaintiffs. . . . It was held that, if such purchase money was used for their benefit, the plaintiffs were estopped to deny the validity of such sale and judgment. This court held, and in my opinion correctly, that such fact would not, of itself, constitute an estoppel upon the plaintiffs."

The principle to be gathered from the cases on the subject seems to be that some act of the ward after he reaches majority, such as receiving the purchase money or a portion of it, or the like, is essential to create an estoppel against him. This is the extent of the decision of this court in that case. No question was raised, considered, or decided, as to the right of a purchaser in good faith at a guardian's sale, which is void by reason of omissions or defects in the preliminary proceedings, to have the purchase money, paid to the guardian and used by him for the benefit of the ward, adjudged an equitable charge on the land, to be paid before the purchaser shall be dispossessed thereof. Had this question been made, we cannot say how it would have been decided."

Where a recovery was had by heirs in ejectment because a partition sale brought by their guardian was void, the court said: "Neither would the fact that he purchased the property for himself at the partition sale, and paid into the estates of these minors the full purchase money, effect a transfer of title to him. The equity which is administered by the courts upon void sales of this character is not that of decreeing them valid. The most that it can do is to decree a return of the purchase money, and order an account of rents, profits, and improvements, and adjudge the land subject to a lien for the difference; and this is done only when such equity is pleaded." *Campbell v. Laclede Gaslight Co.* 84 Mo. 352.

In *Wichita Land & Cattle Co. v. Ward*, 1 Tex. Civ. App. 307, 21 S. W. 128, where a vendor's lien was enforced against a guardian, and the ward had the sale set aside, it was held that the rents and profits were a proper offset against the amount paid by the purchaser.

A guardian's sale was void because of no notice given to the heirs, and the court had no jurisdiction. A petition by the heirs against the purchaser to quiet title was held sufficient, although the purchase money was not shown to have been tendered. *Washburn v. Carmichael*, 32 Iowa, 475. This was on the ground that the defendant might have received more than sufficient rents to reimburse him.

2. Administrators' sales.

The weight of authority holds that, if an administrator's or probate sale is void, in a proceeding to sell the land to pay debts, the purchaser is entitled to restitution or subrogation for the purchase money, where the same is used to pay debts against the estate. *Neel v. Carson*, 47 Ark. 421, 2 S. W. 107; *Daquin v. Colron*, 8 Mart. N. S. 674; *Donaldson v. Winter*, 1 La. 137; *McGee v. Wallis*, 57 Miss. 638, 34 Am. Rep. 484; *Carey v. West*, 139 Mo. 146, 40 S. W. 661; *Cunningham v. Anderson*, 107 Mo. 371, 28 Am. St. Rep. 417, 17 S. W. 972; *Sharkey v. Bankston*, 30 La. Ann. 891; *Wille v. Brooks*, 45 Miss. 542.

So purchasers were held entitled to maintain a bill against the administrator, in the nature of a creditor's bill, and were entitled to substitution for the debts which were paid by the money of the purchaser under a void decree. *Hull v. Hull*, 35 W. Va. 155, 29 Am. St. Rep. 800, 13 S. E. 49. The court said: "Principles of justice demand this, and courts of equity have raised up this principle, a being of their creation, called 'substitution,' unknown to common-law forums, to accomplish the ends of justice; and I know of no more signal instance to exemplify

the disposition, as well as the power, of equity to adopt means to accomplish right, than this of substitution, accorded purchasers under void proceedings, whose money has gone to satisfy liens good against the debtor."

So, restitution was allowed the purchaser in an action brought by heirs to set aside and redeem from an execution sale because the executor, not having power to sell certain lands, used a judgment to effect their sale, and sold them *en masse* for less than their value. It was held that, as complainants were seeking relief in equity, and the purchase relieved the estate from an indebtedness, and gave a surplus to the executor for the benefit of the heirs, they were compelled to refund the purchase price as a condition precedent to their redeeming. *Kinney v. Knoebel*, 51 Ill. 112.

In *Bishop v. O'Conner*, 69 Ill. 431, the case of *Kinney v. Knoebel*, 51 Ill. 112, was distinguished, as subrogation in that case was placed on the ground that it was a bill filed to set aside a sale and to be permitted to redeem, and when equity was sought, relief would only be granted upon doing full equity. Also in that case the purchase was upon condition that he could use the debts against the estate for paying his bid.

In *Smith v. Knoebel*, 82 Ill. 392, which was a subsequent appeal of *Kinney v. Knoebel*, 51 Ill. 112, where the same doctrine was affirmed, it was held that the executor held the land as security for the debts, that the land sold for more than the debts, and that the heirs must pay the whole purchase money in a suit to redeem.

So it was held that the purchaser was entitled to an equity which would prevent a recovery in ejectment until reimbursed, where the record of the probate court failed to show an order authorizing the sale which had been made, but the land had been sold above its appraisal value, and the proceeds were applied to the relief of other lands of the heirs. *Evans v. Snyder*, 64 Mo. 516.

Heirs brought suit to recover land where the property of their ancestor was sold by the registrar of wills, but not under the order or by the direction of the judge. This sale was invalid, under La. "Old Code, p. 174, art. 127," providing that the judge shall cause the property to be sold. It was held that the plaintiff could recover, but should not have possession until the rents, profits, and improvements were determined. *Elliott v. Labarre*, 2 La. 326.

In a later report of this case (3 La. 541) it was held that, if the sum paid for the land by the party evicted extinguished a debt of the owner of the land, the latter must allow it, without interest, as this was compensated for by fruits.

And a purchaser was held entitled to a lien before he could be ejected, where the notice of administrator's sale failed to give time or place. There was no notice given of the petition to sell, and the sale was void. The purchase money paid was applied to the payment of mortgages, debts, and administration. *Blodgett v. Hitt*, 20 Wis. 169.

A sale to pay debts of an intestate, and for distribution, was held void for want of jurisdiction of the county court, as no process was served on the minors, or answer filed in their behalf. It was held that the purchaser, whose money was used by the administrator to pay debts, was entitled to have the value of the payment made by him refunded and, if not paid in a reasonable time, to be paid by a resale, *es-*
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timating the value of Confederate money at the time of the payment, with interest, after charging him with rents and allowing for improvements and repairs. *Martin v. Turner*, 2 Helsk. 384.

An administrator's sale was void, and the proceeds were applied to the debts, removing them as charges upon the personal estate, and maintaining an infant heir. Where restitution to the purchaser was not tendered, an action of ejectment by the heir was enjoined. *Robertson v. Bradford*, 73 Ala. 116.

In *Bland v. Bowle*, 53 Ala. 152, the court said: "We do not doubt that it is competent for the purchaser, at any time after he discovers that the proceedings for the sale are void, to resort to a court of equity to compel the heir or devisee to elect the ratification or the rescission of the contract of purchase. If the purchase money has been paid and distributed to the heirs, or applied by the personal representative to the payment of debts, a court of equity would compel a conveyance of title from the heirs, if they could not successfully impeach the fairness of the sale. *Bell v. Craig*, 52 Ala. 215. It is impossible that injury can result to the vigilant purchaser, and it cannot be allowed him to rescind at pleasure the contract of purchase, which the heirs may be willing to confirm."

In *Dorman v. Lane*, 6 Ill. 143, it was said that a sale under a void authority was also void, and the purchaser could recover back the purchase money. In this case, it was held that an application by an administrator to sell land could not be allowed where fifteen years had elapsed after an order allowing his claim, and the land had previously been sold under an act of the legislature to pay the same debt, and the proceeds had been received by him, but the act had been declared unconstitutional, and that sale was void.

In *Woodstock Iron Co. v. Fullenwider*, 87 Ala. 584, 13 Am. St. Rep. 73, 6 So. 197, it was said: "Where land of a decedent is sold by the probate court for the payment of debts, or for distribution, and the proceeding is void for want of jurisdiction, or otherwise, and the purchase money, being paid to the administrator, is applied by him to the payment of the debts of the decedent's estate, or is distributed to the heirs,—while the sale is so far void as to convey no title at law, the purchaser nevertheless acquires an equitable title to the lands, which will be recognized in a court of equity. And he may resort to a court of equity to compel the heirs or devisee to elect a ratification or rescission of the contract of purchase. It is deemed unconscionable that the heirs or devisees should reap the fruits of the purchaser's payment of money, appropriated to the discharge of debts, which were a charge on the lands, and at the same time recover the lands."

In *Brandon v. Brown*, 106 Ill. 519, the executor made a sale under an order of the county court to pay debts, and before the money was used the heirs recovered the property in ejectment on the ground of want of jurisdiction of the county court, and the executor refunded the money to the purchaser, but refused to charge himself with the same in the county court. It was held that, if the heirs disaffirmed the sale, they must return the purchase money.

An administrator's deed was supposed to be void in an action of ejectment brought by heirs. The defense was that the purchase money was used to pay debts. It was held that the answer should contain a prayer that an account be

taken, and that the sum found to be due the defendant should be declared to be a lien upon the land; and the judgment of the court should be that the plaintiff should have possession upon paying the defendant the sum so found to be due. This was not done in the present case, and in this particular the answer of the defendant was defective. *Sims v. Gray*, 66 Mo. 613.

It is a general rule that where the debts paid from the proceeds of the sale were a charge on the land, and the administrator's sale is void, the purchaser will be held entitled to restitution or subrogation. *McDonough v. Cross*, 40 Tex. 251; *Caldwell v. Palmer*, 6 Lea, 652; *Fisher v. Bush*, 133 Ind. 315, 32 N. E. 924; *Galveston, H. & S. A. R. Co. v. Blakeney*, 73 Tex. 180, 11 S. W. 174; *Mersells v. Vreeland*, 8 N. J. Eq. 575.

So, where an administrator's sale was void, although one parcel of land sold for enough to discharge all debts, the purchaser was held entitled to a vendee's lien for money which he had paid on his bid, and which had gone to release land from the burden of the intestate's debts. *Jones v. French*, 92 Ind. 138.

So, the purchaser at an administrator's sale was held entitled to be subrogated to the extent of the purchase money applied in the extinguishment of a mortgage on the property. *Vallé v. Fleming*, 29 Mo. 152, 77 Am. Dec. 557. This was an action of ejectment by heirs. The court said: "It is immaterial under what form the equity in such cases is administered,—whether under the name of compensation, as it was done in the case of *Bright v. Boyd*, 1 Story, 478, Fed. Cas. No. 1,875, or under the name of substitution, as in the case of *Hudgin v. Hudgin*, 6 Gratt. 320, 52 Am. Dec. 124, or, as it is sometimes more conveniently effected, by reviving the encumbrance, which the purchase money has extinguished in permitting it to be used as a shield against a recovery at law. *Peltz v. Clarke*, 5 Pet. 482, 8 L. ed. 199."

And in an action of ejectment by heirs to recover from the purchaser at an administrator's sale on the ground that it was void, it was held error to strike out the defendant's answer, pleading, as in *Vallé v. Fleming*, 29 Mo. 152, 77 Am. Dec. 557, his equitable claim. *Jones v. Manly*, 58 Mo. 559.

In *Bishop v. O'Conner*, 69 Ill. 431, it was said that in the case of *Vallé v. Fleming*, 29 Mo. 152, 77 Am. Dec. 557, the purchase at administrator's sale was subject to a mortgage, and the purchase money was applied to the satisfaction, and the purchaser was subrogated to the rights of the mortgagee. The correctness of the decision was doubted.

A sale was void because the administrator failed to give bond. The purchaser had paid one third in cash, which was used to pay a judgment lien. There was no formal rescission, but a resale, and the first purchaser bought part of the land. In a suit by him to obtain a preference, it was held that the purchaser was entitled to be reimbursed, out of the estate, the sum of money which he had advanced and could recover by bill in equity. *Short v. Porter*, 44 Miss. 533. The court said: "But the equity of the complainant rests upon the further impregnable ground that he, supposing that he was acquiring the title of the heirs of intestate, at the sale made by the administrator, made a cash payment of—dollars, which was actually used and applied by the administrator to discharge a preferred lien on the land. As to 69 L. R. A.

the heirs, that application of the money exonerated their property *pro tanto*. It went to relieve an encumbrance on the land. They would not be permitted to recover back the land for the reason that the probate decree and sale were invalid, and, therefore, did not divest their title, except upon the condition that they restore to the purchaser his money, or, rather, to the extent of the cash payment."

And a purchaser of property under execution was held to have the right in equity, on the recovery of the property from him by a superior title, to be substituted for the creditor, and to have his purchase money refunded by the defendant in the execution, where the execution was against administrators, out of the assets of the estate. *McLaughlin v. Daniel*, 8 Dana, 182. The court said: "According to the principle repeatedly recognized by this court, he has an equitable right to be substituted in the place of the creditor, and to have the amount so paid refunded to him out of the estate. His equity rests not upon the ground of his want of knowledge as to the title of the slave, but on the ground of his having discharged a judgment against the estate, for which it stood chargeable, by a purchase of property made under the coercive process of the law; and, therefore, has equitable right to be reimbursed out of the estate."

And subrogation was allowed the purchaser where a guardian filed a bill against an executor to subject land devised to the payment of his debt, without making devisees parties. The sale did not pass a legal title. *Hudgin v. Hudgin*, 6 Gratt. 320, 52 Am. Dec. 124. This was on the equitable ground that the purchaser, on disaffirmance of the sale, was entitled to be substituted to the rights of the creditor, and that the land should be charged with the amount of the debt paid by him.

In *Bishop v. O'Conner*, 69 Ill. 431, the case of *Hudgin v. Hudgin*, 6 Gratt. 320, 52 Am. Dec. 124, was distinguished, as there the testator expressly charged the land with the payment of debts, and, the debts having been paid by the purchaser from funds arising from the sale by the executors, the heirs were required to refund to the purchaser the money he had paid the executor, and which had been applied to the encumbrance.

And the purchaser is held entitled to relief where it is shown that the purchase money had been applied for the benefit of the estate and heirs, and the sale was set aside.

An administrator, under an order of the probate court, made a void sale of the homestead to pay debts. It was held that the heirs, in an action against the purchaser to recover the land, should offer to restore the purchase money which they had received, and which had been applied for their benefit. *Stephenson v. Marshall*, 11 Tex. Civ. App. 162, 33 S. W. 383.

In *Stults v. Brown*, 112 Ind. 370, 2 Am. St. Rep. 190, 14 N. E. 230, it was said that a purchaser at an administrator's sale which had been set aside was held entitled to enforce a vendee's lien against the land for the amount of the purchase money which had been used for the benefit of the estate, and to an order requiring the administrator to resell the land for the payment of his debt. But relief was denied in this action, which was a suit for specific performance. The administrator then filed his claim against the estate for the amount paid, and was defeated. Thereafter he brought another suit on the same matter against the heirs.

The disallowance of his claim was held to be *res judicata*. *Stults v. Forst*, 135 Ind. 297, 34 N. E. 1125.

And the defendants in ejectment were held entitled to an equitable counterclaim to the extent of the purchase money and taxes. *Schafer v. Causey*, 76 Mo. 365. This was an action of ejectment by heirs against the purchaser at an administrator's sale, void because the notice was published in a German newspaper, and because the sale was approved at the term of court at which it was made. It was pleaded that a small part, only, of the purchase money had been used to pay the debts of the estate, and that the greater part had been paid over to the plaintiffs' guardian for their benefit.

But some cases hold that the purchaser is not entitled to relief where the sale was unnecessary, and where the purchaser had notice of the want of authority to make the sale, and where the sale was not confirmed. So where it was not shown that the proceeds of the sale were used to pay debts of the estate, and the administrator was the purchaser. In Illinois, Michigan, and Ohio it is held that if the debts paid are not a charge upon the land the purchaser is not entitled to reimbursement or subrogation on setting aside the sale. In the last state a statute has since provided relief in probate sales.

In *Aronstein v. Irvine*, 48 La. Ann. 301, 19 So. 131, where the natural tutor as administrator, unnecessarily caused the property in the succession to be sold to pay debts, and became the purchaser, it was held that the minors could maintain a suit against the purchaser under a mortgage made by the tutor, without tendering the purchase price. The court said: "But in a case like the instant one there is no requirement of antecedent legal tender, as 'there is no principle of equity requiring plaintiffs to tender to defendants before asserting their absolute title to property belonging to them and held by defendant as a mere possessor without title. All that equity could possibly require would be to permit him to set up his claim in reconvention, which would not be denied.'"

So, where an administrator's sale was void, and there were assets in the hands of the administrator sufficient to pay the claim of the purchaser, it was held that the purchaser was not entitled to a lien on the property for his purchase money in setting the sale aside. *Bennett v. Coldwell*, 8 Baxt. 483. The court said: "The law does not make the heirs securities for the administrator, nor make their rights dependent upon the integrity or negligence of the administrator. Hence, we are of the opinion that the decree of the chancellor declaring a lien, and ordering a sale of house and lot, was erroneous."

And a purchaser of personalty at an administrator's sale, having notice of the want of authority of the administrator to make the sale, where the sale was held void, was held not entitled to recover the price from an administrator *de bonis non*, and the payment was held to be voluntary. *Beene v. Collenberger*, 38 Ala. 647.

In *Pool v. Ellis*, 64 Miss. 555, 1 So. 725, where an administrator's sale was never confirmed, it was held the purchaser was under no obligation to pay to the administrator any portion of his bid before confirmation, and such payment was not binding upon the estate or the heirs at law. The court said: "The administrator held the money as a mere depository of the purchaser, and if it was wasted or misapplied

by him the loss must be borne by the purchaser. . . . The chancellor, by subrogating the appellant to the rights of the creditor, to the payment of whose debt against the estate a part of the purchase money was applied, extended to him the full measure of relief to which he was entitled."

A purchaser of land at an administrator's sale, where the purchaser was one of the administrators and the sale was void for that reason, was held to have no equity against the land, where it was not shown that the purchase money had been applied to the debts of the estate. *Jayne v. Bolsgerard*, 30 Miss. 796.

In Illinois, Michigan, and Ohio the purchaser at a void administrator's sale was denied relief where the money was not used to pay debts which were a charge on the land.

In *Bishop v. O'Conner*, 69 Ill. 431, which was an action by the assignee of the purchaser for subrogation, it was held that a purchaser at an administrator's sale to pay debts, which was void for lack of service, would not be subrogated to the extent that money was paid for support of heirs or payment of debts. It was also held that, if it was an action against heirs, it was barred by limitation. But it is said that a volunteer is not entitled to subrogation, and that there is no implied agreement on the part of the heirs to refund.

After land was given to the devisee with the executor's consent, and she had conveyed it, the executor sold the land under an order of the probate court to pay debts. The sale was held void, the executor having no power to sell the land. On a bill to declare the purchase money a lien because the money paid the executor was used for the estate, it was held that the purchaser had no lien. *Frost v. Atwood*, 73 Mich. 67, 16 Am. St. Rep. 560, 41 N. W. 98. The court said: "It is difficult to see how the case can be affected by the use which the executor made of the money. In all probate sales, valid or invalid, the officer making the sale receives the money, and usually appropriates it. But it never has been supposed, and it is not legally true, that such use creates any lien on the premises unlawfully sold. What he receives without lawful authority does not concern the estate, and he can no more create a lien by spending that money than by spending any other. If the estate owes him, he must pursue his remedy as the law gives it, and his claim must first be established before he can get any remedy. The use, if made, is not made for the benefit of the particular piece of land that he attempted to sell, but for the whole estate; and, if it becomes a claim, it is a claim against the whole estate, and not against a part of it."

In the above case the executor had no power to dispose of the land under the will, and the action of the probate court in assessing and enlarging the amounts to be contributed by the devisee was without jurisdiction as there was no personal service. How. Stat. (Mich.) §§ 5818-5820, providing for issuing executions against the devisees in settling the amount of their liabilities, were held to be the only remedy, and they did not declare a lien, and would not bind any specific property. In this case there was no claim against the estate open to subrogation, and no money lent to the executor or to the estate. The court said: "In the present case, the record does not show that, if the executor had done his duty, the debts would not have been fully paid within the proper statutory period, without any deficiency arising.

And when he sees fit to allow all parties to rest on the idea that they can do what they will with their legacies and devises, the statute gives him no power to recall them."

So, in *Nowler v. Colt*, 1 Ohio, 519, 13 Am. Dec. 640. It was held that purchase money paid to an administrator upon a sale of intestate's land was not a charge upon the land where the sale was void and the heirs recovered the land. The court said: "The lands of the deceased were never legally charged with the payment. The administrator, from whom the defendant purchased, had no power over them. He paid his money upon a mistake as to the consideration. The present complainants are not the parties to whom he paid it, or with whom he made the contract; and his right to recover back his money cannot be litigated with them, neither at law nor in equity. We can therefore make no decree with respect to the purchase money."

So it was held that a purchaser could not set up an equity in the estate of the decedent by reason of the payment of the decedent's debts from his purchase, where a court in Virginia directed a sale of Ohio land to pay the debts of the estate in Virginia, and the sale was void as the court had no jurisdiction. *Beall v. Price*, 13 Ohio, 368, 42 Am. Dec. 204. The court said: "But no privity exists between the creditors of Duval and the estate of Price, which will justify them in reaching his assets, except as general creditors of Duval, pursuing his credits. Neither does the advance of money by a stranger, upon a defective sale of a decedent's lands, create an equity against his estate, although the money goes to pay his debts. It has been held by this court that the rule of *caveat emptor* operates on the purchaser at judicial sales, and cuts off all right to indemnity, except such as may arise from express warranty."

So in a suit in equity by the purchaser against heirs it was held that no lien was acquired by the purchaser, and that, if he had a right to recover, the administrator must be made a party. This was in *Lieby v. Ludlow*, 4 Ohio, 469, where a probate sale to pay debts was void because it was proved that the land sold was in a city, and the order to sell to pay debts related to land outside the city, and a recovery from the purchaser was had in ejectment. A subsequent statute now provides relief. See subdiv. III. e, *Statutory relief*.

e. *Statutory relief.*

In some states statutory relief for the purchaser is provided. The decisions under the Indiana statutes have all affirmed the purchaser's right under a void sale to reimbursement, and the same was held in many cases before the statute recognizing this right was passed, and some decisions since the statute affirm the rule without noticing the statute. In New York the Code providing for redemption, and that the title shall pass to the grantee unless the money is paid to him in twenty days from the time the sale is adjudged void, is held unconstitutional.

In *Stevens v. Durrett*, 49 Miss. 411, where a sale was void because made by an administrator without any order of court, it was said that Miss. act February 11, 1873, provides that where real estate has been sold under probate or chancery decrees for debts or distribution, and the money has been paid in good faith, and has been applied in good faith for debts or dis-

tribution, and such sales are void, the heirs or distributees recovering the same in ejectment shall hold such real estate subject to the payment of said purchase money to said purchaser or any party holding under him.

So a purchaser at a guardian's sale that was void was held entitled to an injunction against a judgment in ejectment obtained by the heirs, where the money was paid to the guardian, and the heirs who had become of age had received their shares. This was held to be on principles of equity and estoppel, as well as under Miss. act February 11, 1873, Pamph. 41, *supra*. *Gaines v. Kennedy*, 53 Miss. 103.

In an action of ejectment by heirs of the intestate to recover land sold at a void probate sale, it was held, under this statute, that the purchaser was entitled to an injunction to stay the ejectment suit until the purchase money was refunded, where it was shown to have been applied to the payment of the debts of the estate. *Cole v. Johnson*, 53 Miss. 94. The court said: "Certainly, the most appropriate, if not the only adequate, method of securing it would be by a chancery proceeding. Independently of this statute, however, a court of equity has the right to charge the purchase money on the land where it is shown to have been applied in exoneration of the liabilities of the estate, as was decided, before the enactment of the statute, in *Short v. Porter*, 44 Miss. 533; and it is well settled that the bestowal of jurisdiction on a common-law court does not deplete the jurisdiction of a court of equity, unless it is expressly so enacted."

In *Montour v. Purdy*, 11 Minn. 384, 88 Am. Dec. 88, Gil. 278, where a guardian's sale was attacked by the ward by an action of ejectment, it was held that a tender of the purchase money was not a condition precedent, as possession might be surrendered, and the lien allowed, under Minn. act March 3, 1864, protecting purchasers at executors', administrators', and guardians' sales, and providing that, if the sale shall be void or irregular, the purchaser shall have a lien on the real estate sold for the purchase money, taxes, and interest.

In *Rely v. Burton*, 71 Ind. 118, which was an action to recover possession of land where the sale was held not void because of defect in *nunc pro tunc* entry directing the sale without relief from appraisement laws, it was said that the judgment debtor could not recover possession until the purchase money had been refunded with interest, deducting the rents, under the Indiana Code (2 Rev. Stat. 1876, p. 257, § 625), providing that, when land sold by an executor, guardian, sheriff, or commissioner, is recovered by any person liable to pay the judgment, the plaintiff shall not be entitled to a writ of possession without having paid the amount justly due.

And under this statute a purchaser at an execution sale, where the property was misdescribed and the sale was void, was held entitled to be subrogated to the rights of a judgment creditor. *Ray v. Detchon*, 79 Ind. 56. In this case the foreclosure suit was commenced by publication, and the notice was void for want of sufficient affidavit, and the land was misdescribed in the decree, and the court had no jurisdiction over the person of one of the defendants.

And the same was held in *Short v. Sears*, 93 Ind. 505. In this case it was said that there was no warranty in judicial sales. "But this rule has no application to cases where the pur-

chaser is asserting his rights against the execution debtor or his property. It was framed for and applies to a very different class of cases."

And in *Walton v. Cox*, 87 Ind. 104, which was an action on a covenant of warranty, it was said that the grantee holding under a void administrator's sale in a suit for eviction should have set up his claim under this statute.

A purchaser of school land defaulted, and the mortgage was foreclosed, and the land sold in 1876 to Sterne, against whom there was a judgment in 1875, on which an execution sale was had in September, 1877. Sterne had made a mortgage of this land in the interim. The grantee of the original purchaser redeemed from the sale under the school-fund mortgage. It was then held that the lien of the purchaser under the judgment related back to the time of the judgment, and was prior to the lien of the mortgage made in 1876 as against the redemption fund. *Paxton v. Sterne*, 127 Ind. 289, 28 N. E. 557. The court said: "That a purchaser at a sheriff's sale acquires by subrogation the rights of the judgment plaintiff, in the event that the sale is ineffective to convey title, is affirmed by our statute and asserted by our decisions."

And a purchaser at a sheriff's sale on foreclosure was held entitled to be subrogated to the right of the mortgagee, where the sheriff did not make sufficient written memorandum of sale, and the purchaser failed in a mandamus suit to acquire a deed. *Bodkin v. Merit*, 102 Ind. 298, 1 N. E. 625. The court said: "It is a familiar principle of equity, and is one fully recognized by our statute and decisions, that payment of a debt by a purchaser at an invalid sheriff's sale subrogates the purchaser to the rights of the creditor."

In *Short v. Sears*, 93 Ind. 505, it was said: "A purchaser at a sheriff's sale, who buys in good faith, and pays money which goes to the discharge of a judgment lien on the execution defendant's land, is entitled to be subrogated to the lien of the judgment creditor. This is a general principle of equity, and is not dependent alone upon statutory law. Our cases very early held that a purchaser might recover in equity from the execution defendant the amount paid on his bid, and a long line of decisions has maintained this doctrine. . . . The rule has not been confined to a right to a personal judgment against the debtor, but has been extended, as in justice and equity it should be, to a right to the lien of the judgment paid by the bid. . . . The statute declares in very broad terms this general rule. Rev. Stat. 1881, § 1084. . . . As the statute is a remedial one, and in furtherance of a salutary and long-recognized rule, it ought to receive a liberal construction."

Under *Bates's Ohio Stat. §§ 5410, 5411*, providing that the purchaser at execution, executors', guardians', and assignees' sales, which are set aside, should be subrogated to the rights of the creditor, and shall have a lien, it was held that a purchaser at an executor's sale under an order of the probate court, which was void, was entitled to be subrogated to the creditor's rights when the purchase money was used to pay debts, and the property should be sold to reimburse him. *Wehrle v. Wehrle*, 39 Ohio St. 365.

But in *Gilman v. Tucker*, 128 N. Y. 190, 13 L. R. A. 304, 26 Am. St. Rep. 404, 28 N. E. 1040, N. Y. Code (Civ. Proc. § 1440 (Amended Laws 1881, chap. 681), providing for redemption

tion, and that, if the title of the sheriff's grantee in sales under execution is adjudged void in an action brought by the judgment debtor, such judgment shall have no force unless within twenty days the plaintiff pay to such grantee the money paid on the sale with interest and costs; and that, if not paid, the title shall vest in the grantee,—was held to be unconstitutional. The court said: "The obvious intention of the act is to take away from the owner all remedy for the recovery of his property, except upon the payment by him to his adversary of a sum of money which must frequently be greater than the value of the property itself. If he remains in possession of the property, he is deprived of any remedy to protect his possession, and if his adversary has succeeded in obtaining possession, he is deprived of any remedy to recover it, except upon the condition that he pays as much, or more, than it is probably worth. An owner may, therefore, under this law, be stripped of his property under a void proceeding; be turned out of possession, and denied any affirmative relief in the courts, unless upon the condition that he pays for the property its value, as determined by a judicial sale, and, in addition thereto, a sum for costs and expenses, the amount of which he has no means of ascertaining, and which may also exceed the value of the property in litigation." This was an action by the judgment debtor to have the sale declared void because of void execution. After judgment in favor of the debtor the purchaser moved to set this aside because he had not been tendered the purchase money under the statute. See *Meyer v. Farmer*, 36 La. Ann. 785; *McIntyre v. Sanford*, 89 N. Y. 634; *Lefevre v. Laraway*, 22 Barb. 167,—subdiv. III. g; *Elling to Harrington*, 17 Mont. 322, 42 Pac. 851, subdiv. V.; *Holt v. Bason*, 72 N. C. 308, and *Wood v. Genet*, 8 Paige, 137, subdiv. V.

f. Proceedings against nonresidents.

The purchaser was held not entitled to relief where there was no lien, and the court had no jurisdiction, and the proceedings were by publication against nonresidents.

A judgment was rendered against a nonresident without service, appearance, or attachment, and no lien was asserted. A sale thereunder was void, and it was held that the purchaser under such sale did not acquire a lien for the amount of the debt paid by the sale. *Grigsby v. Barr*, 14 Bush, 330.

In an action of attachment against a nonresident no notice was given to defendant, and the papers contained a misnomer by transposing the initial letters of the Christian name. The conveyance was in the proper name. It was held that the proceedings were void, that the court had no jurisdiction, and the sale was void, of which the purchaser should have taken notice from the record. It was also held that the purchaser was not entitled, in equity, to retain possession of the land until he had been reimbursed. *Buchanan v. Edmisten*, 1 Herdman (Neb.) 429, 95 N. W. 620. The court said: "But it is insisted, . . . that is to say, conceding, for the sake of discussion, that the attachment proceedings are void from their beginning to their conclusion, that the threshing-machine company never had any lien, and that no title passed pursuant to the pretended judicial sale, still, by reason of this void proceeding, void sale, and void deed, the purchaser has

acquired the right to take and retain possession of the premises until he shall be repaid the amount of his bid. In other words, that the unliquidated debt of the appellant has, by the means mentioned, been converted into an equitable mortgage upon his lands, and the purchaser has attained a position superior to that of a mortgagee in possession. Appellee cites no authority in support of this contention, which is indefensible in reason."

So it was held that, a judgment being void, the sheriff's sale did not divest the defendant of his title, and he was not bound to refund the purchase money paid to the sheriff. *Stegall v. Huff*, 54 Tex. 193. This was an action by the defendant in execution against the purchaser to recover land the purchaser held under an execution sale based on a judgment by publication, where the court had no jurisdiction. The court said: "Otherwise he might indirectly be forced to pay an indebtedness which he did not owe."

This case followed *Edrlington v. Allsbrooms*, 21 Tex. 186, which was an action for an injunction against a garnishment judgment, and it was held that a debtor who seeks an injunction against a void judgment is not obliged to bring the money into court before he can claim its interposition.

In *Norcraft v. Oliver*, 74 Tex. 162, 11 S. W. 1121, where the purchaser bought at an execution sale on a judgment void because rendered on publication against a nonresident, the heirs brought ejectment. The defendant pleaded that he should be reimbursed before losing the land, and also pleaded that the heirs could not maintain this action, as the right of action was in the administrator. This latter defense was sustained. As to his lien, the court said: "The right of the creditor of the estate is good to defend against the heirs taking and appropriating the property, but this right is no better to appropriate it exclusively to his own use than is that of the heirs to do the same thing. The creditor protects himself, and at the same time all other creditors and claimants of the estate, by surrendering the estate's property only to an administrator of the estate in whose hands our laws are so framed as to provide for its proper distribution."

See *Boggs v. Fowler*, 16 Cal. 559, 76 Am. Dec. 561, subd. V.

g. Fraudulent sales.

A large number of cases hold that a purchaser who was a participant in a fraudulent sale by procuring the property at a sacrifice, where competition was prevented, or who was a party to a fraudulent judgment, was not entitled to relief on the ground that "he that hath committed iniquity shall have no equity." Relief has been denied where an administrator purchased at his own sale. There are cases where relief was granted without discussing the question whether or not preventing bidding, or fraudulently co-operating in the sale, is sufficient to defeat his right. In some of these relief was granted because the sale was attacked in equity, and the complainant was required to do equity.

A bidder procured a purchase by fraudulently preventing other bids. It was held that he acquired no title, and the court refused to reimburse him, on the maxim that "he that hath committed iniquity shall have no equity." *Goble v. O'Connor*, 43 Neb. 49, 61 N. W. 131. The 69 L. R. A.

court said: "The sale to appellant was void because of his wrongful and fraudulent acts at the time of the sale, and he acquired no title as against appellees, and is not entitled to have the money paid out by him refunded; and this last, not by way of punishment, and not that the court would help or desire to aid appellees beyond the demands of justice and equity, but because, by his own wrong, the appellant has placed himself in such a position that the court is unable to grant him relief."

An administrator purchased land of an intestate at sheriff's sale on a judgment recovered for an alleged debt of the intestate. In ejectment brought by heirs of the intestate alleging the judgment to be fraudulent, it was held that, if the debt was not shown to be bona fide, and if the administrator had assets to pay it, the heirs could recover the land against the administrator on the ground of fraud, without tendering the money paid or the value of the improvements. *Riddle v. Murphy*, 7 Serg. & R. 230.

So, in an action of ejectment by devisees against the purchaser at sheriff's sale, where the purchaser had fraudulently misrepresented the land at the sale so as to acquire it at a low price, it was held that the plaintiff did not have to tender to the purchaser the money paid in order to recover. *Gilbert v. Hoffman*, 2 Watts, 66, 26 Am. Dec. 103. In this case the court said: "In the case at bar, Daniel Gilbert has a title to the land, as the devisee of his father Leonard, which is not in the slightest degree impaired by the deed of the sheriff, which is *ab initio* void, by reason of the fraud practised at the sale. . . . This opinion, it must be observed, is grounded on the assumption that the purchaser was guilty of such fraud as avoids the sheriff's sale. Whether there was actual fraud will be for the jury to decide on another trial."

So it was held that the purchaser could not hold the title as security for the purchase money advanced, or anything else, where he prevented bidding by fraudulently representing that he was buying the property for the family of the defendant in execution, and that the purchaser would take it charged with liens which he knew the sale would divest. *McAskey v. Graff*, 23 Pa. 321, 62 Am. Dec. 336. It was also held that the plaintiff in ejectment was not bound to tender the purchase money before trial, nor to take a conditional verdict by which he would be compelled to pay it afterwards.

Two lots amounting to 446 acres were struck off for \$13. The sale was set aside as fraudulent on the part of the sheriff. The purchaser had assigned his bid, and the sheriff had conveyed to the assignee. It was held that he was not entitled to any protection in his purchase. *Tiernan v. Wilson*, 6 Johns. Ch. 411. The court made no disposition as regards the purchase money. The sheriff was decreed to pay the costs.

A sale was set aside for fraud. It was held that the purchaser was not entitled to equitable relief for the purchase money paid. *Teas v. McDonald*, 13 Tex. 349, 65 Am. Dec. 65. The court said: "But in this case, if Teas, the purchaser of the property, was chargeable with notice of the facts, as we think he was, he is to be deemed to have purchased with a knowledge of the fact that the judgment debtor, whose property he purchased, though legally liable to the plaintiff in execution, yet, as be-

tween him and his codefendant Cotton, was not equitably liable; for that he had paid his proportion of the debt, and really owed nothing; and that his codefendant Cotton, who pointed out the property, was the sole debtor, out of whose property the debt should have been collected; and that he was held so liable by the plaintiff in execution, who did not desire the property of the plaintiff in this suit to be sold in satisfaction of his judgment."

An administrator in a mortgage foreclosure was the purchaser. The purchaser had previously contracted to sell the land, and his vendee was to abstain from bidding, and his vendee subsequently paid him for the land. It was held that the combination not to bid rendered the sale void, and that the vendee could not claim a return of the price on setting aside the sale under La. Rev. Civ. Code, § 2505, providing that the seller, in case of eviction, was entitled to restitution of the price, except that this shall not be the case where the buyer, at the time of sale, was aware of the danger of eviction, and purchased at his peril. *Meyer v. Farmer*, 36 La. Ann. 785.

In *Forniquet v. Forstall*, 34 Miss. 87, where an administrator at his own sale had made a fraudulent combination with the purchaser to buy for the benefit of the administrator, and had sacrificed the property, and had colluded with subvendees to dispose of the same, it was held, in an action by the administrator *de bonis non* to recover the property, that he did not have to tender the purchase money, as such purchasers could not require that before the party entitled shall recover his just rights he should be compelled to pay them what they have knowingly seen fit to pay in order to deprive him of his property.

In *Hampton v. Hampton*, 9 Tex. Civ. App. 497, 29 S. W. 423, where a guardian's sale to his wife was set aside, under Tex. Rev. Stat. § 2582, providing that, if a guardian is the purchaser, directly or indirectly, the sale shall be void, and shall be set aside, as to whether or not the purchaser was entitled to a return of the purchase money was not decided. The court said: "Whether, under the terms of this statute, that character of decree could be entered, we need not decide. But it is not believed that such conditions should be imposed where the sale is one forbidden by law, and those who have become interested were informed of the fact when they purchased; and it does not appear that, assuming the guardian had received the purchase money, the minors derived any benefit from the sale. Conceding that plaintiffs may have had recourse on the guardian and his sureties, we conclude that this fact would not interfere with their prosecution of this remedy, if they so elected."

In other cases where bidding was prevented the purchaser was allowed a lien for his purchase money, without discussing the effect of fraud on the right of subrogation.

An assignee of a rent note went to a tax-foreclosure sale to procure the title for one of the heirs. A lessee was present, and made arrangements to buy the property and protect the assignee, and he procured the title, but failed to carry out his contract for the heirs. The lessee purchased a 140-acre lease for a period of seven years, fairly worth \$1,500, for which he paid but \$455. The sale was set aside, and the lessee who had paid the purchase price of the rental was held entitled to the equitable lien of a vendee to the extent of the sum he had paid. 60 L. R. A.

Stuart v. Brown, 135 Ind. 232, 34 N. E. 976. The court held that he was bound by his contract to purchase for the benefit of the heir, made with the heir's agent at the sale. This was a suit by the heirs to set aside the sale, and the purchaser contended that plaintiffs were not entitled to equity by reason of their fraudulent agreement to prevent competition, and he claimed, in the event of the sale being set aside, the right of subrogation. The court characterizes his purchase as fraudulent, but does not discuss the effect of that fraud upon his right of subrogation.

So, where a bidder prevented competition by his agent representing that the purchase was for a home for an aged and dependent mother of the purchaser, and the property was sacrificed, the sale was held void, and was set aside as fraudulent, because such a purchase was contrary to public policy. It was held that the purchaser was entitled to have the purchase money refunded which had been applied to pay on complainant's debt, and that a lien should be allowed on the land for the same. *Bunts v. Cole*, 7 Blackf. 265, 41 Am. Dec. 226. The court does not discuss the effect of such conduct on the right of the purchaser to subrogation.

So where an administrator bought real estate at his own sale, and a suit to set aside the sale was brought at the instance of the heirs. It was said that, where the administrator had been allowed to make lasting improvements without objection, "It may be good ground in equity for reimbursing him therefor out of the first moneys arising from resale of the property as was ordered by the court, but when this is done he cannot equitably claim anything more." *Potter v. Smith*, 36 Ind. 231.

A bill was filed by minors to set aside a guardian's sale where the purchaser had prevented bidding. The sale was set aside. It was held that the purchaser should be reimbursed the payment made, which had been applied to an existing mortgage and 6 per cent interest, but he was denied the right of subrogation to the mortgage bearing 10 per cent interest. *Devine v. Harkness*, 117 Ill. 145, 7 N. E. 52. The court said: "Paying the mortgage debt to the mortgagee was no more than paying the amount of it to the guardian, and was but paying appellant's bid for the land. The payment was one made in wrong, in the carrying out of a wrongful purchase, and presents no case for the application of the equitable doctrine of subrogation." The court does not discuss further than is stated above the effect on subrogation of the fraud of the purchaser; but the case seems to turn only on the proposition as to whether he was to get 6 per cent, or whether he was entitled to the 10 per cent carried for in the mortgage.

A sale under attachment of four lots in a body, which were divisible and worth eight times the amount of the debt, was held to be fraudulent and a breach of trust on the part of the auditors, who were authorized to sell only so much of the land as was necessary to satisfy the debts of the plaintiff. It was held that the sale should be set aside with liberty to the owners to apply for an injunction in case the plaintiff in attachment, who was the purchaser, upon being tendered the amount, refused to acknowledge satisfaction. *Johnson v. Garrett*, 16 N. J. Eq. 31.

A purchase by an executor at an orphan's court sale for the payment of debts was held voidable by the heir, and the purchaser was held

entitled to be repaid the purchase money, which was applied to the payment of judgments against the *cestui que trust*, who was an habitual drunkard, where these payments were assented to by his committee. And this also applied to payments out of the purchase money, made by order of the orphans' court after the suit brought to set aside the sale. *Beeson v. Beeson*, 9 Pa. 279.

In *McIntyre v. Sanford*, 89 N. Y. 634, it was held that N. Y. Code Civ. Proc. § 1440, as amended by Laws 1881, chap. 681, § 2, providing that, if the title of one claiming under a sheriff's deed sold on execution is adjudged void, a judgment shall have no force unless the plaintiff shall pay the amount paid on the sale, did not apply where the purchaser and the sheriff had fraudulently colluded; but in an equitable action to set aside the sale it was held that the plaintiff should refund to the purchaser the amount of the judgment with interest.

Under 2 N. Y. Rev. Stat. 326, § 62, providing that no guardian of any infant party to the suit shall purchase any lands except for the benefit of such infant, and that all sales contrary to this provision shall be void, a purchase of infant's property at a partition sale was held void, and the purchaser was held entitled to the purchase money paid and interest, but was denied costs or expenses and damages, as the purchase was void. *Lefevre v. Laraway*, 22 Barb. 167.

And in *Mulford v. Bowen*, 9 N. J. Eq. 797, where an administrator was a purchaser at his own sale through another party, and the heirs brought ejectment, it was held that the purchaser could maintain a bill in equity to restrain the ejectment suit until the equitable rights of the purchaser could be ascertained.

So, where an heir had recovered in ejectment property sold by an administrator under a decree of the orphans' court for the payment of debts, and the administrator was the purchaser through another party, and the sale was fraudulent and void as against the heir, and the heir brought a bill for an accounting and partition. It was held that the purchaser had no ground of complaint where he was allowed his advances with interest. *Obert v. Obert*, 12 N. J. Eq. 423.

In *Barbour v. Morris*, 6 B. Mon. 120, where land was sold under executions against the heirs and administrator, and the administrator colluded with the purchaser to prevent competition and to acquire the tract for their joint benefit, and the sale was set aside as fraudulent, in a suit in equity it was held that the complainant should only be granted equity upon the terms of doing equity, and that the purchaser should be reimbursed the amount of the judgments extinguished by the sale, deducting the amount of rents received.

A purchase by an administrator of a head right, under an order of the probate court allowing the administrator to take the land for his claim, was void, but it was held that the heirs must reimburse the purchaser before they could recover the land. *Halsey v. Jones*, 86 Tex. 488, 25 S. W. 696.

Purchase by guardian, see *Campbell v. Laclede Gaslight Co.* 84 Mo. 352, subd. III., d. 1; purchase by administrator, see *Jayne v. Bolgerard*, 39 Miss. 796, subd. III. d. 2.

IV. Relief by action against the debtor.

The weight of authority holds that the purchaser

whose money has been used to extinguish the debt of the defendant may maintain against the latter a suit in equity in the nature of assumpsit, and may recover from him the money paid, on the sale being set aside. This rule is applied notwithstanding the purchaser may have paid the money under a mistake of law. But relief was denied in a purchase of chattels where the purchaser failed to obtain possession, and it was not shown that the sheriff had paid out the money.

So it was held that the purchaser could recover from the defendant in execution for whose benefit the purchase money had been paid, where property of defendant was sold at sheriff's sale, and the sale was invalid because the property was exempt as a homestead. It was further held that the purchaser had not waived his right by failing to plead in the ejectment suit, wherein he lost the property. *Stone v. Darnell*, 25 Tex. Supp. 430, 78 Am. Dec. 582. The court said: "Though a party may plead a demand in reconvention, he is not obliged to do so, nor is he precluded of his action by his failure so to plead."

In an action by a purchaser at a sheriff's sale against the defendant for failure of consideration, it was held that the purchaser was entitled to recover of the defendant the purchase money, where the sheriff had misdescribed the land, and the purchase money had been applied to the payment of the judgment. *McLean v. Martin*, 45 Mo. 393. The court said: "The plaintiff bought at a fair sale, and paid his money; that money was regularly paid to the creditor, and went to extinguish the judgment against the debtor. It was, then, so much paid for the use and benefit of the debtor. The debtor supposed that his land was sold, and surrendered it to the purchaser, who moved on it and made improvements. Afterwards, ascertaining the misdescription and finding the mistake, the debtor regains possession and now claims the land, and refuses to refund the money which the purchaser paid for his use, and which was applied to the discharge of his debts. In other words, he avails himself of the benefits of the payment, and holds onto the land besides. The claim is grossly inequitable and unjust, and ought not to be allowed, and I see no reason why the action is not maintainable."

So it was held that the purchaser could plead as an equitable set-off for damages the purchase money paid by him, where a purchaser under a void execution sale was sued in trespass by the defendant, who was insolvent. *Geoghegan v. Ditto*, 2 Met. (Ky.) 433, 74 Am. Dec. 413.

And it was held that the purchaser was entitled in equity to maintain an action against the judgment debtor for the amount of his purchase. *Hawkins v. Miller*, 26 Ind. 173. In this case a mortgage foreclosure was held void. The court said: "The judgment defendant was guilty of a wrong in refusing to pay his debt. He persisted in that wrong by allowing process to issue on the judgment against him. He stood by and took no steps to have the process set aside, and allowed the sheriff's sale to take place. The plaintiff in good faith paid his money, it is true, under a mistake of law, but the defendant got the benefit of that mistake; he remained in the possession of the land sold, and finally defeated the plaintiff in the suit to recover possession of the premises. Under such circumstances, this court is not inclined to look after fancied distinctions which have no foundation in reason."

A receiver of a partnership sued one of a firm, but before levy the property was fraudulently conveyed. Execution was levied upon the property, and the other partner became the purchaser. In a suit by him to set aside the fraudulent conveyance a decree was had setting it aside, and also the sheriff's sale to the plaintiff. On the question of subrogation, it was held that the purchaser was an ordinary vendee at sheriff's sale, and that the amount which he paid to the sheriff operated as a discharge *pro tanto* of the judgment, and that, the judgment being satisfied, there could be no substitution. It was further held that, as the money advanced on the void sale was paid to the use of the execution defendant, the administrator, and not the heir of plaintiff, was entitled to recover it. *Richmond v. Marston*, 15 Ind. 134. The court said: "The sheriff's sale being a nullity, the administrator of Marston may have the right, by suit against Richmond [the defendant], to recover the money paid to the sheriff on the void sale."

But a purchaser was held not entitled to maintain a suit against the debtor for the amount paid, where an execution levy was made on the interest of the defendant in slaves, and the sale was void because the property was not in the possession of the sheriff. *Brown v. Lane*, 19 Tex. 203. This was because the purchaser did not get such possession or title as ever could have been matured into a good right, and it was not shown that the sheriff had paid the money, and it did not appear whether the purchaser gave a fair value, or bought on speculation at an unconscionable price. This was an action by a purchaser to recover an undivided interest in certain slaves. The validity of the sale was attacked, and the plaintiff then claimed judgment against the defendant for the amount he had paid, and which he alleged had gone to discharge the indebtedness of the defendant in the execution. The court said: "The extent to which our decisions go, so far, is that a bona fide purchaser, who has been sued to vacate his title, will not be required to abandon his possession and title, until his purchase money is refunded to him. It is necessarily implied in this, that the sale is such as to vest the possession, either actually or constructively, in the purchaser; that he paid money which was applied to the use of defendant; that he paid a fair price,—such as would constitute a consideration in good conscience; and generally that he should not be a participant in any fraud connected with the sale."

Cases where the purchaser failed to secure the property because it was owned by a third person, and the purchaser sued the debtor, are not included in this note.

V. Relief by action against the creditor.

The weight of authority is that, in the event of the sale being set aside, and in the absence of other relief given by statute, the purchaser may recover the purchase money in an equitable action for money had and received against the creditor procuring the sale, on the ground of mistake and failure of consideration, and implied promise to return the same. The remedy against the creditor is also given in some states by statute. So where the creditor held another prior lien, and did not disclose it at the sale, the purchaser was held entitled to have the sale set aside, and the creditor was compelled to refund or release his lien. Relief was refused

where the remedy of subrogation was sufficient.

So, the purchaser at a void execution sale was held entitled to recover, in an equitable action for money had and received, the amount of his purchase money from the party who procured the sale. *Schwinger v. Illickok*, 53 N. Y. 280. In this case on a foreclosure of a mortgage by publication a personal deficiency judgment was taken without jurisdiction. The court said that knowledge of the invalidity of process "will not be imputed to the purchaser at such sale in order to make out that the payment was voluntary."

And in *Chapman v. Brooklyn*, 40 N. Y. 372, which was a suit by the purchaser against the city under a judicial sale for taxes, which was void because the lots sold were not owned by the persons named as the owners, it was held that the purchaser could recover, applying the principle that, when the consideration appears to be valuable and sufficient, but turns out to be wholly false, then a promise resting on this consideration is no longer obligatory, and the party paying money can recover it back.

And in *Ward v. Southerland, Peck* (Tenn.) Appx., where the sale was void, the purchaser was held entitled to maintain a bill in equity against the plaintiff in execution to recover the purchase money on the ground of misstatements of the plaintiff in execution, and that the money was paid under a mistake. In this case the creditor obtained a judgment, and after the death of the debtor issued a sc. fa. against the heirs without any executor, and on return of the sc. fa. had the execution awarded against the heirs, and then sold the judgment to the purchaser on the representation that they acquired a good title, and the plaintiffs then purchased at the execution sale.

And where a sale was had in partition, and no guardian *ad litem* had been appointed for an infant defendant, the purchaser was discharged from his bid, and held entitled to his costs, as there was no fund out of which he could be paid. It was held to be proper practice to compel the complainants to pay them in the first instance. *Kohler v. Kohler*, 2 Edw. Ch. 69.

So a purchaser of land having paid the purchase money, and the sale having been set aside, was held entitled to a return of the money from the parties by whom it was received. *Salter v. Dunn*, 1 Bush, 311. The court said: "But in the case of *Bowman v. Melton*, 2 Bibb, 151, this court held, where a mortgagee obtained a judgment of foreclosure and sale of the mortgaged property, and it was afterwards ascertained that the mortgagor did not own the property and the purchaser lost it, that the mortgagee was bound to refund the money to the purchaser. In such cases the property is sold at the instance and by the procurement of the plaintiff, and by his proceedings for that specific purpose, which is not the case under execution, when the levy and sale is the act of the officer of the law."

After an administrator's sale the purchaser learned for the first time that a building on the land was partially on other land, and did not belong to the estate. The administrator retained \$100, the first payment, and resold the land after acquiring a quitclaim deed for the land covered by the building. In an action by the purchaser against the administrator it was held to be no defense that the defendant had accounted for the money to the probate court as belonging to the estate where he had knowledge of plaintiff's claim. This was on the

ground of mutual mistake. *McKay v. Coleman*, 83 Mich. 60, 48 N. W. 203. The court said: "Under this state of facts, the plaintiff cannot, in the language of the announcement made by the defendant, be held to be guilty of default in not paying his bid. It is clear that, under these circumstances, the defendant could not have enforced payment, because he could not himself fulfil the conditions of the sale as they were mutually understood between them. The forfeiture of the money paid must be determined by the ability of the defendant to perform the contract as mutually understood. The inability of the defendant to perform relieved the plaintiff from the forfeiture."

A sale under execution was made of the equity of redemption; but the fact that the judgment creditor held a mortgage also was not disclosed, although he was present at the sheriff's sale. It was held that the purchaser had a right to maintain an action to set aside the sale, and to require the creditor to refund the purchase money or release his mortgage. *Wolford v. Phelps*, 2 J. J. Marsh. 31.

And where the court required a bond conditioned for the repayment into court of the purchase money in the event of the confirmation of the sale being reversed, and on the execution of the bond the marshal paid the complainant from the purchase money received, and the case was reversed, it was held that the purchaser whose money had been wrongfully appropriated to the satisfaction of the judgment could maintain an action upon the bond. *Lamb v. Ewing*, 4 C. C. A. 320, 12 U. S. App. 11, 54 Fed. 269. In this case the judgment creditors were non-residents, and the court said: "When, under these circumstances, the court was asked to pay out the money in its hands, it was at once apparent that by so doing the court, in the event the judgment was held void, would be deprived of the power to cause restitution to be made to the proper parties, because both the fund and the parties might be beyond its control. To avoid this the court required the parties to execute the bond in question, whereby they became bound to repay the money in case the judgment against Lamaster should be held to be void, and thus the court continued its power to compel restitution to be made in case the right thereto should arise. We find nothing in the action of the circuit court in this particular which was illegal in itself, or which imposed upon the judgment creditors burdens of such a nature as to render the bond of no effect."

And where the order of confirmation was vacated the court said that, if the judgment creditor received \$30 from the purchaser, respecting which there was no finding, he became the debtor to the purchaser to that amount, and the purchaser might have a right to be compensated out of the money collected upon the judgment. *Deputron v. Young*, 134 U. S. 241, 33 L. ed. 923, 10 Sup. Ct. Rep. 539.

A judgment and execution were declared void in proceedings instituted by the judgment creditor. It was held that the purchaser under such execution sale could maintain an action against the creditor for the purchase money, under Mont. Comp. Stat. 1887, Code Civ. Proc. § 347, providing that, if a purchaser of real property sold under execution be evicted in consequence of irregularity in the proceeding concerning the sale, he may recover the purchase price paid, with interest, from the judgment creditor. *Elling v. Harrington*, 17 Mont. 322, 69 L. R. A.

42 Pac. 851. The court also held that the purchaser was entitled to recover irrespective of the statute.

Where a purchaser brought suit to rescind the sale, and ten years had elapsed in endeavoring to perfect the title, it was held that the sale should be set aside, and the purchaser relieved; and the case was remanded to the court below that an accounting be had and taken between the parties, of the sums due and chargeable to each on account of the said sale, and for every proceeding according to the principles of equity. *Myers v. Nourse*, 5 Fla. 516.

But in *Holt v. Bason*, 72 N. C. 308, a sale was made under an execution levied on lands of the testator on a judgment against an executor. A creditor by a prior judgment against the testator was the competing bidder. Thereafter an administrator *de bonis non*, by order of the court, sold the land for assets, and realized an insufficient amount to pay the prior judgment. The first purchaser sued the first judgment creditor for inducing a void purchase of land by his bidding. It was held that it was a question for the jury. The court said: "The plaintiff does not ask to be subrogated to the rights of Swepson, who has his money and is the only party benefited, for the obvious reason that prior judgments will exhaust the fund before the Swepson judgment is reached. *Scott v. Dunn*, 21 N. C. (1 Dev. & B. Eq.) 425, 30 Am. Dec. 174. Nor does he bring his action under Rev. Code, chap. 45, § 27, against the defendant in the execution, because the estate is insolvent, and can afford him no relief. *Laws v. Thompson*, 49 N. C. (4 Jones, L.) 104. Nor yet can he bring his case within *Saunderson v. Ballance*, 55 N. C. (2 Jones, Eq.) 322, 67 Am. Dec. 218, where the part owner of land stands by and sees it sold by a trustee as the land of another, and permits the purchaser to pay for it and take a deed, under the belief that he is getting a good title. But Holt is a purchaser at execution sale. The rule there is that the sheriff sells only the interest of the defendant in the execution. If the defendant has an interest, well and good; if he has none, it is the purchaser's own look out, for he buys at his peril, and, as a general rule, he is entitled to no relief as against creditors. In this case it would seem that the plaintiff, by his own showing, was guilty of gross neglect of a plain duty."

A foreclosure was had, to which the grantee owning the legal title was not a party, and a personal judgment was rendered against the mortgagor by publication. The sale was void, and it was held that the purchaser could not maintain an independent action against the plaintiffs in the foreclosure for money had and received, but that he must seek relief in the foreclosure suit, and on his application the court could direct the sale to be set aside, and satisfaction canceled, and authorize a supplemental bill for a resale to be filed and conducted in the names of the complainants in that suit for the plaintiff's benefit. *Boggs v. Fowler*, 16 Cal. 559, 76 Am. Dec. 561.

In *Abadie v. Lobero*, 36 Cal. 390, where it was held that a purchaser at a sheriff's sale was not entitled upon his own motion, made in his own name, to have the judgment upon which the order of sale was issued vacated, and himself substituted as plaintiff, it was said: "It is true a *dictum* is found in *Boggs v. Fowler*, 16 Cal. 566, 76 Am. Dec. 561, to the effect that, upon the application of a purchaser, the court may not only direct the sale to be set aside and

the satisfaction canceled, but also 'authorize a supplemental bill for a resale of the premises to be filed and conducted in the names of the complainants in that suit,' for the benefit of the purchaser; but no authority is cited for the latter proposition, and none, going so far, has fallen under our observation."

In *Wood v. Genet*, 8 Paige, 137, which was an action by a purchaser against a *feme covert* for the surplus money received by her husband on a sale on a judgment against her as heir, and where it was held that she could not be made personally liable although the sale was found to be invalid, it was said that the bill was not framed to obtain relief under 1 N. Y. Rev. Laws 1813, p. 504, providing that, if any purchaser of lands upon any execution shall be evicted on account of any irregularity in the proceedings, such person may have a writ out of chancery to the supreme court, who shall warn the party or parties at whose suit, or for whose benefit, the lands were sold, as the party against whom the execution issued, or their heirs, executors, or administrators, to show cause, and may award the plaintiff judgment in execution against him who ought to repay the same. And the court further said that 2 N. Y. Rev. Stat. 376, §§ (68) 72, which was in force at this time, gave to the purchaser, who was evicted by reason of the reversal of the judgment upon which the real estate was sold, a remedy against the party for whose benefit the same was sold, in a suit at law to recover back the purchase money with interest.

VI. Relief by action against the sheriff.

It seems that the sheriff is liable to any party injured in consequence of a breach of any of the duties connected with his office. This is applied to the right of the purchaser, and it is held that he may recover from the sheriff the purchase money where the sale is avoided by reason of irregularities of the officer conducting the same: but, where the purchaser had actual knowledge of the irregularities, it is held that he cannot maintain the action.

In *Hightower v. Handlin*, 27 Ark. 20, a sale was set aside because the execution was void, and the sale was made six days after the execution should have been returned. The court said: "While it is not incumbent upon bidders and purchasers, at judicial sales, to inquire into any irregularity which may have been permitted by the court rendering the judgment, or the clerk in issuing the execution, if it is regular upon its face, yet, if for any cause the proceedings of either should be declared void, by competent authority, he could not take anything by reason of such sale, but would have recourse upon the sheriff, who made the sale, for the money he paid at it."

So, where property was not seized at all, and the purchaser was evicted on the ground that the sheriff's sale was a nullity, it was held that the sheriff must indemnify the purchaser. *Friedlander v. Bell*, 17 La. Ann. 42.

And a purchaser of a runaway slave sold by a sheriff was held entitled to recover damages where the sale was invalid because not advertised as required by law. *Fleming v. Lockhart*, 10 Mart. (La.) 308.

A purchaser at an execution sale under a judgment void because rendered against a deceased party was held entitled to recover from the sheriff so much of the purchase money as

had not been paid to the plaintiff in the execution. *Bragg v. Thompson*, 19 S. C. 572.

A sheriff under execution sold real estate, and the purchaser paid into the sheriff's hands \$620, and then refused to complete the purchase on the ground that the sale was irregular, and the sheriff resold the property to another party. The first sale having been set aside as irregular, an action was brought by the purchaser against the sheriff. This was held to be an action for the nonpayment of money collected upon execution, within N. Y. act 1871, chap. 733, § 2, excepting such actions from the operation of that statute which required actions against sheriffs to be brought within one year from the time the cause of action accrued. It was further held that the sheriff could not retain the expenses of the sale. *Bowne v. O'Brien*, 5 Daly, 474.

But where the purchaser had notice of the irregularities of the sale he was refused relief against the sheriff.

A sheriff held several executions of different priorities, and sold the property under the prior execution for enough to satisfy the first two executions, but, instead of satisfying the second execution, applied the money to a junior execution, and resold another piece of land under the execution which should have been satisfied. This sale was vacated in a suit brought by the execution defendant against the purchaser, and it was held that the purchaser could not maintain an action on the sheriff's bond to recover the purchase money of such second sale. *State ex rel. Sage v. Prime*, 54 Ind. 450. In this case the court said: "But in the case at bar the purchaser under the execution issued on the next to the oldest judgment, which was next to the oldest lien on the real estate of the judgment defendant, had actual and constructive notice of all the facts. He was the purchaser at the sales made by the sheriff under the execution issued on the oldest judgment, which was the oldest lien on said real estate. He knew, therefore, or had the means of knowing, and was bound to know, that the proceeds of such sale were sufficient to satisfy, not only the said oldest judgment, but also the said next oldest judgment. He knew, also, or had the means of knowing, and was bound to know, that the surplus of the said proceeds of such sales were in law applicable to, and by law satisfied, the said next oldest judgment. When, therefore, at the sheriff's sale under the execution issued on the said next oldest judgment, the said purchaser bid off and paid for the said parcel of said real estate sold thereunder, he knew, or had the means of knowing, and was bound to know, that the said next oldest judgment had been by law paid off and satisfied, and the said sale thereunder was an absolute nullity. In such a case as this, it is very clear to our minds that the purchaser cannot, nor can the assignee of his certificate of purchase, by any possibility, have any cause of action against the sheriff or his sureties, on his official bond, for the recovery of the purchase money. This conclusion is in entire harmony with the doctrine of the case of *State ex rel. Wilber v. Salyers*, 19 Ind. 432, although the facts of the two cases are somewhat dissimilar."

Cases where the purchase is by the creditor are not intended to be included in this note.

VII. Summary.

The purchaser is released from liability on the sale being set aside, and will be released

where there is a resale to hold him liable for a deficiency on failure to comply with his bid, if he has been led to believe that the first sale was abandoned, or where proper steps are not taken to hold him liable. In England, Ireland, Canada, and in New York and some other states, the practice in judicial sales is to allow the purchaser to show before confirmation that the title is defective, and thereupon his deposit will be returned and the sale set aside. On setting a sale aside, or on a recovery in ejectment from the purchaser at a void sale, he is generally allowed reimbursement or subrogation. This is on the broad equitable principle that, having advanced money under a colorable right to pay the debt of another, he is entitled to be recompensed: and in working this out other equitable principles are applied,—“that he who seeks equity must do equity,” and what is called the doctrine of “compensation,” and “substitution,” which is commonly known as subrogation. In states which keep common-law and chancery practice distinct, the remedy is for the purchaser to have the judgment in ejectment enjoined until reimbursed. But where the relief is granted in common-law courts he should set up and claim a lien for the purchase money in the event of eviction. The remedy of reimbursement or subrogation is also usually allowed in cases where guardians' and administrators' sales are held void. Some states deny relief in this class of cases, unless the purchase money was used to pay claims which were a charge on the land, as in Illinois, Michigan, and Ohio. So relief is denied in some cases where the money

is not traced to a use beneficial for the estate; but in others it is held that the purchaser is secure if the money is paid to the guardian. In some states relief is provided by statute; but in New York such a statute attempting to transfer the title to the purchaser on the nonreturn of the purchase money was held unconstitutional. It seems that where sales are had on personal judgments taken against nonresidents on publication service the purchaser is not entitled to restitution or subrogation. So where the purchaser is a party to a fraudulent combination to procure the property at a sacrifice by preventing bidding. But in the latter case relief has been granted in some cases without discussing the question of fraud, and without noticing the cases that refuse relief. The purchaser is held entitled to maintain an action in equity in the nature of assumpsit against the debtor where the purchase money was used to extinguish a debt of the defendant, and the sale is held void. And in the absence of statutory relief it seems that the purchaser may maintain an equitable action for money had and received, against the creditor procuring the sale. This remedy is given by statute in some cases. Where the sale is invalid by reason of negligence on the part of the sheriff, and the purchaser had no notice of the same, the sheriff may be liable to him in damages for the purchase money.

Cases where the creditor is the purchaser, and cases of ordinary tax sales, are not intended to be included in this note. I. T.

UNITED STATES CIRCUIT COURT OF APPEALS, SEVENTH CIRCUIT.

BOARD OF TRADE of the City of Chicago,
App't.,
v.

L. A. KINSEY COMPANY *et al.*

(64 C. C. A. 660, 130 Fed. 507.)

1. A property right in price quotations gathered by a board of trade is not destroyed by the facts that a large percentage of the business done under its auspices consists of gambling transactions, or that the news is susceptible of bad, as well as good, uses.
2. The fact that a board of trade permits gambling transactions within its exchange hall does not deprive it of the right to resort to equity to prevent wrongful dissemination of the quotations of prices at which sales are made, gathered and sent out by it.

(April 12, 1904.)

APPEAL by plaintiff from a decree of the Circuit Court of the United States for

the District of Indiana dismissing a bill filed to enjoin defendants from making use of complainant's stock quotations. *Reversed.*

Statement by **Baker**, Circuit Judge:

On final hearing, appellant's bill to enjoin appellees from purloining its continuous quotations was dismissed for want of equity.

Appellees discuss the questions whether the quotations are property, and whether, if so, appellant lost its proprietary right by its method of giving them out; but that part of the case is ruled in this court by the decisions in *Illinois Commission Co. v. Cleveland Teleg. Co.* 56 C. C. A. 205, 119 Fed. 301, and *Sullivan v. Postal Teleg. Cable Co.* 61 C. C. A. 1, 123 Fed. 411.

There is, however, one further matter that requires presentation and decision. It pertains to the defense that appellant has no standing in a court of equity for either

NOTE.—As to property right in market quotations, see also, in this series, *National Telegraph News Co. v. Western U. Teleg. Co.* 60 L. R. A. 805.

As to property right in compilation of facts with reference to contemplated buildings and improvements made for use of contractors, see 60 L. R. A.

F. W. Dodge Co. v. Construction Information Co. 60 L. R. A. 810.

As to property right in article capable of being used for gambling purposes, see also, in this series, *Gulf, C. & S. F. R. Co. v. Johnson*, 1 L. R. A. 730, and *Edwards v. American Exp. Co.* 63 L. R. A. 467.

or both of two reasons: That the quotations are contraband, and may be seized by anyone with impunity; that appellant, even if the quotations themselves are not contraband, comes into court with unclean hands, in this: That it seeks to exclude all others from using property (the quotations) which might be put to good uses, in order that it may aid its members in maintaining the gambling in grains and provisions which it permits to be carried on in its exchange hall.

Respecting the facts of this defense, the master found as follows:

"The transactions conducted in the 'pits' of the complainant association, while they are of the same general character, are divisible into two classes, which are described by the members of the Board of Trade as 'hedging' transactions and 'speculating' transactions, respectively. Of the members of the complainant association who are engaged in business in the exchange hall, the number conducting speculative transactions is between one third and one half of the total, and practically all of such members conduct a hedging business.

"The principals who are engaged in hedging transactions are, generally speaking, either grain merchants, millers, or manufacturers of grain products. The method of such principals is this: When they have bought grain in the country, or in city warehouses, which they propose to hold for future sales to domestic or foreign purchasers, they at once sell in the pits of the complainant association an equal amount of grain; or, on the other hand, if they have sold to domestic or foreign purchasers grain or grain products for future delivery, they at once buy in the pits of the complainant association an equal amount of grain for future delivery at times corresponding with the times of their selling contracts. And thus, when they have contracts of purchase, they have contracts of sale, for future delivery in the pits, practically even with their purchases; and, if they have contracts of sale with domestic or foreign purchasers, they have contracts of purchase, for future delivery in the pits, practically even with such contracts of sale. The object of such hedging is to insure against loss by fluctuation in the market in the commodity which the principal is carrying, or which he has sold in advance of purchase and manufacture upon a time contract. A hedge must always be against a cash commodity.

"A speculative transaction is not based upon a cash commodity primarily. In effect, it is based upon the confidence which, on the one hand, the seller of the commodity for future delivery has in his personal opinion that the price of the commodity sold

will by the time of delivery have so declined that he can purchase the commodity for less than his selling price, and thus make a profit, and which, on the other hand, the buyer has in his personal opinion that the price of the commodity bought will so advance by the time of delivery that the commodity bought will be worth more at the time of delivery than it was at the time of purchase, and that he will thus have a profit. It is possible, under the rules, usages, and practice of the complainant association, for the seller and the buyer, respectively, if either changes his opinion, to buy or sell in the 'pits' the commodity which he has previously sold or bought, as the case may be, for the same time of delivery. While this procedure is in form the same as hedging, it is not designated as 'hedging,' but is styled 'spreading.' It is also possible, under the rules, usages, and practices of the complainant association, for a member of the complainant association to make such counter contract of purchase or sale during the same day that he has made an original contract of sale or purchase, and thus, within the day or within a few days, to have his advantage of profit or to adjust his disadvantage of loss. Such a course of business is designated 'scalping.'

"The evidence does not contain sufficient data upon which to predicate an estimate of the aggregate volume of business conducted in said pits daily, monthly, or yearly. It does appear, however, that the volume of such business is enormous: one firm conducted transactions in wheat daily aggregating 1,500,000 to 2,000,000 bushels, and in corn 1,000,000 bushels daily; another firm's transactions in wheat daily amounted to 6,000,000 bushels; a third firm's transactions in wheat daily amounted to 4,000,000 bushels; a fourth firm's transactions amounted to 1,000,000 bushels daily; a fifth firm's transactions in all grain amounted to 1,800,000 bushels daily; and a sixth firm's transactions in all grain amounted to 2,000,000 bushels daily. While it is true that the business of these six firms in the pits is much larger than the business of any other six firms conducting transactions in the pits, and that it would not be proper to say that the average business is a proper average of each of the persons conducting transactions in the pits, it is nevertheless true that it is fairly deducible from the evidence that the aggregate business transaction in grain was largely in excess of the total wheat and corn production of the entire United States during either of the years 1900 and 1901, and was many times over the entire receipts in Chicago of grain during each of said two years of 1900 and 1901, and, of such receipts in Chicago, less than

20 per cent inspected up to grades of grain which could be delivered upon time contracts made by said sales and purchases in the pits. It is also true that a decrease in the total grain productions of the United States does not cause a proportionate decrease in the volume of business done in the 'pits' of the complainant association, but, on the contrary, such business is larger during a year in which there is a shortage in the grain crop.

"Under the rules, usages, and practice of the complainant association, all time contracts made in the 'pits' are carried until it is possible to close them as between members of the complainant association by either one of three methods of settlement, namely, the method called 'direct settlement,' the method called 'rings' or 'ringing out,' and the method of delivery by delivering warehouse receipts physically or 'by notice.'

"Most time contracts made in the 'pits' are adjusted as between members of the complainant association, before the specified time of delivery arrives, by either the first or the second of the above-named methods. Direct settlements are effected by offsetting similar contracts at the close of the business hours of each day in the following manner: As soon as is practicable after the close of business in the 'pits,' each broker (individual, firm, or corporation) conducting business in the 'pits' takes from the day's transactions on his books the contracts similar as to amount and time of delivery to counter contracts made with other members of the complainant association, and ascertains therefrom the difference of the aggregate prices of such similar contracts, and, if the difference be in his favor, the amount of such difference is charged to the other party in such counter contracts, and, if the difference is against him, such difference is credited to the other party to such counter contract. The following is a simple illustration: If, during the day, broker A. has sold to broker B 5,000 bushels of December wheat at 75 cents per bushel, and broker B has sold to broker A 5,000 bushels of December wheat at 76 cents per bushel, after offsetting the contracts at 75 cents per bushel, there is a difference in B's favor of 1 cent on each bushel, or \$50. This offsetting difference in cash is placed as a debit or credit, as the case may be, upon the clearing-house sheet, hereinafter described, of the respective brokers, parties to said counter or offsetting contracts.

"The 'ring' method of settlement is as follow: Each broker (person, firm, or corporation) conducting business in the 'pits' has an employee who is called a 'settlement clerk,' who keeps a record of all his employer's transactions in the 'pits.' The com-

plainant association furnishes a room wherein all of such settlement clerks meet at stated hours each day and compare their respective books, called 'settlement books,' which are required by the complainant association to be kept by each broker. Upon comparing their respective books, said settlement clerks ascertain what, if any, outstanding time contracts may be offset by some other corresponding time contract made by the parties with other members of the association, and which of such contracts are, by consent of the parties thereto, permitted to be offset, and thereupon, under the rules of the complainant association, are deemed to have been settled, provided the requirements of §§ 6, 7, 8, and 9 of rule 22 of the complainant association are met, as therein provided, with reference to the clearing-house sheet and other details of settlement therein specified. . . .

"Theoretically, and in bare outline, an illustration of the 'ringing out' method is as follows: Broker A sells to broker B 5,000 bushels May wheat; broker B sells to broker C the same amount; broker C sells to broker D the same amount; and broker D sells to broker A the same amount; by consent of brokers A, B, C, and D, all of these time contracts are deemed discharged, and by novation there is substituted a contract wherein broker A, the initial seller in the series of discharged contracts, sells to broker D, the last buyer in the series of discharged contracts. The clearing-house sheets of the complainant association in evidence in this suit show that the actual process of 'ringing out' time contracts by elimination and substitution is much more complicated than the outline illustration, but that illustration exhibits the principle of the process. Among the daily transactions in complainant's 'pits' there are 'hedging' contracts, 'spreads,' and 'scalping' contracts, and all of these forms of time contracts are adjusted by both the 'direct' method and the 'ring' method of settlement. Upon the question what part of all the transactions in the pits are adjusted by the 'direct' method and the 'ring' method of settlement, the evidence is not very satisfactory. It tends to show, however, and I accordingly so find, that at least three fourths of the total transactions in the pits are adjusted by the 'direct' and 'ring' method of settlement.

"In the event that said time contracts cannot be settled by either the 'direct' method or the 'ring' method, they are and must be closed by a third method, namely, delivery under the rules and usages of the complainant association. Said rules are as follows:

"Rule 21—Section 1. All deliveries upon contracts for grain or flaxseed unless other-

wise expressly provided, shall be made by tender of regular warehouse receipts.' . . .

"The rules of the complainant association do not permit any persons other than members of said association to make 'time' contracts upon the floor of the exchange hall, and all 'time' contracts made in the pits are contracts between the members of the complainant association, who are in said transactions respectively sellers and buyers. The rules of the complainant association permit members of said association, as between themselves and nonmembers, to act as brokers in 'time' contracts made in the pits. In case a member of the complainant association, in making a 'time' contract in the pits, acts as a broker for an undisclosed principal, if such contract is settled by either the 'direct' method or the 'ring' method, such settlement does not discharge it, so far as such undisclosed principal is concerned, as between him and his broker, but the latter is required under complainant's rules to substitute a duplicate 'time' contract with the two elements of identity, namely, like amount of grain or other commodity, and like date of delivery, but not like price. If such substituted contract is not a duplicate, but differs from the original in price, the broker becomes principal as to difference in the prices between the original and the substituted contract, and, if it is impossible for such broker to substitute either a duplicate or a similar time contract, the broker becomes principal as to the entire time contract, instead of the original principal with whom he as broker, in behalf of his own undisclosed principal, entered into said original contract.

"The system of 'hedging' in the pits has a commercial influence which is favorable both to the interest of the producer and the consumer, in that the large cash grain houses, which conduct transactions in complainant's exchange hall, by reason of the risk to them from market fluctuations being decreased through 'hedges,' are able to take, and do take, a smaller margin of profit, and thus they pay to the producer a higher price and sell to the consumer at a lower price. The person taking the side of such hedging contract opposite of that to such grain house is the person who assumes the risk.

"The 'direct' method of settlement and the 'ring' method of settlement is not only an advantage to the members of the complainant association, in that it relieves them from the responsibility of carrying their contracts with other members of the complainant association, but they have, added to this advantage, the benefit of the margins deposited with them by the undisclosed principals for whom they act as brokers. . . .

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"Section 8 of rule 4 of the complainant association is as follows:

"Sec. 8. Any member of the association who shall be interested or associated in business with, or who shall act as the representative of, or who shall knowingly execute any order or orders for the account of, any organization, firm, or individual engaged in the business of dealing in differences on the fluctuations in the market price of any commodity,—without a bona fide purchase and sale of property for an actual delivery,—shall be deemed guilty of unmercantile conduct, which renders him unworthy to be a member of the association; and upon complaint to and conviction thereof by the board of directors, he shall be expelled from membership in the association.' . . .

"The complainant association has prescribed no method or means which shall be employed by members of said association for the purpose of ascertaining the intent of their respective customers with respect to the delivery or nondelivery of the commodity covered by any time contract.

"Every member of the complainant association acting in the pits as a broker for a nonmember customer requires from such customer a deposit as security in each transaction conducted by him, and this fact is within the knowledge of the directors and executive officers of the complainant association. The rules of the complainant association authorize the members of said association who act as brokers to charge broker's commissions in amounts fixed by such rules. One of such commission charges is expressed in part as follows:

"For the purchase or sale and for the purchase and sale of property for future delivery, whether the contract for purchase or for sale be first made as follows: . . .

"Using a member of the complainant association as his broker, a nonmember thereof may become a party to a time contract as buyer or seller, and at any time before the date of required delivery he may become a party to another contract in which he takes the opposite side to that held by him in the first-mentioned contract. Such counter or reverse time contract may be authorized in the same order which authorizes the first contract, by including in said order a so-called 'stop-loss' order. When such contracts are made they may be settled, and are often so settled, as between the member of the complainant association who acted as broker and his nonmember customer, by the payment of the difference between the contract prices. The fact that such is the custom is a fact well known to the directors and executive officers of the complainant association.

"The rules of the complainant association

provide for settlements of time contracts made in the pits when the seller does not deliver the property on the last day of the month of the stipulated delivery—the rules and usages of the complainant association fix such last day of the month as final day of delivery—by allowing the purchasers the privilege of electing: First, to consider the contract forfeited; second, to purchase the property on the market for account of the seller at 1:15 o'clock of the next business day; or, third, by requiring a settlement with the seller at the average market price of the property sold on the last day of the month of delivery."

The master drew conclusions favorable to appellant, and recommended a decree in accordance with the prayer of the bill.

The court, reviewing the matter on exceptions, sustained the master's findings of fact, except that the percentage of transactions in which no actual deliveries were made was nearer 95 than 75; but disagreed with the master's conclusions (125 Fed. 72), and dismissed the bill for want of equity.

Argued before *Jenkins, Grosscup, and Baker*, Circuit Judges.

Mr. D. P. Williams, with **Mr. Henry S. Robbins**, for appellant:

The doctrine of clean hands is not applicable.

Fuller v. Berger, 65 L. R. A. 381, 56 C. C. A. 588, 120 Fed. 274; *Chicago v. Union Stock Yards & Transit Co.* 164 Ill. 224, 35 L. R. A. 281, 45 N. E. 430; *Bateman v. Fargason*, 2 Flipp. 660, 4 Fed. 32; *Anslay v. Wilson*, 50 Ga. 421; *Langdon v. Templeton*, 66 Vt. 173, 28 Atl. 866; 1 Pom. Eq. Jur. § 399.

A court of equity cannot justify its refusal to protect appellant's property in its quotations upon the ground merely that it is violating a criminal statute by permitting illegal transactions to be made within its exchange hall. The stock quotations were property.

National Teleg. News Co. v. Western U. Teleg. Co. 60 L. R. A. 805, 56 C. C. A. 198, 119 Fed. 294; *New York & C. Grain & Stock Exchange v. Board of Trade*, 127 Ill. 153, 2 L. R. A. 411, 11 Am. St. Rep. 107, 19 N. E. 855.

Messrs. Jacob J. Kern, John A. Brown, E. D. Crumpacker, Peter Crumpacker, A. G. Smith, Bernard Korbly, and Smiley N. Chambers, with **Mr. Charles D. Fullen**, for appellees:

The quotations in controversy immediately cease to be the property of the Board of Trade upon the publication thereof in the manner and form in which the same is shown to have been done.

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The Board of Trade has no property interest in the quotations made up of transactions in its pits when said transactions are not based upon actual bona fide contracts of purchase and sale of the commodity dealt in.

Counselman v. Reichart, 103 Iowa, 430, 72 N. W. 490; *First Nat. Bank v. Oskaloosa Packing Co.* 66 Iowa, 41, 23 N. W. 255.

After the trades are rung out or settled upon the Board of Trade, the customer of the member has no particular person to whom he can look for fulfilment of his contract, even if he has actually made a genuine, bona fide contract.

Higgins v. McCrea, 116 U. S. 671, 29 L. ed. 764, 6 Sup. Ct. Rep. 557.

It makes no difference that a bet or wager is made to assume the form of a contract. Gambling is none the less such because it is carried on in the form or guise of legitimate trade.

Irvine v. Williar, 110 U. S. 499, 28 L. ed. 225, 4 Sup. Ct. Rep. 160; *Melchert v. American U. Teleg. Co.* 3 McCrary, 521, 11 Fed. 193; *Barnard v. Backhaus*, 52 Wis. 593, 6 N. W. 252, 9 N. W. 595; *Dows v. Glaspel*, 4 N. D. 251, 60 N. W. 60; *Whitesides v. Hunt*, 97 Ind. 191, 49 Am. Rep. 441; *Edwards v. Hocffinghoff*, 38 Fed. 639; *Embrey v. Jemison*, 131 U. S. 336, 33 L. ed. 172, 9 Sup. Ct. Rep. 776; *Mohr v. Miesem*, 47 Minn. 228, 49 N. W. 862; *Pickering v. Cease*, 70 Ill. 328; *Counselman v. Reichart*, 103 Iowa, 430, 72 N. W. 490.

The Board of Trade in itself, in connection with its quotations, does not present such a party, or such a subject-matter, to the court as can appeal to the conscience of the chancellor.

Soby v. People, 134 Ill. 68, 25 N. E. 109; *Liverpool & L. & G. Ins. Co. v. Clunie*, 88 Fed. 160; *Woodward v. Woodward*, 41 N. J. Eq. 224, 4 Atl. 424; 1 Pom. Eq. Jur. 399.

It is the evil practice and wrong conduct of the appellant in permitting and promoting transactions which go to make up its quotations, which is involved in this case.

Delaware, L. & W. R. Co. v. Frank, 110 Fed. 689; *Manhattan Medicine Co. v. Wood*, 108 U. S. 18, 27 L. ed. 706, 2 Sup. Ct. Rep. 436; *Lawrence Mfg Co. v. Tennessee Mfg. Co.* 31 Fed. 776; *Krauss v. Jos. R. Peebles' Sons Co.* 58 Fed. 585; *Symonds v. Jones*, 82 Me. 302, 8 L. R. A. 570, 17 Am. St. Rep. 485, 19 Atl. 820; *Joseph v. Macowsky*, 96 Cal. 518, 19 L. R. A. 53, 31 Pac. 914.

Ex turpi causa non oritur actio.

Holman v. Johnson, 1 Cowp. 341; *Fetridge v. Wells*, 4 Abb. Pr. 144; *Coppell v. Hall*, 7 Wall. 542, 19 L. ed. 244.

The contentions of the appellees have been sustained in—

Board of Trade v. O'Dell Commission Co.

115 Fed. 574; *Board of Trade v. Donovan Commission Co.* 121 Fed. 1012; *Board of Trade v. Ellis*, 122 Fed. 319; *Board of Trade v. Consolidated Stock Exchange*, 121 Fed. 433; *Board of Trade v. L. A. Kinsey Co.* 125 Fed. 72; *Christie Grain & Stock Co. v. Board of Trade*, 61 C. C. A. 11, 125 Fed. 161.

Baker, Circuit Judge, delivered the opinion of the court:

1. We deem it unnecessary to determine from the evidence whether the percentage of trades in which actual deliveries were made was 5 or 25. The finding of the one figure or the other would not prove what proportion of the remaining no-delivery transactions were gambling. Of these, an indeterminate number were "hedging contracts." If we felt called upon by the necessities of this decision to give a definite opinion of hedging, the record might well lead us to find that hedging is a manufacturer's or merchant's insurance against price fluctuation of materials, and no more damnnatory than insurances of property and life, which in one sense are wagers that the property will not be destroyed during the term, and that the life will not fail in less than the expectancy in the actuaries' tables. The remainder of the no-delivery transactions were "speculative." But speculation is not unlawful. One may buy any sort of property to hold for a rise, one may contract to buy or sell property not in possession or in existence at the time, and lawful contracts may lawfully be canceled and settled in advance of the time of performance. If a contract, lawful in form, is entered into, it is lawful in fact, even though one of the parties never intended to perform his part of it; that is, the intent that the lawful form shall cover a sham must be mutual to make it a sham. We think the court's conclusion that, because in 95 per cent of the trades no deliveries were in fact made, it was intended that in those cases deliveries should not be made, and that the parties in nineteen instances out of twenty were using the forms of lawful contracts to cover mere wagers on the future prices of commodities, is not warranted by the facts in the record. The "direct" and "ring" methods of settlement between members might cancel out nine tenths of the bids back and forth between the members as agents, and yet every contract may have been perfectly legal and enforceable between the principals, and every principal satisfied by receiving a "substitute" contract. If a seller intended not to deliver, but to settle on differences if prices rose, the buyer who entered into the contract in good faith, and who desired to receive the property, could

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not force the seller to deliver. In every such case there would be no delivery, but the buyer would have a valid cause of action. Undoubtedly gambling was going on in the exchange hall, but it was contrary to appellant's by-laws. Appellant was chartered by Illinois for a lawful and useful purpose, and the association adopted and promulgated suitable by-laws and rules. We think the record fails to show that the dominant feature of the members' dealings was unlawful, much less that appellant, as a creature of the state, was violating its charter, or was *particeps criminis* in what gambling the members carried on.

We do not, however, attach very much importance to the preponderating character of the transactions in the exchange hall, because, in our opinion:

2. The real subject-matter of the suit is the property right in the news, in the reports of prices. Even if it were true that 95 per cent of the dealings in the exchange hall were wagers, the prices are the same for the transactions that are not wagers, and the quotations sent out show the figures at which honest dealers may secure contracts. Millers, grain buyers, elevator companies, govern their dealings by the market prices made in appellant's exchange hall. The news therefore serves, or, at least, is capable of serving, a useful purpose. So it seems to us immaterial what proportion of the transactions are wagers, since the prices made in the transactions are the prices that farmers and shippers can get, and since the news of the prices and the dissemination thereof are valuable to the community. News may be an object of lawful ownership though nine tenths of the things reported be unlawful.

3. Nor should the property in this case (the news, the continuous quotation of prices) be adjudged contraband because it is susceptible of bad uses as well as good. Gamblers in Indiana may settle their bets on prices according to appellant's quotations and this quite irrespective of the fact, if it were the fact, that 95 per cent of the transactions in appellant's exchange hall were lawful; just as Indiana grain dealers may make and settle their honest contracts on the basis of appellant's quotations, regardless of the fact, if it were the fact, that 95 per cent of transactions reported were gambling. It seems to us, therefore, that the news, as news, is not without the pale of protection, and that the moral quality is chargeable solely to the user.

4. The property concerned in this suit not being contraband, should appellant be denied the writ of injunction, even if it were true that appellant permits gambling in its exchange hall? We think not. Suppose this

noncontraband news were collected and disseminated by the Associated Press. If that company were complainant and "clean-handed," its right to an injunction, the case being proper in other respects, would not be doubted. But if complainant were a gambler or a thief, what then? We think our answer has been sufficiently stated in *Fuller v. Berger*, 65 L. R. A. 381, 56 C. C. A. 588, 120 Fed. 274: "Equity is not concerned with the general morals of a complainant; the taint that is regarded must affect the particular rights asserted in his suit. . . . If the defendant can do no more than show that the complainant has committed some legal or moral offense which affects the defendant only as it does the public at large, the court must grant the equitable remedy and leave the punishment of the offender to other forums."

In this case the appellees, citizens of Indiana, have never had any dealings with appellant respecting the quotations; they have not been misled or deceived by appellant in any way; and they certainly are no more concerned with or affected by appel-

lant's violations of the common law or of the penal laws of Illinois than the general public.

In reaching our conclusion, we have given respectful consideration to the cases of *Board of Trade v. O'Dell Commission Co.* 115 Fed. 574; *Board of Trade v. Donovan Commission Co.* 121 Fed. 1012; *Board of Trade v. Ellis*, 122 Fed. 319; *Christie Grain & Stock Co. v. Board of Trade*, 61 C. C. A. 11, 125 Fed. 161,—and regret that we are unable to concur therein. We have been aided by the opinion of Judge Hook at circuit (116 Fed. 944) in support of his decree in the *Christie Case*, which was reversed in 61 C. C. A. 11, 125 Fed. 161.

The decree herein is reversed, with the direction to enter a decree in appellant's favor in conformity to the prayer of the bill.

Petition for rehearing denied May 27, 1904.

Affirmed by Supreme Court of United States May 8, 1905.

ARKANSAS SUPREME COURT.

KANSAS CITY, FORT SCOTT, &
MEMPHIS RAILROAD COMPANY,
Appt.,

v.

Josie WASHINGTON.

(.....Ark.....)

The checking of baggage to destination upon a through ticket to transport the passenger over roads of initial and connecting carriers will render the initial carrier liable for its loss on a connecting line.

(January 21, 1905.)

A PPEAL by defendant from a judgment of the Circuit Court for Crittenden County in favor of plaintiff in an action brought to recover for the loss of baggage delivered to defendant for transportation. *Affirmed.*

The facts are stated in the opinion.

NOTE.—As to liability of initial carrier generally for goods carried beyond its own line, see cases in notes to *Fox v. Boston & M. R. Co.* 1 L. R. A. 703; *Crossan v. New York & N. E. R. Co.* 3 L. R. A. 766, and *Richmond & D. R. Co. v. Payne*, 6 L. R. A. 849; also the later cases in this series of *McCarn v. International & G. N. R. Co.* 16 L. R. A. 39; *McCann v. Eddy*, 35 L. R. A. 110; *Illinois C. R. Co. v. Carter*, 36 L. R. A. 527; *Colfax Mountain Fruit Co. v. Southern P. Co.* 40 L. R. A. 78; *Richmond & A. 69 L. R. A.*

Mr. C. H. Trimble, for appellant:

The initial carrier is only liable for loss on its own line.

Mauritz v. New York, L. E. & W. R. Co. 23 Fed. 765; *Green v. New York C. R. Co.* 4 Daly, 553; *Milnor v. New York & N. H. R. Co.* 53 N. Y. 363; *Michigan C. R. Co. v. Mineral Springs Mfg. Co.* 16 Wall. 318, 21 L. ed. 297; *Myrick v. Michigan C. R. Co.* 107 U. S. 106, 27 L. ed. 326, 1 Sup. Ct. Rep. 425; *Ray, Negligence of Imposed Duties*, p. 583.

A through ticket on three distinct lines of transportation on one piece of paper is to be regarded as a distinct ticket for each line.

Ray, Negligence of Imposed Duties, p. 525; *Nashville & C. R. Co. v. Sprayberry*, 9 Heisk. 852; *Taylor v. Little Rock, M. R. & T. R. Co.* 32 Ark. 393, 29 Am. Rep. 1; *Packard v. Taylor*, 35 Ark. 410, 37 Am. Rep. 37;

R. Co. v. R. A. Patterson Tobacco Co. 41 L. R. A. 511; *Illinois C. R. Co. v. Southern Seating & Cabinet Co.* 50 L. R. A. 729; *Courteen v. Kanawha Despatch*, 55 L. R. A. 182; and *Taffe v. Oregon R. & Nav. Co.* 58 L. R. A. 187.

As to rights of passengers generally on connecting roads, and liability of initial carrier, see *Harris v. Howe*, 5 L. R. A. 777; *Gulf, C. & S. F. R. Co. v. Looney*, 16 L. R. A. 471; *Atty. Gen. v. Old Colony R. Co.* 22 L. R. A. 112; *Chicago & A. R. Co. v. Mulford*, 35 L. R. A. 599.

Little Rock & Ft. S. R. Co. v. Odom, 63 Ark. 326, 38 S. W. 339.

Mr. J. T. Coston, for appellee:

If the receiving carrier collects full fare from the passenger, issues a through ticket to him, and checks his baggage to his destination, it thereby contracts to deliver the passenger and his baggage to the place of his destination, and is liable for loss or damage to baggage occurring on its own, or connecting, lines.

4 Elliott, Railroads, § 1658; Schouler, Bailments & Carriers, 2d ed. § 696; *Hailey v. Screven*, 62 Ga. 347, 35 Am. Rep. 127; *Baltimore & O. R. Co. v. Campbell*, 36 Ohio St. 647, 38 Am. Rep. 617; *Carter v. Peck*, 4 Sneed, 203, 67 Am. Dec. 604; *Louisville & N. R. Co. v. Weaver*, 9 Lea, 38, 42 Am. Rep. 657; *Coward v. East Tennessee. V. & G. R. Co.* 16 Lea, 225, 57 Am. Rep. 227; *Candee v. Pennsylvania R. Co.* 21 Wis. 582, 94 Am. Dec. 567; *Nashua Lock Co. v. Worcester & N. R. Co.* 48 N. H. 339, 2 Am. Rep. 242; *Illinois C. R. Co. v. Copeland*, 24 Ill. 332, 76 Am. Dec. 749; *Illinois C. R. Co. v. Johnson*, 34 Ill. 389; *Foy v. Troy & B. R. Co.* 24 Barb. 382; *East Tennessee & V. R. Co. v. Rogers*, 6 Heisk. 143, 19 Am. Rep. 589; *Western & A. R. Co. v. McEluice*, 6 Heisk. 208; *Mobile & G. R. Co. v. Copeland*, 63 Ala. 219, 35 Am. Rep. 13; *St. John v. Southern Exp. Co.* 1 Woods, 612, Fed. Cas. No. 12,228; *Condict v. Grand Trunk R. Co.* 54 N. Y. 500; *Peet v. Chicago & N. W. R. Co.* 19 Wis. 119; *Ogdensburg & L. C. R. Co. v. Pratt*, 22 Wall. 132, 22 L. ed. 830.

Battle, J., delivered the opinion of the court:

Josie Washington, in her own right and as next friend of her daughter, Nora Brown, brought this action against the Kansas City, Ft. Scott & Memphis Railroad Company to recover the value of a trunk and its contents. The defendant sold to Nora Brown a ticket over its railroad from Deckerville, Arkansas, by way of Memphis, and thence by a connecting railroad to Argenta, in this state, and checked her trunk over the same route to the same destination. She took passage on its train, and was transported as indicated by her ticket to Argenta, but her trunk was lost on the connecting railroad between Memphis and the place to which it was checked.

The question in the case is, Is the receiving carrier, in the absence of an express contract, liable for the loss of baggage by a connecting carrier; the receiving carrier having sold the passenger a through ticket, and checked her baggage through to her destination? The trial court held the former liable.

Courts differ as to what is sufficient to
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constitute a contract by a common carrier to transport property delivered to it to its destination, when that place is beyond its route. Some courts hold that, "when a carrier receives goods directed to a place beyond his line, he, in the absence of a stipulation to the contrary, by the very act of acceptance, engages to deliver them at their destination, wherever that may be. Other courts hold that the acceptance of the goods for shipment, so directed, implies nothing more than an agreement on the part of the carrier to transport them to the end of their route, and there deliver them to a connecting carrier to complete the carriage. The first of these views is sustained by the English courts and a few of the American states, and is known as the "English doctrine." The other is adopted by the decided weight of American authorities. As this court has not adopted either view, we are at liberty to adopt that which in our opinion is more reasonable.

Mr. Lawson, in his treatise on the Contracts of Common Carriers, gives the reason for the two views as follows: "In support of the first doctrine, it is argued that a different rule would work a great inconvenience. A person delivering his goods to a carrier, to be sent to a certain place, will generally rely on him alone to perform the service. He cannot be supposed to know the particular portion of the transit which the first carrier controls, much less, the other owners or proprietors of the continuous line. He intends to make one contract, but not two or three or half a dozen. When he places his property in the hands of the carrier, he at once loses all control over it. If it is not delivered, how is he to discover at what particular portion of the route it was lost? He would be forced to rely on the statements of the carriers themselves, who would be little likely to aid him in his search. If he did succeed in fixing the responsibility, he might find himself obliged to assert his claim against a party hundreds of miles away, and under circumstances which might well discourage a prudent man, and induce him to bear his loss rather than incur the expense and trouble of pursuing his remedy against so distant a defendant. The first carrier, on the contrary, has facilities for tracing the loss not possessed by the public. He is in constant communication with his associates in the business. He has their receipts for the property delivered to them, and with no inconvenience at all could charge the loss to his negligent agent. In support of the second doctrine, it is simply answered that the extraordinary liabilities of common carriers cannot in

justice be extended beyond their own routes, where alone they have an opportunity of choosing for themselves their servants, and of guarding the property intrusted to their care." *Lawson, Contracts of Carr. §§*

238-242, and cases cited. *Hutchinson, Carr. 2d ed. §§ 145a, 149b, and cases cited.*

We think the English doctrine more reasonable, and adopt it.

Judgment affirmed.

CALIFORNIA SUPREME COURT.

W. H. HOLMES, *Appt.*,
v.

N. A. MARSHALL *et al.*
and

Annie J. JENKINS, *Resp't.*

(145 Cal. 777.)

1. The exemption from execution of the proceeds of insurance policies is not limited to claims against the insured, but extends to those against the beneficiary, under a statute providing that all moneys, benefits, privileges, or immunities accruing, or in any manner growing out of, life insurance, are exempt from execution; and the same rule applies where the policy is payable to the estate of the assured, and, being exempt from his debts, the proceeds are distributed to his widow under the statute as his next of kin.
2. The deposit by the beneficiary of the proceeds of a life-insurance policy, which are exempt from execution for her debts, in a bank, does not destroy the exemption.
3. The court may set aside the levy of an attachment upon exempt property.

(January 17, 1905.)

APPEAL by plaintiff from an order of the Superior Court for Los Angeles County setting aside an attachment of the proceeds of a life-insurance policy. *Affirmed.*

The facts are stated in the Commissioner's opinion.

Messrs. Powers & Holland, for appellant:

As the statute of this state has prescribed a mode of procedure, and pointed out the circumstances under which an attachment may be dissolved, the statutory remedy is the length and breadth of the respondent's rights in the premises.

Waples, Attachm. p. 427.

The statutes of exemption are in derogation of the common-law principle that a man's property should be taken in payment and satisfaction of his indebtedness, and the exemption laws should not be expanded or enlarged to include persons not therein specifically mentioned.

2 Freeman, *Executions*, 3d ed. § 234b;

NOTE.—As to exemption of proceeds of life-insurance policy, see also, in this series, *Brown v. Balfour*, 12 L. R. A. 373.

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Bolt v. Keyhoe, 30 Hun, 619; *Crosby v. Stephan*, 32 Hun, 478; *Millington v. Fox*, 13 N. Y. Supp. 334; *Commercial Travelers' Asso. v. Newkirk*, 16 N. Y. Supp. 177; *Re Brown*, 123 Cal. 399, 69 Am. St. Rep. 74, 55 Pac. 1055.

Had the statute applied to the heirs or beneficiaries it would have so declared, and, in the absence of such designation, it would be giving the statute a broader scope than was intended by the legislature, by construing it to read in favor of persons not therein named.

Only money, and not a debt, is exempt from execution.

Phœnix Bank v. Risley, 111 U. S. 125, 28 L. ed. 374, 4 Sup. Ct. Rep. 322; *Janin v. London & S. F. Bank*, 92 Cal. 14, 14 L. R. A. 320, 27 Am. St. Rep. 82, 27 Pac. 1100; *Pullen v. Placer County Bank*, 138 Cal. 169, 94 Am. St. Rep. 19, 66 Pac. 740, 71 Pac. 83.

Where the debtor voluntarily parts with the ownership of exempt property, and acquires in lieu thereof property not exempt, he waives his right to the benefit of the exemption law.

2 Freeman, *Executions*, 3d ed. § 235; *Harrier v. Fassett*, 56 Iowa, 264, 9 N. W. 217; *Connell v. Fisk*, 54 Vt. 381; *Dortch v. Benton*, 98 N. C. 190, 2 Am. St. Rep. 331, 3 S. E. 638; *Knabb v. Drake*, 23 Pa. 489, 62 Am. Dec. 352; *Drake, Attachm. § 244a*; *Cranz v. White*, 27 Kan. 319, 41 Am. Rep. 408; *State, Jardain, Prosecutor, v. Fairton Sav. Fund & Bldg. Asso.* 44 N. J. L. 376; *Rozelle v. Rhodes*, 116 Pa. 129, 2 Am. St. Rep. 591, 9 Atl. 160; *Martin v. Hurlburt*, 60 Vt. 364, 14 Atl. 649; *McIntosh v. Aubrey*, 185 U. S. 122, 46 L. ed. 834, 22 Sup. Ct. Rep. 561.

The statute says "money accruing" out of life insurance, etc., shall be exempt. The word "money" has a well-defined meaning.

15 Am. & Eng. Enc. Law, p. 701.

The word "accruing" does not apply to money already in hand.

Gross v. Partenheimer, 159 Pa. 556, 28 Atl. 370; *Johnson v. Humboldt Ins. Co.* 91 Ill. 95, 33 Am. Rep. 47; *Kennedy v. Burrier*, 36 Mo. 128; *Cutcliff v. McAnally*, 88 Ala. 509, 7 So. 331; *Jones v. Thompson*, 27 L. J. Q. B. N. S. 234; *Dresser v. Johns*, 6 C. B. N. S. 434.

Petition for rehearing in banc.

The legislature has no power to increase

the amount of property which a debtor may claim as exempt, so as to affect existing creditors.

Gunn v. Barry, 15 Wall. 610, 21 L. ed. 212; *Edwards v. Kearzey*, 96 U. S. 595, 24 L. ed. 793; *Skinner v. Holt*, 9 S. D. 435, 62 Am. St. Rep. 883, 69 N. W. 597; *Johnson v. Fletcher*, 54 Miss. 629, 28 Am. Rep. 388.

The law existing when a contract is made enters into and forms a part of it; and this is applicable as well to the remedy as to the right, so that the impairment or taking away of the remedy is an impairment of the obligations of a contract.

12 Am. & Eng. Enc. Law, 2d ed. p. 167.

The burden of proof of showing that money claimed to be exempt under a life-insurance policy is so rests upon the party making such claim.

Briggs v. McCullough, 36 Cal. 542.

Messrs. Morton, Houser, & Jones, for respondent:

The power of the court over its process is essential to the administration of justice, and is coeval with the common-law courts, and does not by any means depend upon statutory enactments.

Sandburg v. Papineau, 81 Ill. 446; 8 Enc. Pl. & Pr. p. 579; *Blair v. Compton*, 33 Mich. 414; *Palmer v. Gardiner*, 77 Ill. 143; *Jones v. Williams*, 2 Swan, 105; *Bryan v. Bridge*, 6 Tex. 137.

If an execution is levied upon exempt property the levy may be quashed or vacated on motion in the court from which the execution issued.

12 Am. & Eng. Enc. Law, 2d ed. p. 255; *Totten v. Sale*, 72 Ala. 488; *Catron v. Lafayette County*, 125 Mo. 67, 28 S. W. 331; *Jacks v. Bigham*, 36 Ark. 481; *Farrell v. McKee*, 36 Ill. 225; *Finke v. Craig*, 57 Mo. App. 393; *Wilson v. Stripe*, 4 G. Greene, 551, 61 Am. Dec. 138.

The money was exempt from the debts of the beneficiary.

Schillinger v. Boes, 85 Ky. 357, 3 S. W. 427; *Brown v. Balfour*, 46 Minn. 68, 12 L. R. A. 373, 48 N. W. 604; *Re How*, 61 Minn. 217, 63 N. W. 627; *First Nat. Bank v. How*, 65 Minn. 187, 67 N. W. 994; Minn. Gen. Stat. 1894, § 3312.

The estate of the deceased is held in trust only, by the executor or administrator for a limited period for purposes of administration; and the court in such cases will not regard the estate, or administrator, or executor, as the actual owner, but will look through and beyond this, limited and temporary right of possession of the administrator or executor to ascertain the real and intended beneficiary of the deceased.

Pace v. Pace, 19 Fla. 438.

Exemption statutes should be liberally construed.

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12 Am. & Eng. Enc. Law, 2d ed. pp. 75, 76, and notes; *Re McManus*, 87 Cal. 294, 10 L. R. A. 567, 22 Am. St. Rep. 250, 25 Pac. 413.

When a statute does not exempt specific articles, but exempts money within certain limits, property purchased with the exempt money is exempt.

Yates County Nat. Bank v. Carpenter, 119 N. Y. 550, 7 L. R. A. 557, 16 Am. St. Rep. 855, 23 N. E. 1108; *Pool v. Reid*, 15 Ala. 826; 2 Freeman, Executions, 3d ed. § 235, p. 1270.

Cooper, C., filed the following opinion:

This action is upon a promissory note for \$1,000, dated October 5, 1899, signed by J. F. Jenkins and his wife, Annie J. Jenkins. J. F. Jenkins died intestate, and respondent, Annie J. Jenkins, is his surviving widow. After the action had been commenced, a writ of attachment was issued and levied upon \$1,020.57 on deposit in the Citizens' National Bank of Los Angeles to the credit of respondent, Annie J. Jenkins. The court made an order, after notice, and on motion of respondents, setting aside the levy of said writ, and dissolving it as to the money so on deposit with said bank. This appeal is from the order so made.

The principal question is as to whether or not the said money was subject to the debts of respondent, Annie J. Jenkins, or exempt from execution against her. At the time of his death, J. F. Jenkins was the owner and holder of three full paid-up life-insurance policies upon his own life, two of which (one for \$99 and one for \$1,385) were payable to respondent, Annie J. Jenkins, and one of which (for \$982.50) was payable to the estate of deceased, his administrators, or executors. The estate of said deceased was duly probated, and the \$982.50 insurance collected, which constituted the entire estate, and of which there remained \$539.45 after paying costs and expenses of administration. This was set apart to the surviving widow, Annie J. Jenkins, as exempt from execution, under § 1465, Code Civ. Proc. The proceeds of all said policies were deposited by respondent, Annie J. Jenkins, in one account, to her credit in said Citizens' National Bank of Los Angeles. She drew against this account from time to time until the date of the levy of the attachment, when there remained the sum of \$1,020.27 to her credit in said bank.

"All moneys, benefits, privileges, or immunities accruing, or in any manner growing, out of any life insurance, if the annual premiums paid do not exceed \$500," are exempt from execution. Code Civ. Proc. subdiv. 18, § 690. The main contention of appellant is that the exemption extends only against the debts of the person whose life

was insured, and who paid the premiums requisite to procure the insurance and keep it in force; and that such exemption does not continue after his death, in favor of the beneficiary. In construing this statute, as in the construction of all statutes, it is the duty of the court to arrive at the intent of the legislature, if it can be done, from the language used in the statute. Statutes exempting property from execution are enacted on the ground of public policy, for the benevolent purpose of saving debtors and their families from want by reason of misfortune or improvidence. The general rule now is to construe such statutes liberally, so as to carry out the intention of the legislature and the humane purpose designed by the lawmakers. 12 Am. & Eng. Enc. Law, 2d ed. pp. 75, 76, and cases cited; *Re McManus*, 87 Cal. 294, 10 L. R. A. 567, 22 Am. St. Rep. 250, 25 Pac. 413; *Spence v. Smith*, 121 Cal. 536, 66 Am. St. Rep. 62, 53 Pac. 653. Bearing this rule in mind, let us see what the legislature has said as to this matter. It has said that, where the annual premiums do not exceed \$500, the insurance moneys shall be exempt from execution. Here the annual premium did not exceed \$500. It has said that all moneys accruing, or in any manner growing, out of any life insurance shall be exempt from execution. The money here accrued and grew out of life insurance upon the life of deceased. After his death no execution could issue against him. The words "exempt from execution" were clearly intended to apply to the moneys coming from the life insurance to the hands of the beneficiary. It is exempt from execution as to all strangers or parties who have no claim to it, without any provision of statute. It was intended to exempt it from the debts of the party to whom it was payable, and who procured title to it by the death of the insured. It was not the intention that the insured might die, leaving a small insurance and a dependent family, and that the insurance money should be subject to execution for the debts of the wife, even if she is the beneficiary named in the policy. The words "exempt from execution" mean exempt from any execution. The legislature mentioned no class of executions, and we are not at liberty to judicially insert a class. "Exempt from execution" includes the defendant, Annie J. Jenkins, and applies to plaintiff. We have no decision of this court upon the question, and the decisions of other courts do not furnish much assistance, because the statute under which each decision was made is different from ours. In Kentucky and Minnesota the statutes declare, in effect, that certain insurance benefits, reliefs, etc., "shall be exempt from execution, and shall not be liable to be

seized, taken, or appropriated, by any legal or equitable process, to pay any debt or liability of a member." In both these states the fund or relief is held to be exempt from execution, whether against the original member, or against any beneficiary who has been paid, or is entitled to be paid, any benefit falling within the class described in the statute. *Schillinger v. Boes*, 85 Ky. 357, 3 S. W. 427; *Brown v. Balfour*, 46 Minn. 68, 12 L. R. A. 373, 48 N. W. 604; *First Nat. Bank v. How*, 65 Minn. 187, 67 N. W. 994. It seems at least doubtful as to whether or not these decisions properly construe the statutes of these states. The decisions in other states—particularly in New York—hold similar language to create an exemption only as to the member or insured. In New York the language of the statute is that such funds shall be exempt "from execution, and shall not be liable to be seized, taken, or appropriated by any legal or equitable process to pay any debt or liability of such deceased member." *Bolt v. Keyhoe*, 30 Hun, 619. The Kentucky and Minnesota cases are criticised by Freeman in his work on Executions, 3d ed. vol. 2, § 234b. But the author says, in speaking of the language of the statutes in those states: "If these statutes stopped with the words 'exempt from execution,' there would be no doubt of the exemption in favor of the beneficiary; but the additional words in the statute indicate that the legislature had in mind merely the debts or other liabilities of members of the association in question, and hence that, after the benefit was received by a person other than a member, it would be subject to the usual laws relating to executions." In our Code the statute stops with the words "exempt from execution." Under our statute, necessary household and kitchen furniture is exempt from execution; and, if the wife succeeds to such furniture, it is equally exempt as to her debts. The farming utensils or implements of husbandry of the judgment debtor are exempt, and, if the son should take them under the will of his father, following his father's occupation, they would still be exempt as to the son's debts. Equally true as to the insurance money in controversy herein. If it had come to J. F. Jenkins in his lifetime, it is conceded that it would have been exempt as to his debts. It came to his wife as his beneficiary, and is equally exempt as to her debts.

As to the policy payable to and collected by the estate, the estate was the beneficiary, and the money was, for the reasons before stated, exempt from execution. It was therefore assets of the deceased exempt from execution, and was properly set apart to the widow as being so exempt. Code Civ. Proc.

§ 1465; *Re Miller*, 121 Cal. 353, 53 Pac. 906. The administrator or executor is not the owner of any part of the estate. He, in his official character, only holds it in trust for the parties entitled to it, subject to the purposes of administration. The title to the insurance money came to respondent, Annie J. Jenkins, through the estate, and under the order setting it apart, and vested the title in her as effectually as if she had been named as the beneficiary of the policy. We can see no reason why the insurance money coming to her directly as beneficiary should be exempt from execution, and not that coming to her indirectly through the estate and the order setting it apart. In either case it is exempt from execution. In one case the instrument of life insurance gives her the title; in the other, the law gives it to her. The statute provides that all property exempt from execution shall be set apart for the use of the surviving husband or wife. Code Civ. Proc. § 1465. If it is exempt from execution before being set apart, it does not cease to be so the moment it is set apart. The widow takes the family allowance by order of the court. After it is paid to her, it cannot be seized on execution for her prior debts and diverted from the support of the family. The principle is fully discussed in regard to a homestead set apart for the family in *Keyes v. Cyrus*, 100 Cal. 322, 38 Am. St. Rep. 296, 34 Pac. 722. It was there held that the provision for setting apart exempt property, including a homestead, was for the protection and support of the family. The court said: "The authority given to the court in the first part of § 1465 to set apart for the family 'all the property exempt from execution, including the homestead selected,' implies that the property, when set apart, is exempt from execution. . . . A homestead may be set apart to the widow, even though the estate be insolvent, and the property so set apart constitute the entire estate of the decedent; but, if the homestead thus set apart to her could be immediately taken in execution by one of her creditors, it would fail to be available for her use or support, and it might happen that her creditor would fare better than a creditor of the decedent whose money had perhaps been used to purchase the very property so set apart." In *Barnum v. Boughton*, 55 Conn. 117, 10 Atl. 514, it was held that money paid to the widow, as an allowance for her support, through the probate court, could not be taken or attached by one of her creditors. The court said: "She could neither ask nor receive it for the payment of her debts. The probate court could not grant it for that purpose. . . . If one allowance can be intercepted, so can every other, for, if the door is opened for

one creditor, it cannot be closed against any, and the entire estate might thus be diverted from its legal destination. The law will not permit the instant necessities of the widow and the ultimate rights of the creditors of the estate to be postponed, in its name, to the demands of her creditors." So in this case the court will not allow the insurance money which is exempt from execution as to the creditors of the estate to be taken by the creditors of the widow. It is equally exempt as to them.

Appellant contends that by the deposit of the money in the bank the money lost its identity, and that thereafter the bank owed Annie J. Jenkins the money; that the debtor thus voluntarily parted with the money which was exempt, and acquired in lieu thereof a credit due by the bank. Such construction would seem to be unreasonable, and no authority is cited which supports it. It is true that, in one sense, by the deposit the relation of debtor and creditor was created as between the bank and Mrs. Jenkins; but she put the exempt money in the bank. She regarded it as money in the bank. She expected to, and did, draw it as she needed it. The bank did not give her the identical pieces of money that she deposited, but it gave her, as she drew upon it, money equal in value and kind. She was not required to keep the money buried, or in her stocking, in order to have it remain exempt. If the appellant's theory is correct, she could not have paid a \$5 grocery bill with a \$20 piece, receiving \$15 in change, without the risk of having the \$15 attached. The law does not require such absurdity. The cases cited by appellant arose under the United States pension laws, and are not in point. The section of the Revised Statutes construed provides: "No sum of money due, or to become due, to any pensioner, shall be liable to attachment," etc. The courts have correctly held that the section only protected the money while due or in course of transmission to the pensioner. Money due, or to become due, is designed to protect the amount of the pension until it reaches the hands of the pensioner. It is then no longer money due, or to become due. Our statute exempts the money, and, although deposited in the bank, it is still money and protected. It has not lost its identity because of the fact that the identical coins or bills deposited are not to be returned. Respondent probably never saw any coins or bills, but took the checks which the insurance company gave her as evidence that it had the money for her, and deposited them with the bank; having the amounts credited in her bankbook as evidence that she had the money in the bank. In *Hibernia Sav. & L. Soc. v. San Francisco*, 139 Cal. 205, 96 Am.

St. Rep. 100, 72 Pac. 920, it was held that the checks or orders drawn upon the Treasurer or Assistant Treasurer of the United States, payable on demand, are not merely obligations of the United States, but solvent credits, subject to taxation. The court said: "The orders were simply a convenient mode of payment of the obligation. They were, for all practical purposes, the money itself." So in the case at bar the credit in the bank is, for all practical purposes, under the exemption laws, to be regarded as the money itself. Respondent had the right to have the levy set aside upon the exempt property. Section 556, Code Civ. Proc., provides that the writ may be discharged when the same was improperly or irregularly issued. This was not a dissolution of the writ of attachment, but an order setting aside the levy as to the exempt property. It would be strange if a court were so impotent that it could not set aside the erroneous levy of its own writ upon exempt property. Any other rule

would compel the injured party to bring a suit for damages, which not only would lead to delay, but might in the end prove futile. Courts have power over their own process, and to set aside a levy of a writ of attachment or execution upon exempt property. 2 Freeman, Executions, § 271; 8 Enc. Pl. & Pr. p. 579, and cases cited; *Sandburg v. Papineau*, 81 Ill. 446.

It follows that the order should be affirmed.

We concur: **Gray, C.; Smith, C.**

Per Curiam:

For reasons given in the foregoing opinion, *the order is affirmed.*

McFarland, Henshaw, and Lorigan, JJ., concur.

Petition for rehearing in banc denied February 16, 1905.

UNITED STATES CIRCUIT COURT OF APPEALS, NINTH CIRCUIT.

Re PETITION OF PACIFIC MAIL STEAMSHIP COMPANY for Limitation of Liability Arising out of Loss of the City of Rio de Janeiro.

(64 C. C. A. 410, 130 Fed. 76.)

1. A steamship company is not entitled to a limitation of its liability for loss of passengers and baggage through the sinking of its vessel, where its crew could not understand the language of its officers, and were not drilled in the launching of the boats, so that after the accident but one boat was successfully launched, although there was time enough to launch them all had proper orders been given and obeyed, and the statute provides that no steamer carrying passengers shall depart from any port unless she shall have in her service a full complement of licensed officers, and a full crew sufficient at all times to manage the vessel.

2. The doctrine of fellow service will not defeat the liability of a steamship company for death of a member of the crew through the sinking of the vessel, although the cause of the accident was the negligence of the master and pilot, where the loss of life was due to inability to launch the boats because of insufficiency of the crew in that they could not understand the language of the officers, and had not been drilled in lowering the boats.

(May 2, 1904.)

NOTE.—For another case in this series as to when steamship company cannot take advantage of statute permitting limitation of liability, see *Weisshaar v. Kimball* 8, S. Co. 65 L. R. A. 84.

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CROSS-APPEALS from a decree of the District Court of the United States for the Northern District of California limiting the liability of petitioner for loss of life through the sinking of one of its steamships; the petitioner excepting to so much of the decree as held it liable for a greater sum than it contended for; and persons claiming damages excepting to so much as permitted a limitation of liability. *Reversed on appeal of passengers.*

The facts are stated in the opinion.

Argued before *Gilbert and Ross*, Circuit Judges, and *Hawley*, District Judge.

Mr. William Denman, for passengers, appellants:

In order to limit its liability, the petitioner has resting upon it the burden of proving that the "damage or injury done, occasioned, or incurred," shall be done without the privity or knowledge of such owner or owners.

U. S. Rev. Stat. § 4283, U. S. Comp. Stat. 1901, p. 2943.

The words "sufficient at all times to manage the vessel" include the time when the lifeboats should be launched to save the passengers at the wrecking of the vessel; and the owners failed to supply a crew sufficient for such an occasion.

Kimball v. Tucker, 10 Mass. 195; *The Lady Pike (Germania Ins. Co. v. The Lady Pike)* 21 Wall. 12, 22 L.ed. 502; *The Gentelman*, Olcott, 115, Fed. Cas. No. 5,324; *Tait v. Levi*, 14 East, 482; *Parsons v. Empire Transp. Co.* 49 C. C. A. 302, 111 Fed. 208.

The burden of proof is on the owners to show that the loss of life could not possibly arise from the insufficiency of the crew.

The Pennsylvania (The Pennsylvania v. Troop) 19 Wall. 136, 22 L. ed. 151; *Richelieu & O. Nav. Co. v. Boston Marine Ins. Co.* 136 U. S. 415, 34 L. ed. 401, 10 Sup. Ct. Rep. 934; *The Guildhall*, 58 Fed. 800; *The Annie Faxon*, 21 C. C. A. 366, 44 U. S. App. 591, 75 Fed. 319.

Messrs. Gavin McNab, Thomas & Gerstle, W. P. Humphrey, R. H. Countrymen, W. H. Willitt, Chickering & Gregory, R. H. Cross, Bien & Jackson, A. Morgenthal, Corget & Goodwin, Charles E. Snook, and Roger Johnson also for passengers, appellants.

Messrs. Charles Page and Ward McAllister for Pacific Mail Steamship Company.

Ross, Circuit Judge, delivered the opinion of the court:

The steamship City of Rio de Janeiro, whose home port was San Francisco, on entering the Bay of San Francisco on the 22d day of February, 1901, on one of her return trips from Hong Kong and intermediate ports, struck a reef of rocks near the Golden Gate, and within twenty minutes sank beneath the waters, carrying down a large number of her passengers and crew and all of her cargo. Shortly thereafter, to wit, March 19, 1901, the Pacific Mail Steamship Company, owner of the ship, filed in the court below its petition for limitation of liability, alleging therein that the sinking of the ship occurred by reason of the perils of the sea, and praying for a limitation of liability, and for the privilege of contesting any liability for the losses that occurred. The court below directed a reference to its commissioner to ascertain and report the value of the ship and freight pending. Evidence was taken showing the amounts collected by the petitioner on the ship's outward voyage for passage money and freight and the amount received and agreed to be paid upon the return voyage. In respect to the question of freight pending, it was shown that all goods lost had been shipped under bills of lading containing these provisions: "Freight for the same to be paid in United States gold coin, said freight to be considered earned, steamer or goods lost or not lost at any stage of the entire transit. . . . The foregoing bill of lading is issued subject to the terms and conditions of an act of Congress of the United States of America, approved February 13, 1893, entitled 'An Act Relating to Navigation of Vessels, Bills of Lading, and to Certain Obligations, Duties, and Rights in Connection with the Carriage of Property' (Acts of 69 L. R. A.

52d Congress, 2d Session, page 445, chap. 105), the provisions of which are hereby made a part hereof, and are deemed to control and express the contract of the parties hereto in all cases where there may be (if there be any such cases) a difference between the expressed provisions of the bill of lading and the terms of such act of Congress."

Based upon evidence introduced before the commissioner, that officer reported to the court findings to the effect that the petitioner was, and still is, the sole owner of the steamship, the value of which, in its wrecked condition, was \$150; that the voyage which terminated in the wreck and loss of the ship began at Hong Kong, China, on the 22d day of January, 1901; that the freight money collected at Hong Kong and way ports for the voyage to San Francisco, and that which was to have been collected at the latter place, "is earned and the freight pending in this cause," and appraising the value of the ship and her freight pending as follows:

Steamship City of Rio de Janeiro, and her tackle, apparel, machinery, and furniture. . . .	\$ 150 00
Freight and passage money pending	24,827 93
Total	\$24,977 93

The commissioner took no account of the freight or passenger money collected on the outward voyage of the ship.

To his report the claimant, Sarah Guyon, administratrix of the estate of Henry Guyon, deceased, filed these exceptions:

"(I.) Claimant excepts to the following finding of said report and appraisement: 'I do further find that the voyage which terminated in the wreck and loss of the aforesaid steamship at the entrance to San Francisco harbor on the 22d day of February, 1901, began at Hong Kong on the 22d day of January, 1901,' on the grounds: (a) That there is no evidence before the commissioner to show that the said voyage began at Hong Kong, China. (b) That the evidence conclusively established that the voyage for which the freight was pending at the time of the said wreck began at San Francisco on or about December 14, 1900, and extended through the ports of Honolulu, Yokohama, Kobe, Nagasaki, Shanghai, to Hong Kong, and return to San Francisco, touching at the same ports in the reverse order.

"(II.) Claimant excepts to the following finding: 'I do further find the freight and passage money pending for the aforesaid voyage to be the sum of \$24,827.93,' on the grounds: (a) That the term 'aforesaid voy-

age' is ambiguous, and that it cannot be determined therefrom whether the said term applies to the voyage on which the City of Rio de Janeiro was wrecked, or whether it refers to the portion of the voyage beginning at Hong Kong January 22, 1901; claimant admitting the said sum to be the freight pending for the latter, but excepting to the said sum as a finding of the freight for the entire voyage. (b) That the evidence conclusively shows the freight pending for the voyage on which the City of Rio de Janeiro was wrecked to have been \$55,412.05.

"(III.) Claimant excepts to the following finding and appraisal: 'I do further appraise the value of the said steamship and her freight pending as follows:

"Steamship City of Rio de Janeiro, her tackle, apparel, and furniture	\$ 150 00
Freight and passage money pending	24,827 93
Total	\$24,977 93

"—On the grounds: (a) That the evidence conclusively shows that the venture in which claimant was interested was the sending of the City of Rio de Janeiro on a voyage from San Francisco to Asiatic ports and return to carry for hire passengers, freight, and mails, and that the freight pending for the portion of the voyage from San Francisco to Hong Kong, amounting to \$30,202.11, should be added to the \$24,827.97 earned on the homeward trip of the voyage; making the total appraisal for the freight pending \$55,040.04. (b) That the evidence shows conclusively that the value of the ship after the wreck was \$500, and that this sum should be included in the said appraisal. (c) That the appraisal of the said vessel should be amended as follows:

"Freight pending for venture..	\$55,040 04
Wreck \$500.00; boats \$150.00..	650 00
Total	\$55,690 04

"Wherefore claimant prays that the said exceptions to the said report and appraisal be allowed, and that the said appraisal be recommitted to the said commissioner, with instructions to amend the same by adding thereto the item of \$30,212.11 as for freight pending for the outward trip of the voyage on which the said steamship sank, and the item of \$500 as for the value of the ship after the wreck."

The petitioners filed the following: "Petitioners except to the following finding of said report and appraisal: 'And that 69 L. R. A.

which was to have been collected at San Francisco.' Wherefore petitioners pray that the said appraisal be recommitted to the said commissioner, with instructions to amend the same by deducting the sum of \$13,729.17 for freight which was to have been collected at San Francisco."

All of the exceptions were overruled.

Various claims having been filed for damage by reason of loss of life and for loss of goods, baggage, etc., the cause came on for trial before the court upon its merits. The court found and held that the sinking of the ship was not due to any peril of the sea, but to the gross negligence of her master and pilot; after which the petitioner moved for a reduction of the bond so far as it represented freight pending, which motion was denied.

In and by its final decree the court below awarded damages to various of the claimants who were representatives of lost passengers, or who had themselves suffered injury, in amounts aggregating \$35,125, but limited the liability of the petitioner for such damages to the sum of \$24,977.93, with interest thereon from March 19, 1901, which sum, with interest, was directed to be paid into the registry of the court within ten days, and to be apportioned among the various claimants to whom damages were so awarded after the payment out of such fund of all the costs of the proceeding except the cost incurred in the proceedings relating to the appraisal of the steamship and her freight pending, which the petitioner was directed to pay. The court held against the claims of Clara Barwick, and Ruth Miller as executrix of the estate of Sarah Wakefield, deceased.

From the decree various of the claimants, as also the petitioner, have appealed. The ground of the petitioner's appeal is that, inasmuch as the court below found and held that the loss occurred solely by reason of the negligence of the ship's officers, and not by reason of any peril of the sea, it erred in holding that pending freight included either any prepaid freight or prepaid passage money, or any uncollected and uncollectible or unearned freight, and that, instead of limiting the liability of the ship to \$24,977.93, it should have been limited to the sum of \$4,483.53, which latter sum, it is contended on the part of the petitioner, is the aggregate amount of the value of the ship and her freight pending. The main ground of the appeal of those of the claimants whose appeal is from that portion of the final decree adjudging "that the liability of the Pacific Mail Steamship Company for said damages be and hereby is limited to the sum of \$24,977.93 and interest thereon from March 19, 1901," is that the crew

of the lost steamship "spoke and understood only the language of a race and nation different from the officers immediately in command over them in the launching of the lifeboats on said vessel, and that they could not speak or understand the commands of said officers, and that they had never been drilled in the launching of the lifeboats to train them to launch the same without commands, and that the said crew was therefore not sufficient at all times to man said steam vessel carrying passengers, and that the injury to claimants arose from said insufficiency," and "that the officers of said City of Rio de Janeiro in command of her eleven lifeboats could not speak any language which the members of the crew immediately under their command in launching said boats could understand, which said crew had not been trained in launching said boats, and therefore that said Pacific Mail Steamship Company has not supplied a full complement of officers sufficient at all times to manage a steam vessel carrying passengers, and that the injuries to the claimants arose through said insufficiency."

It is apparent that, if this position of the claimants is well founded, the petitioner is not entitled to any limitation of its liability, the questions presented on its appeal become immaterial, and the claimants to whom damages were awarded by the court below will be entitled to judgment for the full amounts so awarded them, together with their costs, whether the voyage on which the disaster occurred should include the round trip from San Francisco to Hong Kong and back, as contended on the part of the claimants, or is limited to the return trip from Hong Kong to San Francisco, as contended on the part of the petitioner. The record shows that the disaster occurred about half past 5 o'clock of the morning of February 22, 1901. The fog was so dense that the day afforded no light. It was very dark, but the water was smooth, and there was but little, if any, list to the ship as she sank, which she did in twenty minutes from the time of striking the rocks. She carried 211 persons and 11 lifeboats, 3 of which were swung by davits from the sides of the ship, and 8 of which were on skids on the roofs of the deckhouses. Their equipment and the apparatus for launching them was good. The evidence is that under such conditions five minutes was ample time for the lowering of the boats. It further shows that there was no panic among the passengers or crew; that the passengers behaved well; and that the captain, immediately upon the ship's striking the rocks, sounded the alarm, and called the crew to the boats. Each of the boats was commanded by a white officer, and manned by a part of the Chinese crew.

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Yet but three of the eleven boats were lowered into the water, one of which (the aft quarter boat No. 10) was lowered by Officer Coghlan and the ship's carpenter, and but three of the hundred and odd passengers that the ship carried were taken into any boat. There must, in the very nature of things, have been some paramount, controlling cause for all this. And that cause, we think, is very easily to be seen. It was not merely for the reason that the men depended upon to man the boats were Chinese. To the contrary, the evidence is that the Chinese make excellent sailors.

We extract the following from the testimony of Capt. Seabury, a most competent and experienced mariner, and who, at the time of giving his testimony in this cause, had completed his sixty-fifth round voyage from San Francisco to the Orient for the petitioner:

A. Every time I have been to sea on this side of the continent, and every time I have had a white crew, we have always had trouble with them getting drunk; especially sailing days. At times at sea—when I ran to Australia, where I made five voyages—twice we had a white crew, and there was scarcely a day but I did not have to go to the police court on account of some row that they made. I have always found the Chinese crew obedient, able to do their work, and always on hand in bad weather, and not eyeservants. You do not have to watch them in the ordinary run of work.

Q. During those sixty-five voyages, Captain Seabury, have you ever encountered any typhoons?

A. Yes, sir; two or three.

Q. And any bad weather?

A. Yes, sir; I had a very bad one last September.

Q. At the time did you have a Chinese crew?

A. Yes, sir; on this same ship.

Q. How did they behave in time of peril?

A. As well as any men could possibly behave. They never stow away in dark nights in bad weather. They are always right there, and you can always make sure of them.

Q. Have you ever seen them in time of wreck?

A. I have never been wrecked, not since I have been steamshipping. I have in sailing schooners. We had pretty nearly a wreck on the Alaska in 1879, and had to turn back.

Q. With a Chinese crew?

A. Yes, sir.

Q. Did they behave well?

A. Yes, sir.

Q. How many men have you on the China

now in your crew? By the word "crew" I mean sailors. I do not mean men in the steward's department, or men in the steerage department, or men in the fireroom. I mean crew—sailor men.

Mr. Denman: I object to the question as incompetent, irrelevant, and immaterial, and in no way referring to the City of Rio de Janeiro, the ship in issue.

A. Thirty-two.

Mr. McAllister: Q. Thirty-two men?

A. Yes, sir.

Q. Can any of those men speak English?

Mr. Denman: The same objection.

A. All of them can speak English. Some cannot speak quite so well as others, but all of them can understand when you give them an order about the ship.

Mr. McAllister: Q. Can you give to a majority of that crew yourself an order in English to haul this rope, or do this or that, whatever you saw fit?

A. Yes, sir.

Q. And would they understand you?

A. Yes, sir.

But how about Chinese sailors, or sailors of any other class or race, who cannot understand the orders that become necessary in the course of their duties because of a lack of knowledge of the language in which they have to be given? That is the question we have to consider and determine here.* It is declared by § 4463 of the same statutes [U. S. Comp. Stat. 1901 p. 3045] that "no steamer carrying passengers shall depart from any port unless she shall have in her service a full complement of licensed officers and full crew, sufficient at all times to manage the vessel, including the proper number of watchmen. But if any such vessel . . . is deprived of the services of any licensed officer, without the consent, fault, or collusion of the master, owner, or any person interested in the vessel, the deficiency may be temporarily supplied, until others licensed can be obtained."

It is, as was said by Judge Hawley in *Re Meyer*, 74 Fed. 885, "the duty of the owners of a steamer carrying goods and passengers, not only to provide a seaworthy vessel, but they must also provide the vessel with a crew adequate in number, and competent for their duty with reference to all

the exigencies of the intended route;" not merely competent for the ordinary duties of an uneventful voyage, but for any exigency that is likely to happen, such, for example, as unfortunately did happen in the present case,—the striking of the ship on a reef of rocks,—and the consequent imperative necessity for instant action to save the lives of passengers and crew. The duty rested upon the petitioner to be prepared for such an emergency, not only by reason of the statute cited, but by the general maritime law. In the case of *The Gentleman*, Olcott, 115, Fed. Cas. No. 5,324, it was held that the owners were liable for furnishing an inadequate crew, which they shipped at the Gambia river, West Africa, large enough in numbers, but sick with fever. In *Tait v. Levi*, 14 East, 482, it was held that, where the captain did not know the coast, and entered the enemy's port, and was captured, the vessel was "incompetently fitted out," because there was no proper master for the purpose of the voyage. In *Parsons v. Empire Transp. Co.* 49 C. C. A. 302, 111 Fed. 202, 208, we held that, where the owners appointed an incompetent superintendent to manage ships in Alaskan waters, they were not entitled to a limitation of liability for loss arising from sending out a barge in wintry and stormy weather. There can, in our opinion, be no doubt that the crew of a ship must be not only sufficient in numbers, but also competent for the duties it may be called upon to perform. The case shows that the City of Rio de Janeiro left the port of Honolulu, on the voyage under consideration, with a crew of 84 Chinamen, officered by white men. The officers could not speak the language of the Chinese, and but two of the latter—the boatswain and chief fireman—could understand that of the officers. Consequently, the orders of the officers had to be communicated either through the boatswain or chief fireman, or by signs and signals. So far as appears, that seems to have worked well enough on the voyage in question, until the ship came to grief, and there arose the necessity for quick and energetic action in the darkness. In that emergency the crew was wholly inefficient and incompetent, as the sad results proved. The boats were in separate places on the ship. The sailors could not understand the language in which the orders of the officers in command of the respective boats had to be given. It was too dark for them to see signs (if signs could have been intelligibly given), and only one of the two Chinese who spoke English appears to have known anything about the lowering of a boat; and there had been no drill of the crew in the matter of lowering them. Under such circumstances it is not

*Section 4493 of the Revised Statutes of the United States (U. S. Comp. Stat. 1901, p. 3058), provides that "whenever damage is sustained by any passenger or his baggage from explosion, fire, collision, or other cause, the master and the owner of such vessel, or either of them, and the vessel, shall be liable to each and every person so injured, to the full amount of damage if it happens through any neglect or failure to comply with the provisions of this title, or through known defects or imperfections of the steaming apparatus or of the hull."

surprising that but three of the boats were lowered, one of which was successfully launched by the efforts of Officer Coghlan and the ship's carpenter, another of which was swamped by one of the Chinese crew letting the after fall down with a run, and the third of which was lowered so slowly that it was swamped as the ship went down. We have no hesitation in holding that the ship was insufficiently manned, for the reason that the sailors were unable to understand and execute the orders made imperative by the exigency that unhappily arose, and resulted so disastrously to life, as well as to property. It results from what has been said that the court below also erred in denying the appellant Clara Barwick's claim made on her own behalf and that of her minor children, for damages for the death of her husband, on the ground that he was a fellow servant of the master and pilot of the ship.

The action of the court in respect to the

claim of Ruth Miller, executrix of the estate of Sarah Wakefield, deceased, was, in our opinion, correct.

The judgment is reversed, and the cause remanded, with directions to the court below to enter judgment against the petitioner denying its application for a limitation of liability, and in favor of the respective claimants for the full amount of damages it has heretofore awarded them, with interest and costs, and in favor of the claimant Clara Barwick for such amount of damages as the court shall find from the evidence already taken, or that may be taken, she is entitled to by reason of the death of her husband, and by reason of the loss of his personal effects; and against the claim of Ruth Miller, as executrix of the estate of Sarah Wakefield, deceased, in so far as it is based upon her death.

Petition for writ of certiorari denied November 7, 1904.

CONNECTICUT SUPREME COURT OF ERRORS.

Samuel D. SMITH, Trustee, etc., of Alfred Smith, Deceased,
v.

C. Bates DANA *et al.*

(..... Conn.)

1. **Investment of the profits of a corporation in permanent works** does not capitalize them, so that upon the sale of the works the directors cannot distribute them as a cash dividend, which will belong to life tenants, and not to remaindermen, of the stock.
2. **Cash dividends upon corporate stock belong to the life tenants** notwithstanding they were derived from the sale of permanent property in which profits had been invested.
3. **The rule that cash dividends on corporate stock go to life tenants**, and stock dividends to the remaindermen, will not yield whenever an investigation might appear to indicate its failure in a given case to accomplish what might be conceived to be exact justice, upon the basis of some theoretical view of the ultimate rights of persons asserting conflicting successive stock interests.
4. **Withdrawal from certain incidental branches of business which a corporation has been carrying on** does not make the distribution of the money invested in them as dividends a partial liquidation which will carry the dividends to the remaindermen as against life tenants, where the

capital stock is not impaired, and its value remains above par, and practically the same after the dividends as before.

(March 9, 1905.)

CROSS-APPEALS by the respective defendants from a judgment of the Superior Court for Hartford County in an interpleader proceeding to determine the rights of life tenants and remaindermen to certain corporate dividends. *Reversed on the appeal of the life tenants.*

The facts are stated in the opinion.

Mr. Charles E. Gross, for I. C. Bates Dana, life tenant, appellant:

Cash dividends are income, and go to the life tenant, and stock dividends are capital, and go to the remainderman.

2 Thomp. Corp. chap. 35, art. 5, §§ 2193, 2199, 2201, 2207, 2208, 2211, 2212, 2222.

The law of Connecticut follows the general rule.

Mills v. Britton, 64 Conn. 12, 24 L. R. A. 536, 29 Atl. 231; *Terry v. Eagle Lock Co.* 47 Conn. 141; *Brinley v. Grou*, 50 Conn. 66, 47 Am. Rep. 617; *Hotchkiss v. Brainerd Quarry Co.* 58 Conn. 120, 19 Atl. 521; *Spooner v. Phillips*, 62 Conn. 62, 16 L. R. A. 461, 24 Atl. 524.

This rule is based upon the absolute necessities of the case.

NOTE.—As to rights of life tenants and remaindermen with respect to stock dividends, see also, in this series, *Spooner v. Phillips*, 16 L. R. A. 461; and *note*; *Hite v. Hite*, 19 L. R. A. 173; *Mills v. Britton*, 24 L. R. A. 536; 61 L. R. A.

Pritchett v. Nashville Trust Co. 33 L. R. A. 856; *McLouth v. Hunt*, 39 L. R. A. 230; *Quinn v. Safe Deposit & T. Co.* 53 L. R. A. 169; and *De Koven v. Alsop*, 63 L. R. A. 587.

Brinley v. Grou, 50 Conn. 76, 47 Am. Rep. 617; *Spooner v. Phillips*, 62 Conn. 74, 16 L. R. A. 461, 24 Atl. 524; *Gibbons v. Mahon*, 136 U. S. 549, 34 L. ed. 525, 10 Sup. Ct. Rep. 1057; *Hotchkiss v. Brainerd Quarry Co.* 58 Conn. 137, 19 Atl. 521.

The law presumes that a dividend made by a going concern is made from profits.

2 Thomp. Corp. § 2193.

The stockholders of the Holyoke Water Power Company never had any title to, or interest in, the earnings, property, or surplus (as such) of the incidental plants.

Gibbons v. Mahon, 136 U. S. 549, 34 L. ed. 525, 10 Sup. Ct. Rep. 1057.

They were the sole property of the water power company, when received were merged with its other assets, and whether they were spent or set aside, invested or paid out in cash dividends, it is impossible, as well as immaterial, to decide.

2 Thomp. Corp. § 2207.

The fact that these plants have been income producing does not make the proceeds thereof, when sold, capital. The capital of the company must be increased to take up such invested accumulations.

Messrs. Grosvenor Calkins and Robert M. Washburn, for life tenants, appellants:

Cash dividends are income, and belong to the life tenant.

Vinot v. Paine, 99 Mass. 101, 96 Am. Dec. 705; *Brinley v. Grou*, 50 Conn. 66, 47 Am. Rep. 617; *Mills v. Britton*, 64 Conn. 4, 24 L. R. A. 536, 29 Atl. 231; *Bouch v. Sproule*, L. R. 12 App. Cas. 385; *Gibbons v. Mahon*, 136 U. S. 549, 34 L. ed. 525, 10 Sup. Ct. Rep. 1057; *Re Brown*, 14 R. I. 371, 51 Am. Rep. 397; *Richardson v. Richardson*, 75 Me. 570, 46 Am. Rep. 428; *Lord v. Brooks*, 52 N. H. 72; *Re Kernochan*, 104 N. Y. 618, 11 N. E. 149.

It is the well-settled policy of all courts to interfere as little as possible with the management of corporate affairs, an' to establish plain and uniform rules to guide persons in fiduciary positions in the management of their trusts.

Bouch v. Sproule, L. R. 12 App. Cas. 385; *Minot v. Paine*, 99 Mass. 101, 96 Am. Dec. 705; *Richardson v. Richardson*, 75 Me. 570, 46 Am. Rep. 428; *Lyman v. Pratt*, 183 Mass. 58, 66 N. E. 423.

The only exception to the rule is that cash dividends declared in liquidation are principal, and belong, not to the life tenant, but to the remaindermen.

Gifford v. Thompson, 115 Mass. 478.

The courts are willing to be guided by a clear expression of intention in the form of a vote of the directors of a corporation in declaring a dividend.

Gibbons v. Mahon, 136 U. S. 549, 34 L. 69 L. R. A.

ed. 525, 10 Sup. Ct. Rep. 1057; *Bouch v. Sproule*, L. R. 12 App. Cas. 385; *Hemenway v. Hemenway*, 181 Mass. 406, 63 N. E. 919.

This dividend of 65 per cent is not a dividend in liquidation, but is income, and should be paid to the life tenants.

Harvard College v. Amory, 9 Pick. 446; *Balch v. Hallet*, 10 Gray, 402; *Reed v. Head*, 6 Allen, 174; *Gifford v. Thompson*, 115 Mass. 478; *Hemenway v. Hemenway*, 181 Mass. 406, 63 Atl. 919; *Second Universalist Church v. Colegrove*, 74 Conn. 79, 49 Atl. 902; *Davis v. Jackson*, 152 Mass. 58, 23 Am. St. Rep. 801, 25 N. E. 21.

Mr. Charles Welles Gross for plaintiff.

Mr. Edward I. Baker, for John M. Steele, Gertrude D. Steele, and C. Bates Dana, remaindermen, appellants:

The gas plant was a part of the original capital of the corporation. When the corporation invested its money in the construction of the electric-light plant, and later in its purchase, the corporation permanently capitalized that money, and the plant became a part of the permanent capital of the corporation just as the gas plant had always been; and a distribution of that permanent capital was not a dividend of earnings.

The rule that ordinary cash dividends are income, and stock dividends are principal, does not apply to a distribution of capital.

Hotchkiss v. Brainerd Quarry Co. 58 Conn. 120, 19 Atl. 521; *Spooner v. Phillips*, 62 Conn. 62, 16 L. R. A. 461, 24 Atl. 524; *Heard v. Eldredge*, 109 Mass. 258, 12 Am. Rep. 687; *Gifford v. Thompson*, 115 Mass. 478; *Hemenway v. Hemenway*, 181 Mass. 406, 63 N. E. 919; *D'Ooge v. Leeds*, 176 Mass. 558, 57 N. E. 1025; *Wheeler v. Perry*, 18 N. H. 307; *Walker v. Walker*, 68 N. H. 407, 39 Atl. 432; *Re Skillman*, 2 Connolly, 161, 29 N. Y. S. R. 217, 9 N. Y. Supp. 469; *Vinton's Appeal*, 99 Pa. 434, 44 Am. Rep. 116; *Bouch v. Sproule*, L. R. 12 App. Cas. 385.

Prentice, J., delivered the opinion of the court:

The will of Alfred Smith, who died in Hartford, the place of his residence, on August 12, 1868, was on August 16th following admitted to probate in the court of probate for the district of Hartford. By the will the testator gave to trustees the sum of \$100,000. By the terms of the trust the trustees were required to pay over the income to certain persons designated during the lives of three grandchildren and the survivor of them, and upon the death of the last survivor to divide and distribute the corpus in the manner provided. Each of

the three grandchildren was made the beneficiary of a share of said income during his life. The defendant I. C. Bates Dana is the only one of them surviving. Certain of the other defendants are his children and the husband of one of them. The remaining defendants are the children of Alfred F. Dana, another of said grandchildren. The third died childless. It is assumed and conceded by all parties that these defendants embrace all who, under the provisions of the will, are, or can become, entitled to share in the income of the trust estate, and all who are, or can become, entitled to participate in the division of the corpus upon the termination of the trust to pay over income, unless it be persons representing them or hereafter born children of said Bates Dana. The children of Alfred occupy the position of both life tenants and remaindermen. The claim which they here assert is made in the former capacity.

The will provided that, in setting apart said trust fund of \$100,000, there should be included therein 300 shares of the stock of the Holyoke Water Power Company, which the testator owned; the same to be taken for that purpose at their par value. That was done. The capital stock of said corporation was then \$350,000. July, 1877, said capital was increased to \$600,000 by the issue of new stock subscribed and paid for at par. The right to subscribe for this new issue was accorded to existing stockholders *pro rata*. The trustees sold the rights attaching to said 300 shares. In 1893 the capital stock was again increased to \$1,200,000, in the same manner as before. At this time the trustees subscribed for and took 200 shares, making their trust holdings 500 shares, and sold the remaining rights. December 20, 1902, the directors declared a cash dividend of 65 per cent payable December 24th to stockholders of record December 20th. The plaintiff, who is the only survivor of the trustees, received the sum of \$32,500 as the amount of said dividend upon said 500 shares. This sum he now holds. The defendants Bates Dana and the children of Alfred Dana claim the whole thereof as income to which they are entitled. The children of Bates Dana claim that the whole, or at least the bulk, of said sum belongs to the corpus of the trust estate, and should be held by the trustee as an accretion thereto. The trial court sustained this claim with respect to approximately two thirds of the dividend, and adjudged that the balance be divided as income. This conclusion, and the reasons which the court gave in support of it, as well as those which counsel for said children of Bates Dana urge in support of their broader contention, require for their understanding and examina-

tion a statement of some of the facts which enter into the history of the corporation in question, and which serve to indicate the source and character of the corporate assets which formed the basis of the 65 per cent dividend. Previous to 1859 the Hadley Falls Company, a Massachusetts corporation, had acquired a large tract of land where the city of Holyoke is now located, and had constructed a dam across the Connecticut river, extending from South Hadley, on the northeasterly shore, to Holyoke, on the southwesterly shore, of the Connecticut river, and had built locks and canals at Holyoke, and had laid out streets, sites for manufactories, tenements, and residences; and several factories, residences, and other buildings had been erected. Among other buildings, said Hadley Falls Company had constructed a small gas plant, which it operated. Subsequently said company went into a receiver's hands, and the Holyoke Water Power Company, hereinafter referred to as the Holyoke company, was, in 1859, organized with a capital stock of \$350,000 to purchase and take over said property of said Hadley Falls Company. The purchase was made, the entire capital of the Holyoke company being paid as the consideration therefor. The purpose of the Holyoke company, as defined in the act creating it, was "of upholding and maintaining the dam across the Connecticut river heretofore constructed by the Hadley Falls Company and one or more locks and canals in connection with the said dam, and of creating and maintaining a water power to be used by said corporation for manufacturing and mechanical purposes, and to be sold or leased to other persons or corporations to be used for like purposes." The charter gave the corporation "full power and authority to purchase, take, hold, receive, sell, lease, and dispose of all or any part of the estate, real, personal, or mixed, with all the water power, water courses, water privileges, dams, canals, rights, easements, and appurtenances thereto pertaining or belonging, or therewith connected, or which have at any time heretofore belonged unto, or been the property of, the said Hadley Falls Company, and any other real estate that may be required for the use of said corporation for the purposes contemplated by this act." The Holyoke company continued the manufacture, sale, and distribution of gas by the usual means and methods, to supply the needs of the growing community which came into existence upon the site of its property, and which in time became the city of Holyoke, without other authority therefor than was contained in those portions of the charter recited until 1873, when special legislative authority was obtained. In 1880 the

company was, as required by law of all persons engaged in the generation and sale of electricity, duly authorized to engage in that business by an order of the board of gas commissioners. From that date down to December, 1902, it generated electricity for sale and distribution, erecting and maintaining a plant for that purpose. As the result of proceedings instituted under the provisions of chapter 370, p. 949, of the acts of the legislature of Massachusetts of the year 1891, which are in the main similar to those in force in this state regulating the establishment of gas and electric plants by municipalities within which there are existing public service plants of that character owned by private corporations, the city of Holyoke on December 15, 1902, acquired both the gas and electric plants of the Holyoke company; paying therefor the sum fixed by the commission appointed for that purpose by the court under the provisions of said act. Upon such acquisition the right of the Holyoke company to engage in the business of manufacturing and distributing gas or electricity ceased by virtue of the provisions of said act. The amount so paid by said city to said company was \$721,043. By the use of said sum and other moneys of the corporation on hand, which at the time did not exceed \$150,000 in amount, the dividend in question, requiring the disbursement of \$780,000, was paid. The actual cost to the company of the electric-light plant was \$243,776.34. Previous to the declaration of said dividend of 65 per cent the market value of the shares of said company was from \$380 to \$385 per share. At the time of its declaration the company held real and personal property amounting in value to more than \$4,000,000 over and above all of its obligations. At the date of the commencement of this action the market value of the shares of the company, as evidenced by the sale of a few shares of said stock, appeared to be from \$315 to \$325 per share. All sums derived from the issue of stock have gone into the general treasury, and there become mingled with the other funds of the company. No separation of funds has been made, and it is impossible to trace the funds derived from any one source so as to follow them into any distinct investments. For many years the company has paid regular dividends of 10 per cent per annum. Between February 1, 1899, and January 15, 1901, it paid extra dividends amounting to 90 per cent of the capital stock.

The present contention between those who stand in the relation of life tenants and remaindermen to trust funds invested in stocks presents the oft-recurring question as to the rights of persons occupying those

relations to participate in the benefits of a distribution to stockholders of the assets, or some portion of the assets, of the corporation. In the present case a solvent and going corporation, whose capital was undergoing no reduction in amount, declared a dividend payable and paid in cash. Life tenants of stock held in trust claim to be entitled to the dividend payment as income. Remaindermen claim that it should go to augment the capital account of the trust estate. In *Minot v. Paine*, 99 Mass. 101, 96 Am. Dec. 705, the necessity of some plain and simple rule which in situations like the present, frequently arising, should serve to guide trustees in the discharge of their duties, and *cestuis que trust* in the determination of their rights, without a resort to harassing and expensive litigation, was expressed, and such a rule formulated. This rule made the character of the dividend the test. Cash dividends, it was said, should be regarded as income, and stock dividends as capital. It was not pretended that this rule, which has been commonly known as the Massachusetts rule, was the ideal rule of reason; nor have the courts of high authority which have given their approval of it ever claimed it to be such, or one which would accomplish exact justice under all circumstances. What has been claimed for it is that its general application—at least if due regard be had for the substance and intent of the transaction—would prove more beneficent in its consequences, and, on the whole, lead to results more closely approximating to what was just and equitable, than would the application of any other rule, or any attempt to go behind the declaration of the dividend to search out and discover the equities of each case according to some theoretical ideal. *Gibbons v. Mahon*, 136 U. S. 549, 34 L. ed. 525, 10 Sup. Ct. Rep. 1057; *Richardson v. Richardson*, 75 Me. 570, 46 Am. Rep. 428; *Rand v. Hubbell*, 115 Mass. 461, 15 Am. Rep. 121; *D'Ooge v. Leeds*, 176 Mass. 558, 57 N. E. 1025; *Lyman v. Pratt*, 183 Mass. 61, 66 N. E. 423. The necessity for a rule which should serve as a guide and protection to trustees in the performance of their duties is apparent. The advantages of one which would make ceaseless litigation, with its attendant harassment and expense, unnecessary, are no less so. The uncertainty and difficulties attending any attempt at arriving at the true equities between parties respectively asserting income and capital interests in the proceeds of a dividend declared are not so readily appreciated. It requires, however, but slight reflection to discover the magnitude of the obstacles to be surmounted, and the impossibility which must oftentimes be met, whereby the ju-

dicial search for precise equities necessarily becomes resolved into a speculation and a guess. There exists the ever-present difficulty of tracing financial results to their source, and of distinguishing between what of increased assets rightfully represents profits, and what increase of value to appropriate to capital. Above all, there enters into most situations, to render courts powerless to arrive at any certain results, a controlling factor arising from the discretionary power which directors rightfully exercise to determine at all times, within reasonable limits, the destiny of profits and of accumulated profits represented by surplus. *Gibbons v. Mahon*, 136 U. S. 549, 34 L. ed. 525, 10 Sup. Ct. Rep. 1057. Profits may be distributed as earned. They may be, in whole or part, retained and utilized for the corporate advantage. They may be used for a time, and later distributed. They may never be distributed, but permanently used in the business. Whether they will inure to the benefit of stockholders, in the way of a dividend, may ever remain uncertain. Whether, in the ordinary course, they will fall to the lot of the life tenant, as profits declared, or remain to enhance the value of the stock, will depend in part upon the action of the directorate, and in part upon the term of the trust. They, as we shall have occasion to notice later on, can never acquire a status which must remain a fixed and abiding one unless they are formally capitalized. Their future is ever an uncertain one, and none save one who can foretell the action of boards of directors can discover it. The rights of stock are involved in this maze of doubt. Absolute rights there are not. Rights which are superior to those which may at any time be created by corporate management may not exist. In the presence of such conditions, courts must oftentimes find themselves powerless to ascertain and determine rights, since there may be nothing which lies without the domain of conjecture to act upon. The more the matter is studied, the more apparent it becomes that the Maine court, speaking of the Massachusetts rule through Chief Justice Peters, was justified in its expression: "We are satisfied that this can be the only safe, sound, just, and practicable rule, and that any attempt to engraft refined and nice distinctions upon such rule will be productive of much more evil than any good that can come from it." *Richardson v. Richardson*, 75 Me. 570, 46 Am. Rep. 428. This court has heretofore given its adhesion to the doctrine of *Minot v. Paine* as the one to be ordinarily applied. *Mills v. Britton*, 64 Conn. 4, 24 L. R. A. 536, 29 Atl. 231; *Brinley v. Grou*, 50 Conn. 66, 47 Am. Rep. 618.

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An application of this principle would *prima facie*, at least, quickly resolve the present contention in favor of the life tenants. The trial court, however, has regarded the rule as it has been adopted in this jurisdiction, at least, as a decidedly flexible one. The logical conclusion of the position taken in its exhaustive memorandum of decision, although not stated in precise terms, is that the rule is such a tentative one that it will yield where it appears upon inquiry that justice will not be accomplished by it. Starting with this premise, the court arrived at the conclusion that in this case justice would not be done by its application, and the rule was therefore disregarded. An inquiry was then made into the sources of the funds out of which the dividend was paid, to discover what was conceived to be the true nature of the transaction, and the real equities of the parties claimant. The court thus arrived at three vital conclusions which dictated the judgment as rendered, to wit: (1) That the accepted general rule must yield where it fails to accomplish just and equitable results; (2) that such results would not be reached in this case by its application; and (3) that the results established by the judgment were the just and equitable ones.

Let us first consider the last two of these conclusions, since they furnish the key to the court's action. It is said that the operation of the rule would be inequitable, because it would, under the circumstances, result in the diversion to the life tenants, under the guise of income, of that which of right belongs to the stock, as capital, and therefore is the remainderman's. It is said that the distribution made by the court is equitable, because it prevents that diversion, and gives the remaindermen what is equitably theirs, and that only. The same conception underlies both conclusions. They are, however, reached upon mistaken premises. These mistaken premises arise from a failure to properly distinguish between the different qualities which attach to the various assets of a private corporation, and between the different characters which these assets may assume.

A citation from the memorandum of decision will indicate the nature of the misconception which lies at the foundation of the trial court's argument and position, to wit: "All of the subject-matter of these awards was properly appropriated to the uses of these plants, and hence permanently made a part of the capital of the company. . . . Corporate profits undistributed belong to the corporation. . . . When such profits are expended upon the property of the corporation used in its business, or devoted to the acquisition of new property

or to the creation of a new business, these constitute a permanent addition to capital, beyond the recall of the directors. Once capital always capital. It makes no difference whether such augmentation of capital resulted from the proceeds of increase of stock, or from profits appropriated to capital. It is the thing done with the funds which determines. Did it go to the increase or addition to the property of the corporation, and has it become permanently devoted as such to its uses? This is the test." The misconception embodied in this statement was not a new one. It appears in the opinion in *Hemenway v. Hemenway*, 181 Mass. 406, 63 N. E. 919, from which source the trial court apparently derived it. As that opinion was the utterance of the same court which promulgated the rule in *Minot v. Paine*, and which has since repeatedly affirmed that rule, its expressions in argument were naturally accepted as authoritative without careful analysis. They will not, however, bear such analysis.

"Capital" is a term which, as applied to private corporations as ordinarily constituted, is used with widely varying significations. In one sense—the strict sense—it is employed to designate specifically the fund, property, or other means contributed, or agreed to be contributed, by the share owners as the financial basis for the prosecution of the business of the corporation; such contribution being made either directly through stock subscriptions, or indirectly through the declaration of stock dividends. As thus used, the term signifies those resources whose dedication to the uses of the corporation is made the foundation for the issuance of certificates of capital stock, and which, as the result of the dedication, become irrevocably devoted to the satisfaction of all the obligations of the corporation. *State v. Norwich & W. R. Co.* 30 Conn. 290; *Bailey v. Clark*, 21 Wall. 284, 22 L. ed. 651; *Christensen v. Eno*, 106 N. Y. 97, 60 Am. Rep. 429, 12 N. E. 648; *Iron R. Co. v. Lawrence Furnace Co.* 49 Ohio St. 102, 30 N. E. 616; *Reid v. Eatontown Mfg. Co.* 40 Ga. 103, 2 Am. Rep. 563; *Com. v. Charlottesville Perpetual Bldg. & L. Co.* 90 Va. 790, 44 Am. St. Rep. 950, 20 S. E. 364; *Thomp. Corp.* § 1660. Sometimes the term "capital" is used when what is meant to be designated is that portion of the assets of a corporation, regardless of their source, which are utilized for the conduct of the corporate business and for the purpose of deriving therefrom gains and profits. *Iowa State Sav. Bank v. Burlington*, 98 Iowa, 739, 61 N. W. 851; *People ex rel. Lemmon v. Feitner*, 56 App. Div. 280, 67 N. Y. Supp. 893; *Hemenway v. Hemenway*, 181 Mass. 406, 63 N. E. 919. Frequently the term is employed in a still

wider sense, as descriptive of all the assets, gross or net, of a corporation, whatever their source, investment, or employment. *Security Co. v. Hartford*, 61 Conn. 89, 23 Atl. 699; *Batterson's Appeal*, 72 Conn. 374, 14 Atl. 546; *People ex rel. Union Trust Co. v. Coleman*, 126 N. Y. 433, 12 L. R. A. 762, 27 N. E. 818; *Ohio & M. R. Co. v. Weber*, 96 Ill. 443; *State ex rel. Batz v. Lewis*, 118 Wis. 432, 95 N. W. 388.

In *Hemenway v. Hemenway*, 181 Mass. 406, 63 N. E. 919, the court drew a distinction between those undistributed profits which have been applied to and invested in the increase and improvement of the property used in the business of the corporation, and those profits which may have been set aside for use in the conduct of the business, but not invested in permanent works. The former, it said, was capital; the latter, "floating capital." The former, it said, was as effectually capitalized as they would have been through the declaration of a stock dividend. The trial court accepted this principle as a sound one, and thereon based its argument and conclusions, as witness its language already recited, to wit: "When such profits are expended upon the property of the corporation used in its business, or devoted to the acquisition of new property, or to the creation of a new business, these constitute a permanent addition to capital, beyond the recall of the directors. Once capital always capital." This proposition contains a fundamental error. The quality and incidents of surplus, however invested or employed, are not the same as those of capital, within the strict meaning of that word. Capital, in that sense, constitutes a fund so set apart and devoted to the corporate uses and the security of creditors that the law jealously guards it from the encroachment of directors in the declaration of dividends. It is placed beyond their reach for that purpose, and no way is open to them to return it to the share owners. Its dedication is irrevocable, and it must ever remain a fund held in trust for creditors, unless some judicial or other process authorized by legislation intervene. Of it, it may well be said, "Once capital, always capital." It is not so of undistributed profits or surplus in any form. They may be effectually dedicated to corporate uses through the processes of a stock dividend, but until so dedicated they are not removed from the reach and control of directors. The manner of utilization may be changed, investments altered, permanent property sold and turned into cash, and experimental or other enterprises abandoned, with a realization upon the investments therein, all at the discretion of directors, with no such artificial consequence that the assets thus

employed change their character as the result of the process. Investment in permanent works does not, and ought not to, capitalize. Directors can, in their discretion, fairly exercised, withhold profits, and employ them in the conduct or enlargement of the business. By the same right they ought to be able to, and can, withdraw from any action which will enable the assets thus employed to be returned to their original condition, as funds available for distribution to those to whom they might have been originally divided as dividends. Capital of this kind does not bear the perpetual stamp of capital. It simply constitutes a portion of the corporate assets which are within the discretionary control of the directors, which they may use for the corporate advantage in such ways as have the approval of their judgment, or, if that course seem wiser, cease using, and by proper action withdraw from the corporate resources.

It follows that the court's second and third conclusions, in so far as they rest upon the mistaken proposition that undistributed profits which may become invested in permanent works, property, improvements, or acquisitions or business extensions, become, by their very nature, a permanent addition to capital, beyond the recall of directors, and possessing the quality of capital, in the strict sense, are unjustified. There is nothing growing out of the corporate relation, or any of the incidents of corporate estate, which can support the argument which is made to rebut the presumption that, when a solvent, going concern declares a lawful dividend, it is one to be paid out of profits, since capital cannot be impaired. 2 Thomp. Corp. § 2192.

We have thus far pursued the line of argument of the trial court. There is another aspect of the question which possibly requires attention. While invested assets do not become capital in such sense that they thereafter have the quality and incidents of strict capital, it might be suggested that the character of such assets, by their investment in permanent works, improvements, or extensions, becomes such that, as between owners of successive stock interests, they ought, in justice, to be regarded as capital, in the general sense that it should thereafter belong to the capital rather than the income side of those interests. 1 Cook, Corp. § 8. The reason for this is not apparent. Their source is presumptively and for the most part in fact profits. 2 Thomp. Corp. § 2192, and his article on *Corporations*, 10 Cyc. Law & Proc. p. 502. In so far as such is the case, their status as invested surplus has been created by the lawful fiat of directors, through the withholding and appropriation for use of what might have gone out as income. *Gib-*
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bons v. Mahon, 136 U. S. 549, 34 L. ed. 525, 10 Sup. Ct. Rep. 1057; *Bouch v. Sproule*, L. R. 12 App. Cas. 385; *Pratt v. Pratt*, 33 Conn. 446. It would seem fair that its return by the same means to its original status should be as possible as its first transition, and as fair that when it has been transformed back into cash, and a cash dividend declared and paid therefrom, the benefit of that dividend should be dependent upon the final act of the directorate thereon. as upon some arbitrarily chosen intermediate act. Our adopted rule rests upon that proposition. It sees no injustice in its general application, and therefore admits of no relaxation when other conditions are not shown.

There remains to be considered still another aspect of the case: The court finds justification for its conclusions, and counsel for the remainder interests attempt to support the judgment, upon a line of reasoning which differs in form, at least, from those already considered, although it may appear that in its ultimate analysis it rests upon the same fundamental erroneous conception. We have therefore to return to a consideration of the first of the court's conclusions, as we have classified them. The memorandum of decision discloses that the trial court accorded to the rule as adopted in this jurisdiction too much elasticity. We have already had occasion to discuss its importance and beneficent character when reasonably interpreted and applied. If our observations were well made, and the commendations of eminent authorities justified, the conclusion would follow that it was not only a safe and sane one upon occasions, but also a rule which, if used with a proper regard for the substance and intent of the vote of declaration, would be a judicious one for general application, and to which few, if any, exceptions should be admitted. In that spirit and to that effect it has been accepted by this and other courts. We have no occasion to make the academic inquiry as to whether, the rule being interpreted as suggested, any, or what, circumstances would justify a suspension of its operation. Certain it is that it ought not to be, and is not, one which yields whenever an investigation might appear to indicate its failure in a given case to accomplish what might be conceived to be exact justice, upon the basis of some theoretical view of the ultimate rights of persons asserting conflicting successive stock interests. One of the purposes of the rule is to put an end to all such investigations under all ordinary conditions, at least. The prohibition of inquiry naturally and properly extends to all that field of investigation which we have thus far had under consideration in this case.

There remains, however, another aspect of the situation before us, which is relied upon as satisfying the conditions of what is termed an approved exception. As nothing else is pointed out as justifying a departure from the literal enforcement of the rule, we may well confine our discussion to the claim which is made. In *Second Universalist Church v. Colegrove*, 74 Conn. 83, 49 Atl. 902, we held that, where the assets of a corporation were distributed to the share owners in liquidation, they were, as between life tenants and remaindermen, to be treated as principal or capital, and not income, although the distribution was made in the form of a cash dividend. See also, to the same effect, *Gifford v. Thompson*, 115 Mass. 478. It is needless to inquire whether or not the principle involved in these cases constitutes a true exception to the general rule, as properly interpreted. Whether it does or not, it is plain that it is a just and sound one. On the behalf of the remaindermen it is contended that this principle is as applicable to partial as to complete liquidations. By "partial liquidations" we understand to be meant proceedings involving the surrender by the corporation of portions of its capital. The contention may, for the purposes of this case, be conceded. But there has been no liquidation, complete or partial, of the Holyoke company, or anything tantamount thereto. The company has withdrawn from certain incidental branches or departments of its business, as it was formerly, in the discretion of its directors, conducted, and converted what had been the investment of some of its assets in those departments into cash. The amount of the company's capital stock after the dividend remained unchanged. It was not only unimpaired, but continued to represent an ownership of net assets amounting to nearly three times the par value of its stock. The shares continued to be worth \$300 or more each. The business of the corporation remained the same, in its general character and purposes, and the inception of

these proceedings found it a prosperous, going concern,—the same, in all essentials, it was before the city of Holyoke's threatened competition made a change in the scope of its operations an apparently wise act of corporate management. Clearly, there was nothing in the nature of liquidation or a return of capital in the transactions under consideration.

The remaindermen claim that they will be aggrieved if the life tenants are permitted to take this dividend. That must depend upon the view which is taken of their rights and equities. The advocates of judicial investigation for the purpose of ascertaining and establishing in each case the rights of the parties have most commonly and confidently asserted that the rule which alone could lead to exact justice was one which recognized the right of remaindermen to have the capital and those profits which had accumulated prior to the inception of the trust retained in the corpus, and that of life tenants to receive subsequent accumulations. *Earp's Appeal*, 28 Pa. 368; *Smith's Estate*, 140 Pa. 344, 23 Am. St. Rep. 237, 21 Atl. 438; 2 Thomp. Corp. § 2196; 2 Cook, Corp. § 552. Even if this rule, which of all rules professes to be most mindful of strict equities, were accepted for application to the present situation, we should look in vain through this record to discover any suggestion that a disposition of this dividend as income would operate to the injury of those asserting the remainder interest in the corpus, which, after the dividend, remained worth three times what it was worth when the trust took effect.

It is conceded that the decision of the case is to be governed by the law of Connecticut. Massachusetts law would lead to the same result.

There is error. *The judgment is reversed*, and the cause remanded for the rendition of judgment in accordance with the views herein expressed.

The other Judges concur.

DISTRICT OF COLUMBIA COURT OF APPEALS.

Abraham WOLFF, Appt.,
v.

DISTRICT OF COLUMBIA.

(21 App. D. C. 464.)

1. A horse block or stepping stone of ordinary size, placed on the edge of

the sidewalk to facilitate access to and egress from carriages in the street, is not an obstruction to the walk, so as to render the municipality liable for injuries caused by a traveler falling over it.

2. A municipal corporation is not liable for injuries caused to a traveler by falling over a horse block on the sidewalk because sufficient light is not main-

NOTE.—As to liability of city for injury caused by rise in sidewalk, see, in this series, *Watertown v. Greaves*, 56 L. R. A. 865.

As to liability for fall caused by step in
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sidewalk, see *Teagar v. Flemingsburg*, 53 L. R. A. 791, with note as to liability of municipal corporations generally for defects in streets.

tained near it to render it visible to passers-by.

(April 7, 1903.)

APPPEAL by plaintiff from a judgment of the Supreme court in favor of defendant in an action brought to recover damages for personal injuries alleged to have been caused by obstructions which defendant unlawfully allowed to be upon a sidewalk. *Affirmed.*

The facts are stated in the opinion.

Messrs. D. W. Baker and John C. Gittings, for appellant:

This carriage block in question was an unlawful obstruction of the street, and it was the clear duty of the District to see that all sidewalks were free from obstructions of every kind and character.

D. C. Rev. Stat. §§ 222, 225-227, 229; *United States v. Cole*, 7 Mackey, 504; *District of Columbia v. Libbey*, 9 App. D. C. 321; *Curry v. District of Columbia*, 14 App. D. C. 423.

There being an unlawful obstruction in the streets of a municipal government, of which it has knowledge, it is certainly its duty to cause the same to be removed.

Scranton v. Catterson, 94 Pa. 203; *Davis v. Austin*, 22 Tex. Civ. App. 460, 54 S. W. 927; *Barnes v. District of Columbia*, 91 U. S. 540, 23 L. ed. 440; *District of Columbia v. Woodbury*, 136 U. S. 450, 34 L. ed. 472, 10 Sup. Ct. Rep. 990.

Messrs. Andrew B. Duvall and E. H. Thomas, for appellee:

A pedestrian has no right to assume that the portion of a public sidewalk ordinarily occupied by steps and inner-line projections, or the outer portion commonly occupied by carriage steps and the like, can be passed over with freedom; and it is negligence in him to use such portions of the sidewalk without at least casual observation of their condition.

Howes v. District of Columbia, 2 App. D. C. 188.

The use on the curb line of such a common article or thing as a carriage step was not of itself notice that it was necessarily hazardous or dangerous.

District of Columbia v. Moulton, 182 U. S. 581, 45 L. ed. 1237, 21 Sup. Ct. Rep. 840; *Allis v. Columbian University*, 8 Mackey, 270; *District of Columbia v. Ashton*, 14 App. D. C. 579.

The immediate cause of the plaintiff's accident in this case was the reckless speed with which, without looking, he approached the wagon, and not the existence of the carriage step alone.

Swart v. District of Columbia, 17 App. D. C. 412; *District of Columbia v. Brewer*, 7 App. D. C. 113. Reaffirmed in *Mosheuvel v. District of Columbia*, 17 App. D. C. 401; 60 L. R. A.

Quimby v. Filter, 62 N. J. L. 766, 42 Atl. 1051.

If one, in passing over a sidewalk, fails to exercise ordinary care, he is not entitled to recover.

Moore v. Richmond, 85 Va. 538, 8 S. E. 387; *Dubois v. Kingston*, 102 N. Y. 219, 55 Am. Rep. 804, 6 N. E. 273; *Robert v. Powell*, 168 N. Y. 415, 55 L. R. A. 775, 85 Am. St. Rep. 673, 61 N. E. 699; *Vincennes v. Thuis*, 28 Ind. App. 523, 63 N. E. 315; *District of Columbia v. Moulton*, 182 U. S. 582, 45 L. ed. 1237, 21 Sup. Ct. Rep. 840.

A stepping stone upon a sidewalk in front of a house, which does not interfere to an unreasonable extent with the use of the sidewalk, is not an unlawful obstruction, nor a nuisance, nor does it constitute negligence which will render a municipality liable to one who is injured by falling over it.

Howes v. District of Columbia, 2 App. D. C. 188; *Dubois v. Kingston*, 102 N. Y. 219, 55 Am. Rep. 804, 6 N. E. 273; *Robert v. Powell*, 168 N. Y. 414, 55 L. R. A. 775, 85 Am. St. Rep. 673, 61 N. E. 699; *Cincinnati v. Fleischer*, 63 Ohio St. 229, 58 N. E. 568; *Macomber v. Taunton*, 100 Mass. 255; *Rockford v. Tripp*, 83 Ill. 247, 25 Am. Rep. 381; *Tiesler v. Norwich*, 73 Conn. 199, 47 Atl. 161; *Vincennes v. Thuis*, 28 Ind. App. 523, 63 N. E. 315; *Canavan v. Oil City*, 183 Pa. 611, 38 Atl. 1096; *Horner v. Philadelphia*, 194 Pa. 542, 45 Atl. 330; *Cushing v. Boston*, 124 Mass. 434.

Alvey, Ch. J., delivered the opinion of the court:

This is an appeal from the supreme court of the District of Columbia. The action was brought by the appellant, Abraham Wolff, against the District of Columbia to recover damages suffered by the plaintiff, occasioned, as alleged, by what is contended to be a nuisance or an unlawful obstruction allowed to exist in C street N. W., in the city of Washington, by the defendant, the municipal corporation of the District of Columbia.

The cause of action, as set forth in the amended declaration of the plaintiff, is stated to be that the defendant, as a municipal corporation, was in duty bound to keep the sidewalks of the streets in the city of Washington free from obstruction, nuisances, or encumbrances, so as to be safe for all travelers thereon, including the plaintiff; and the breach of duty of the defendant, as alleged in the declaration, was, that the defendant wrongfully and negligently allowed "a certain large stone, several inches high above the surface of the sidewalk, usually termed a carriage step, to impede travel and encumber that part of said sidewalk which was opposite to and in front of a certain

house known as the Saengerbund Hall, between Third and Four-and-a-half streets on C street northwest," during the night of the 27th day of October, 1895, while said street was enveloped in darkness, without fixing any light or sign at or near said stone, and without placing any watchman or other person to warn plaintiff of its existence, position, and location, and without placing any guard or screen around said stone, by means of which the plaintiff stumbled and tripped against and fell over said stone and was injured, without any neglect on his part, and he claims \$25,000 damages.

The defendant pleaded the general-issue plea of not guilty, and the case was tried and resulted in a verdict and judgment for the defendant.

There was considerable proof taken at the trial, both as to the occurrence of the accident, and as reflecting upon the question of contributory negligence of the plaintiff, assuming that it might be shown that there was negligence on the part of defendant. But, in the view that we take of this case, the question of contributory negligence on the part of the plaintiff, in producing the injury complained of, is not an element in the case, and therefore is not a matter for consideration. The carriage block or step over which the plaintiff fell and injured himself is shown to have been of the ordinary size and character, a block of brown stone a little more than 2 feet long, about 15 inches wide, and about 8 inches high from the surface of the pavement, and occupied a position in or at the curb dividing the street from the sidewalk, immediately in front of the door of the Saengerbund building, No. 312 C street N. W., on the south side thereof; and that this block of stone or carriage step had been there from the time the building was erected, many years prior to the time of the accident, and without question by anyone. It was similar in size and character to the one set in the curb in front of the adjoining building, No. 314, and which had been used for many years, according to the testimony in the case. The plaintiff, in coming out of the Saengerbund building, by a quick and rapid gait, and intending to go to the vehicle awaiting him in the street in front of the door of the Saengerbund, stumbled over the carriage block at the curb, and was thrown down, and fractured his leg. He swears that he did not see the carriage block in his way, and that there was not sufficient light to enable him to detect his danger.

At the close of the evidence the court below, being of opinion that there was no case made out for the plaintiff, instructed the jury to render their verdict for the defendant, which was accordingly done, and the 69 L. R. A.

plaintiff excepted; and from the judgment the plaintiff has appealed.

The error assigned is, that the court below committed error in directing the verdict for the defendant.

It is contended by the plaintiff that the carriage block in question was an unlawful obstruction of the sidewalk, and consequently a public nuisance, and that, being so, it was the plain duty of the municipal authorities of the District to see that all sidewalks were kept free from obstruction of every kind and description; and §§ 222, 225, 226, 227, and 229 of the Revised Statutes relating to the District of Columbia are cited and relied on in support of the proposition.

By § 226, D. C. Rev. Stat., it is provided that "it shall be the duty of the chief of engineers, in charge of the public buildings and grounds, to cause obstructions of every kind to be removed from such streets, avenues, and sidewalks in the city of Washington as have been, or may be, improved, in whole or in part, by the United States, and to keep the same, at all times, free from obstructions." And by § 229 it is provided that, "if any person shall place any obstruction on the streets, avenues, or sidewalks so improved by the United States, such persons shall pay the costs of removing the same, and shall be subject to a penalty of \$10, to be recovered as other debts are recovered in said District, for each and every day the obstruction may remain after the chief of engineers shall have given notice for its removal."

Without stopping to inquire what duty these sections of the Revised Statutes imposed, if any, upon the commissioners of the District, the question here presented is, whether an ordinary carriage block or step, such as we have in this case, and such as has been in use from time immemorial, as an incident or appurtenant of convenience, if not of necessity, to places of business and residences in cities, constitutes an obstruction within the meaning of the sections of the statute quoted. It is clear, the provisions of the statute do not apply to many things that may, in a sense, be regarded as obstructions to the sidewalks of a city. They certainly do not apply to the shade trees growing along the sidewalks, nor to lamp posts, water hydrants, awning posts, telegraph or telephone poles, that we find everywhere, in the city, along the sidewalks. All these things may be regarded, in a particular sense, as obstructions, but they are not such within the meaning of the statute. They are objects allowed and authorized, by immemorial custom and usage, as being necessary to the health, convenience, protection, and enjoyment of the homes and lives of the inhabitants of the city. Where

these objects of convenience and comfort have been subject to proper regulation, as they always are and should be, they have never been regarded as nuisances, either public or private. And, in the case of a carriage step or block, it is of such reasonable convenience and such a necessary appurtenant to dwellings and places of business on the streets of a city that the right to maintain it, of a proper size and in a proper position, has seldom been attempted to be questioned. The legal existence of carriage steps or blocks was fully recognized in this city long before the occurrence of the accident, the subject of the present action, and they have been regulated by both the building and police regulations prescribed by municipal authority. Their legal existence has been explicitly recognized by this court in the case of *Hovcs v. District of Columbia*, 2 App. D. C. 188, and that case is in accordance with decisions of the highest authority elsewhere.

In the case of *Dubois v. Kingston*, 102 N. Y. 219, 55 Am. Rep. 804, 6 N. E. 273, it was the unanimous opinion of the court of appeals of New York that a stepping stone in the front of a public building, just inside the curb of the sidewalk, was not such an obstruction as would render a city liable for an injury sustained by a person falling over it, even though others had been previously injured by falling over the step. It appeared that the plaintiff was injured while running to a fire, which appeared to be in the direction of his own house, in the city of Kingston, by falling over a stepping stone lying in the sidewalk in one of the streets of the city. The stone was 3 feet 4 inches in length, 20 inches wide, and 14 inches high. It lay lengthwise with the curb and on the side thereof, in front of the building containing the postoffice, a music hall, and several stores. In the opinion, the court said: "Actions against municipal corporations for injuries sustained by individuals while using or passing along its streets are founded upon the ground of negligence of its officers in the performance of their official duties, and cannot be maintained without evidence showing that they have been derelict in this respect, by means of which the injury has been sustained. We think there was no such proof upon the trial of this action. The stepping stone over which the plaintiff fell and was injured was not of unusual size or of an improper construction, nor was it located at an improper place. It was placed in a position on the sidewalk most convenient for persons who should alight from a wagon or carriage or get into the same from the sidewalk, and thus it was a means of accommodation to those who had business at the postoffice, or

in the building in front of which it was located. It was not any more exposed than was essential for its proper and useful location." And in the conclusion of the opinion it was said: "It would be extending the rule of the liability of municipal corporations far greater than has yet been done in any decided case, to hold that they are liable for assenting to the placing of stepping stones on the edge of sidewalks in front of hotels, stores, public buildings, and private residences. The courts have gone quite far in holding such corporations to a very strict responsibility in reference to accidents caused by a failure of their officers to keep the streets and sidewalks in a proper and safe condition; but it would be adding to the corporate liability beyond reasonable limits to hold that stepping stones, which are almost a necessity in providing for the interest, comfort, and convenience of the public in the maintenance of walks, avenues, and streets, constitute a nuisance or obstruction, and that [municipal] corporations are liable for damages by reason of accidents caused thereby."

In the more recent case of *Robert v. Powell*, 168 N. Y. 414, 55 L. R. A. 775, 85 Am. St. Rep. 673, 61 N. E. 699, the same principle is very fully laid down. In this latter case the action was brought against the owner of the dwelling in front of which the carriage block was placed. It was held by the unanimous opinion of the court that the block, being of an ordinary size, and placed in the usual position at the curb, was not an unlawful obstruction of the sidewalk, and the plaintiff could not recover for injuries received by stumbling over the step. In that case, on the night of the accident, the plaintiff, while walking rapidly on Fifty-eighth street, crossed the street diagonally from the defendant's house, in order to take a cab, and stumbled over a stepping stone or carriage block maintained by the defendant in front of her residence. The stone over which the plaintiff fell was 18 inches high, 13 inches long, and 16 inches wide. In the opinion the court said: "The stepping stone in this case, located upon the sidewalk in front of a private house, was a reasonable and necessary use of the street, not only for the convenience of the owner of the house, but for other persons who desired to visit or enter the house for business or other lawful purpose. It did not interfere in the least with the use of the roadway or bed of the street; nor did it interfere to any appreciable or unreasonable extent with the use of the sidewalk. There were 8 feet of a clear, open space upon the sidewalk for the use of travelers, and the fact that the plaintiff, while hurrying in the nighttime to take a cab, stumbled over the stone,

when the place was well lighted and the object plainly visible, does not prove, or tend to prove, that the defendant was guilty of any wrong or breach of duty in maintaining the stepping stone in front of her house. It is true that the plaintiff was injured, but that was the result of an accident, due, possibly, to his own fault, but at all events not to any fault on the part of the defendant, or to any unlawful obstruction by the defendant of the street. The question involved in the case is, we think, well settled by authority. *Dubois v. Kingston*, 102 N. Y. 213, 55 Am. Rep. 804, 6 N. E. 273; *Dougherty v. Horseheads*, 159 N. Y. 154, 53 N. E. 799. While it is said that these cases involved only the question of liability on the part of a municipality for negligence, they also decided that the existence of objects of this character in the streets is lawful. If the city could not be held liable for permitting them to be there after notice, neither can the defendant be held liable for placing them there. The question involved in this class of cases is whether the object complained of is usual, reasonable, or necessary in the use of the street by the owner of the premises, or anyone else."

There are other courts than those of New York that have maintained the same principle. *Cincinnati v. Fleischer*, 63 Ohio St. 229, 58 N. E. 568; *Macomber v. Taunton*, 100 Mass. 255; *Cushing v. Boston*, 124 Mass. 434; *Horner v. Philadelphia*, 194 Pa. 542, 45 Atl. 330.

Upon general principle, as well as upon authority, we are clearly of opinion the carriage block or stepping stone in question was not an unlawful obstruction of the street or sidewalk, and that the defendant is not liable for the injury received by the

plaintiff in stumbling and falling over the stone.

But the plaintiff contends that, even conceding that the carriage block in question was not an unlawful obstruction, and did not constitute a public nuisance, yet the street in that particular section was defectively and insufficiently lighted, and, because of such defective and insufficient lighting of the street and sidewalk, the plaintiff ran against and stumbled over the block or stepping stone and was injured, and that the defendant corporation is liable for such injury, because of the neglect to properly light and keep lighted the street and sidewalk where the accident occurred. But, whatever insufficiency may have existed in the light upon the occasion of the accident (if any insufficiency did in fact exist), such an action as the present is not the remedy for the consequences of such defect. Money is annually appropriated by Congress for lighting the streets of the city; but whether such appropriation be sufficient or insufficient, the courts cannot determine: nor can they determine how the lights shall be distributed through the city; or how any particular street or section of a street shall be lighted,—whether by few or many lights, or whether by gas or electricity. These are matters that are confided exclusively to the judgment and discretion of the municipal authorities.

Finding no error in the ruling of the court below directing the verdict for the defendant, we must affirm the judgment, and it is so ordered.

Judgment affirmed.

Affirmed by Supreme Court of United States January 3, 1905.

GEORGIA SUPREME COURT.

Hattie H. MORRISON, *Plff. in Err.*,
v.

James L. DICKEY.

(..... Ga.)

"1. Mutual confidence being the foundation of the partnership relation, the mere fact that a member of a partnership is not the owner of property which he

has embarked in the partnership enterprise—the same belonging to a third person, who has consented that it may be so used for his benefit, but whose interest is not disclosed to the other member of the partnership—does not cause a partnership relation to arise between the other partner and the concealed principal of his copartner.

2. A partner may make an agreement with a third person for a division of the profits coming to him from the partnership enterprise, and, if the character of the agreement is such as to disclose the essentials necessary to a partnership, a subpartnership is thereby formed between the partner and the third person; but such person does not become a member of the first partnership, nor is he liable for the debts of that partnership.

3. Husband and wife may, in this state,

*Headnotes by COBB, J.

NOTE.—As to business partnership between husband and wife, see also, in this series, *Glickerson-Sloss Commission Co. v. Salinger*, 16 L. R. A. 526, and *note*; *Fuller & F. Co. v. McHenry*, 18 L. R. A. 512; *Vall v. Winterstein*, 18 L. R. A. 515; *Haggett v. Hurley*, 41 L. R. A. 362; and *Hocaglin v. Henderson*, 61 L. R. A. 756. 69 L. R. A.

lawfully transact business as copartners, and therefore there may be a subpartnership between a husband and wife in reference to the profits of a business in which the husband is a partner.

4. In a subpartnership of the character above referred to, where the members are husband and wife, a gift by the wife to the husband of a portion of her interest in the profits which the husband would derive from the first partnership is valid; and the use by him, or by his copartner, of such profits to discharge a debt of the husband would not render his partner liable to the wife on account of having used her money for the purpose of paying her husband's debt.
5. The verdict for the defendant was demanded by the evidence, and any errors that may have been made by the judge in his instructions to the jury did not require the granting of a new trial.

(March 7, 1905.)

ERROR to the City Court of Atlanta to review a judgment in favor of defendant in an action brought to recover money alleged to have been wrongfully appropriated by defendant to the payment of a debt of plaintiff's husband. *Affirmed.*

The facts are stated in the opinion.

Mr. W. R. Hammond, for plaintiff in error:

The debt was that of the husband, and his alone, both morally and legally; and plaintiff is absolutely disqualified by the statute from making any contract to assume it or pay it.

Code, § 2488.

The mere fact that Mr. Morrison was the agent of his wife in the conduct of her business, he being in possession of the property and the apparent owner, would not make Dickey her partner.

2 Lawson, Rights, Rem. & Pr. p. 1190, ¶ 635.

Partnership, as between the partners, is a contractual relationship, and cannot arise in any other way, though a liability as to third parties may arise, by estoppel, on the part of one who is not a partner.

Ibid.; Civil Code, § 2626. See also § 2629; *Huggins v. Huggins*, 117 Ga. 151, 43 S. E. 759.

The law of concealed agency, which makes the principal liable, when discovered, at the election of the other party, operates alone for the protection of the other party to the contract.

Williams v. Merle, 11 Wend. 80, 25 Am. Dec. 605; Ga. Civ. Code, §§ 3024, 3539; *Maddox v. Wilson*, 91 Ga. 40, 16 S. E. 213; *Rosser v. Darden*, 82 Ga. 219, 14 Am. St. Rep. 152, 7 S. E. 919.

The mere fact of the purchase of this machine by Morrison, even though it may have been intended for use in connection with

his wife's business, would not render her liable for it.

Blount v. Dugger, 115 Ga. 109, 41 S. E. 270.

Messrs. Felder & Rountree, for defendant in error:

It is not material that the contract of purchase was signed "J. L. Dickey, President, and J. J. Morrison." The partners were liable, at least *inter se*, for the debt.

Maddox v. Wilson, 91 Ga. 40, 16 S. E. 213; *Lenney v. Finley*, 118 Ga. 718, 45 S. E. 593.

Mrs. Morrison was originally liable for the debt. She was liable upon the principle of ratification and estoppel.

Code, §§ 2626, 5150; *Murray v. Walker*, 44 Ga. 58.

A party who has received the benefit of a contract made by a husband concerning property owned by the wife cannot resist performance on the ground of the wife's coverture and the absence of her statutory assent to the contract.

Texas & St. L. R. Co. v. Robards, 60 Tex. 545, 48 Am. Rep. 268; *Hathaway v. Payne*, 34 N. Y. 92; *Louisville, N. A. & C. R. Co. v. Flanagan*, 113 Ind. 488, 3 Am. St. Rep. 674, 14 N. E. 370.

The creation of a partnership by an agent without authority may be ratified and made valid by the principal, notwithstanding that intervening rights are thereby cut off, where such rights rest on an inferior equity to that of the principal.

Williams v. Butler, 35 Ill. 544.

Cobb, J., delivered the opinion of the court:

This was an action by Mrs. Morrison against Dickey to recover a sum of money which she alleged had been wrongfully appropriated by Dickey to the payment of her husband's debt. The jury found in favor of the defendant, and the plaintiff assigns error upon the overruling of her motion for a new trial.

Mrs. Morrison was the owner of a business which was conducted by her husband in his name. Her ownership was not disclosed to the world, nor was there anything to indicate to those who dealt with Morrison that he was not the owner of the business. Dickey, while ignorant of Mrs. Morrison's ownership, bought from Morrison a half interest in the business. This sale was made, if not with the approval, certainly without the disapproval, of Mrs. Morrison. Morrison and Dickey purchased a machine, which, if not necessary, was adapted to and useful in the business they were carrying on, and was actually used in that business. The contract for the purchase price was signed, not by the partnership, but by Mor-

and Dickey individually. Suit was brought upon this contract, and judgment obtained against Morrison and Dickey as individual joint promisors. Up to this point it seems that Dickey was still in ignorance of the fact that the business into which he had been admitted as a partner with Morrison was in reality the business of Morrison's wife, but this fact was subsequently disclosed to him. Dickey, having ascertained that Mrs. Morrison was the real owner of the business, negotiated with her for the purchase of her remaining one-half interest; and an agreement was reached by which Mrs. Morrison sold this interest to Dickey for the sum of \$2,500, \$1,000 of which was to be paid in cash. The stipulation in the contract with reference to the remaining \$1,500 was in the following words: "The balance of the amount, being fifteen hundred dollars, I hereby give and convey to him, my said husband, J. J. Morrison, for the affection I have for him, together with some compensation for his long service in it. Of course he can do as he pleases with that, provided I get one thousand dollars or its equivalent." Dickey assumed all debts and liabilities of the firm. Morrison agreed with Dickey that the \$1,500 above referred to should be left in the latter's hands, to be appropriated first to the payment of one half of the judgment against Dickey and Morrison above referred to, and the remainder, so far as necessary, to the payment of one half of the other debts of the firm. Dickey subsequently paid the balance due on the judgment, and it is claimed by Mrs. Morrison that this payment was made from the proceeds of the business in which her money had been placed by her husband, and therefore that one half of this money paid on this judgment was hers, and should have been paid to her, and the payment of it by Dickey on her husband's debt was illegal, and she was entitled to recover the amount from him; it being also claimed that the arrangement by which \$1,500 of the purchase money of her remaining interest in the business should be left in the hands of her husband, and the subsequent arrangement between Dickey and her husband that this sum should be appropriated in part to the payment of the judgment, was merely a scheme or device to use her money for the purpose of paying her husband's debt. No partnership relation existed between Mrs. Morrison and Dickey prior to the time that he knew that the business was owned by her. The partnership up to that time was one composed of Dickey and Morrison. The relation created by a partnership agreement is one founded so essentially upon mutual confidence that there can be no such thing in the law as a partnership between persons

unless the persons are known to each other, and each has an opportunity to determine whether that relation shall be formed between them. Partnership is founded upon agreement and consent, and there can be no consent to the formation of a partnership with a person who is not known. 1 Bates, Partn. § 158; 22 Am. & Eng. Enc. Law, 2d ed. p. 15. The relation which existed between Morrison and his wife after Dickey had been admitted as a partner into the business carried on by Morrison was in the nature of a subpartnership, which made Morrison and his wife partners as between themselves; and as such they assumed all of the responsibilities that would be incident to a partnership created between two persons, where one furnished the capital, and the other the skill and labor, necessary in carrying out the enterprise. 1 Bates, Partn. §§ 164, 169. How profits between themselves as members of this subpartnership would be divided would be immaterial, and therefore the mere fact that Mrs. Morrison was to receive the entire profits of the business thus carried on in her husband's name for her benefit would not deprive the business relationship between them of the essential elements of a subpartnership. It is now the settled law of this state that husband and wife may lawfully engage in business as partners. *Ellis v. Mills*, 99 Ga. 490, 27 S. E. 740. But this relation existing between Morrison and his wife as to each other would not make the wife a partner in the business carried on by Dickey and Morrison, nor would she be liable for the debts of that partnership; but she would be liable for any debts which might be considered as debts of the subpartnership existing between herself and her husband. 1 Bates, Partn. §§ 168, 169; 22 Am. & Eng. Enc. Law, 2d ed. p. 17. Mrs. Morrison therefore could not have been held bound on the contract for the purchase of the machine above referred to, as this purchase was made before the fact of her interest in the business came to the knowledge of Dickey, and therefore before there could have been, in law, any partnership relation existing between them. But Morrison was bound, not only by virtue of the partnership relation existing between himself and Dickey, but by the express terms of the contract itself. When Dickey discovered that Mrs. Morrison was the real owner of the business which he had formerly carried on as a partner of her husband, he had a right to deal with her as such owner, by either admitting her into the partnership, or by purchasing from her her interest therein. The contract, therefore, between Dickey and Mrs. Morrison, by which he purchased her remaining one-half interest in the business, was valid and lawful, and after

this purchase he became the owner of the entire business. It was lawful for him to pay her \$1,000, and agree to pay her \$1,500 in the future, and it was also lawful for her to make a gift of the latter amount to her husband. This is the legal effect of the contract upon its face, and, if the gift became complete, it was immaterial for what purposes her husband used the money which was the subject of the gift. He might use it for the purpose of paying his debts, and the subsequent agreement between him and Dickey that a portion of the money given to him should be applied by Dickey to the judgment against Morrison and himself was a transaction free from legal infirmity. Morrison would then be paying his own debt with his own money, and not with the money of his wife. In addition to this, while Mrs. Morrison was not at all bound by the judgment against Morrison and Dickey, and not in any way liable upon the contract which was the foundation of that judgment, this liability of Morrison and Dickey was one of the liabilities of the partnership between them; and, when Mrs. Morrison saw fit to disclose her ownership of the business, and Dickey saw proper to recognize her as a partner, she then took her position for the first time as a partner in the business with Dickey, and she then became liable, upon an accounting as to the affairs of the partnership, to account to her partner for all claims or demands which, as between the partners, would be lawful charges against the partnership business; and, if the partnership had gone into liquidation, there would have been, in an accounting between the partners, no legal obstacle in the way of Dickey insisting that the money expended for the machine should be treated, as between him and Mrs. Morrison, as a liability of the firm, and one for which she should account for one half. This is true notwithstanding the fact that at the time the machine was purchased, when her ownership of the business was not known to Dickey, she gave her husband special instructions not to purchase the machine; it appearing that the machine was actually purchased and used in carrying on the business of the partnership. Take still another view of the matter. The subpartnership, or relation in the nature thereof, existing between Mrs. Morrison and her husband, rendered her liable to account to her husband for all legitimate and necessary expenses incurred in realizing, or attempting to realize, profits from the partnership between him and Dickey; and, if the purchase of the machine was necessary or proper for the conduct of the business, and was actually used in the business, before Mrs. Morrison could demand from her husband the profits of the 69 L. R. A.

business she would have to account to him for the amount for which he rendered himself liable on account of such purchase. Her protest against its purchase would not avail her as an excuse for not so accounting, if the profits claimed by her were the result of the business in which the machine had been actually used.

So that it seems to us that, under any view of the law and facts of the case, no other legal judgment could have been rendered than one in favor of the defendant. There is nothing in the case to authorize a finding that the transaction was a mere scheme or device to use Mrs. Morrison's money for the purpose of paying her husband's debt. It was either the use of her money to pay a liability which Dickey would have a right to claim against her when she admitted her ownership, and accepted position as a partner with him, or it was a payment by Morrison of his debt with his money, title to which he had derived by a voluntary gift from his wife, or the payment of a sum which Mrs. Morrison would have been bound to pay in an accounting with her husband. While the instructions of the judge are not at all in accord with some of the principles above laid down, still, under the undisputed facts of the case, the verdict for the defendants was demanded, and any errors committed in charging the jury were harmless.

Judgment affirmed.

All the Justices concur.

EMPLOYING PRINTERS' CLUB *et al.*,
Plffs. in Err.,
v.

DOCTOR BLOSSER COMPANY.

(..... Ga.)

- *1. A combination of two or more persons to injure one in his trade by inducing his employees to break their contract with him, or to decline to longer continue in his employment, is, if it results in damage, actionable.
- *2. A former member of an illegal combination, whose connection with it was severed before the filing of the suit, will not be denied the protection of a court of equity

*Headnotes by EVANS, J.

NOTE.—As to conspiracy by trade union to procure discharge of nonunion men, see, in this series, *Flaccus v. Smith*, 54 L. R. A. 640, and *Erdman v. Mitchell*, 63 L. R. A. 534.

As to boycott or conspiracies by trade unions or strikers generally, see *Casey v. Cincinnati Typographical Union*, No. 3, 12 L. R. A. 193, and *note*; *Toledo, A. A. & N. M. R. Co. v. Penn-*

against an illegal act of such combination because of his previous connection therewith.

3. **The malicious procurement of a breach of contract** of employment resulting in damage, where the procurement was during the subsistence of the contract, is an actionable wrong.

4. **A court of equity will interpose by injunction** to prevent the several members of an illegal combination from enforcing an illegal agreement to the hurt and injury of one engaged in competitive business.

(March 25, 1905.)

ERROR to the Superior Court for Fulton County to review a judgment in favor of plaintiff in an action brought to enjoin defendants from interfering with plaintiff's employees. *Affirmed*.

The facts are stated in the opinion.

Messrs. Smith & Wright, for plaintiffs in error:

Where parties are concerned in illegal agreements or transactions, whether they are *mala prohibita*, or *mala in se*, courts of equity, following the rule of law as to participation in crime, will not grant relief to either party in accordance with the maxim, *in pari delicto*, etc.

Harrington v. Bigelow, 11 Paige, 349; *Warburton v. Aken*, 1 McLean, 460, Fed. Cas. No. 17,143; *Atwood v. Fisk*, 101 Mass. 363, 100 Am. Dec. 124; *Swartz v. Gillett*, 1 Chand. (Wis.) 207; *Davies v. London & Provincial Marine Ins. Co. L. R. 8 Ch. Div. 469*; *Bromley v. Smith*, 2 Hill, 517; *Vanduyck v. Hewitt*, 1 East, 96; *Hewson v. Hancock*, 8 T. R. 575.

When the scheme is *malum in se*, and the parties to it are *in pari delicto*, the law refuses to aid either of them against the other, but leaves them where they have placed themselves by their own act.

Thomas v. Richmond, 12 Wall. 349, 20 L. ed. 453; *Smith v. Hubbs*, 10 Me. 71; *Schermerhorn v. Talman*, 14 N. Y. 94; *Knowlton v. Congress & E. Spring Co.* 57 N. Y. 518; *Vellis v. Clark*, 20 Wend. 24; *Smith, Contr.* 3d Am. ed. 187; *Burt v. Place*, 6 Cow. 431; *LeWarne v. Meyer*, 38 Fed. 191; *Keel v. Larkin*, 83 Ala. 146, 3 Am. St. Rep. 702, 3 So. 296.

Blosser is bound, as a member of the club, by its rules; and he is bound by the decision on complaint. He is also bound to

have the remedy of arbitration exhausted before appealing to the law.

National Protective Asso. v. Cumming, 170 N. Y. 321, 58 L. R. A. 135, 88 Am. St. Rep. 648, 63 N. E. 309; *Parks v. Andrews*, 56 Hun, 393, 10 N. Y. Supp. 344.

The plaintiffs in error and the labor unions had a legal right to agree and act in harmony with each other, and they had a perfect right to make it a part of this agreement, and stipulate that the members of the unions should not work for any printer in Atlanta except the parties to this agreement.

Willis v. Muscogee Mfg. Co. 120 Ga. 597, 48 S. E. 177; *National Protective Asso. v. Cumming*, 170 N. Y. 321, 58 L. R. A. 135, 88 Am. St. Rep. 648, 63 N. E. 369.

Messrs. Kontz & Austin and Howard Van Epps, for defendant in error:

The case discloses an illegal combination conducting its operations squarely in the teeth of the law.

Brown v. Jacobs' Pharmacy Co. 115 Ga. 429, 57 L. R. A. 547, 90 Am. St. Rep. 126, 41 S. E. 553; *Walker v. Cronin*, 107 Mass. 555.

Defendant in error was not *in pari delicto*.

Whenever the plaintiff can make out his case without invoking the illegal contract to his aid, he is entitled to recover.

Equitable Loan & Secur. Co. v. Waring, 117 Ga. 633, 62 L. R. A. 93, 97 Am. St. Rep. 177, 44 S. E. 320; Civil Code. § 3937; *Ingram v. Mitchell*, 30 Ga. 547; *Clarke v. Brown*, 77 Ga. 606, 4 Am. St. Rep. 98; *Holleman v. Bradley Fertilizer Co.* 106 Ga. 163, 32 S. E. 83; *Raleigh & G. R. Co. v. Swanson*, 102 Ga. 761, 39 L. R. A. 275, 28 S. E. 601.

The club could not enforce against defendant in error the rules and regulations of its illegal constitution and by-laws.

Ertz v. Produce Exchange, 82 Minn. 173, 51 L. R. A. 825, 83 Am. St. Rep. 419, 84 N. W. 743; *Martell v. White*, 185 Mass. 255, 64 L. R. A. 260, 102 Am. St. Rep. 341, 69 N. E. 1085; *Boutwell v. Marr*, 71 Vt. 1, 43 L. R. A. 803, 76 Am. St. Rep. 746, 42 Atl. 607.

If one maliciously interferes in a contract between two parties, and induces one of them to break that contract, to the injury

Pennsylvania Co. 19 L. R. A. 395; *Toledo, A. A. & N. M. R. Co. v. Pennsylvania Co.* 19 L. R. A. 387; *Waterhouse v. Comer*, 19 L. R. A. 403; *Our D'Alene Consol. Min. Co. v. Miners' Union*, 19 L. R. A. 382; *Lucke v. Clothing Cutters' & T. Assembly No. 7,507 K. of L.* 19 L. R. A. 408; *Macaulay Bros. v. Tierney*, 37 L. R. A. 455; *Beck v. Railway Teamsters' Protective Union*, 42 L. R. A. 407; *Marx Hass J. Clothing Co. v. Watson*, 56 L. R. A. 951; and 59 L. R. A.

Gray v. Building Trades Council, 63 L. R. A. 753.

As to liability for inducing breach of contract generally, see, in this series, *Boysen v. Thorn*, 21 L. R. A. 233, and *note*; *Raycroft v. Tayntor*, 33 L. R. A. 225; *Gore v. Condon*, 40 L. R. A. 382; *Doremus v. Hennessy*, 43 L. R. A. 797; *West Virginia Transp. Co. v. Standard Oil Co.* 56 L. R. A. 804; and *Raymond v. Yarrington*, 62 L. R. A. 962.

of the other, the party injured can maintain an action against the wrongdoer.

Angle v. Chicago, St. P. M. & O. R. Co. 151 U. S. 13, 38 L. ed. 62, 14 Sup. Ct. Rep. 240; *Lumley v. Gye*, 2 El. & Bl. 216; Bigelow, Torts, 1st ed. p. 108; *Jones v. Blocker*, 43 Ga. 331; *Salter v. Howard*, 43 Ga. 601; *Smith v. Goodman*, 75 Ga. 198; *Bixby v. Dunlap*, 56 N. H. 456, 22 Am. Rep. 475; *Huff v. Watkins*, 15 S. C. 82, 40 Am. Rep. 680; *Daniel v. Swarengen*, 6 S. C. N. S. 297, 24 Am. Rep. 471; *Haskins v. Royster*, 70 N. C. 601, 16 Am. Rep. 780; *Hewitt v. Ontario Copper Lightning Rod Co.* 44 U. C. Q. B. 287.

It is only necessary that the relation of master and servant exist. It matters not whether the contract is valid or not, or whether the employee is employed at will or for a definite period of time.

16 Am. & Eng. Enc. Law, pp. 1111, note 8, 1114, note 8; Webb's Pollock, Torts, Am. ed. pp. 278, 279; *Gunter v. Astor*, 4 J. B. Moore, 12, 21 Revised Rep. 733; *Moran v. Dunphy*, 177 Mass. 485, 52 L. R. A. 115, 83 Am. St. Rep. 289, 59 N. E. 125; *Noice v. Brown*, 39 N. J. L. 569; *Haskins v. Royster*, 70 N. C. 611, 16 Am. Rep. 780; *Chiple v. Atkinson*, 23 Fla. 206, 11 Am. St. Rep. 367, 1 So. 934; *Salter v. Howard*, 43 Ga. 601; *Walker v. Cronin*, 107 Mass. 555; *Benton v. Pratt*, 2 Wend. 385, 20 Am. Dec. 623.

Lumley v. Gye is now the law of England.

Quinn v. Leathem [1901] A. C. 495; *Read v. Friendly Soc.* [1902] 2 K. B. 738; *Bowen v. Hall*, L. R. 6 Q. B. Div. 333.

The doctrine is generally recognized in America.

Ames, Lead. Cas. on Torts, pp. 608, 612; *Heaton Peninsular Button-Fastener Co. v. Dick*, 55 Fed. 23, 52 Fed. 667; *Lally v. Cantwell*, 30 Mo. App. 524.

As respects enticing away servants, the authorities all seem to agree that a right of action lies.

Read v. Friendly Soc. [1902] 2 K. B. 732; *Temperton v. Russell* [1893] 1 Q. B. 715; *Bowen v. Hall*, L. R. 6 Q. B. Div. 333; *Angle v. Chicago, St. P. M. & O. R. Co.* 151 U. S. 1, 38 L. ed. 55, 14 Sup. Ct. Rep. 240; *Moran v. Dunphy*, 177 Mass. 485, 52 L. R. A. 115, 83 Am. St. Rep. 289, 59 N. E. 125; *Carew v. Rutherford*, 106 Mass. 1, 8 Am. Rep. 287; *Plant v. Woods*, 176 Mass. 492, 51 L. R. A. 339, 79 Am. St. Rep. 330, 57 N. E. 1011; *Doremus v. Hennessy*, 176 Ill. 608, 43 L. R. A. 797, 68 Am. St. Rep. 203, 52 N. E. 924, 54 N. E. 524; *Chiple v. Atkinson*, 23 Fla. 206, 11 Am. St. Rep. 367, 1 So. 934; *Old Dominion S. S. Co. v. McKenna*, 30 Fed. 48; *Walker v. Cronin*, 107 Mass. 555; *Rogers v. Evarts*, 17 N. Y. Supp. 264; *State v. Stewart*, 59 Vt. 273, 59 Am. Rep. 710, 69 L. R. A.

9 Atl. 559; *Curran v. Galen*, 2 Misc. 553, 22 N. Y. Supp. 826; *Sherry v. Perkins*, 147 Mass. 212, 9 Am. St. Rep. 689, 17 N. E. 307; *Van Horn v. Van Horn*, 52 N. J. L. 284, 10 L. R. A. 184, 20 Atl. 485; *Hopkins v. Oxley Stave Co.* 28 C. C. A. 99, 49 U. S. App. 709, 83 Fed. 912; *State v. Glidden*, 55 Conn. 46, 3 Am. St. Rep. 23, 8 Atl. 890; *Delz v. Winfree*, 80 Tex. 400, 26 Am. St. Rep. 755, 16 S. W. 111; *Thomas v. Cincinnati, N. O. & T. P. R. Co.* 4 Inters. Com. Rep. 788, 62 Fed. 803; *Crump v. Com.* 84 Va. 927, 10 Am. St. Rep. 895, 6 S. E. 620.

Conspiracies to induce the business of another by inducing employees or others under contract to quit work and break contracts, and by otherwise maliciously interfering, are unlawful and actionable.

Toledo, A. A. & N. M. R. Co. v. Pennsylvania Co. 19 L. R. A. 387, 5 Inters. Com. Rep. 522, 54 Fed. 730; *Murray v. McGarrigle*, 69 Wis. 483, 34 N. W. 522; *Barr v. Essex Trades Council*, 53 N. J. Eq. 101, 30 Atl. 881; *State v. Dyer*, 67 Vt. 690, 32 Atl. 814; *Cour D'Alene Consol. Min. Co. v. Miners' Union*, 19 L. R. A. 382, 51 Fed. 260; *O'Neil v. Behanna*, 182 Pa. 236, 38 L. R. A. 382, 61 Am. St. Rep. 702, 37 Atl. 843; *Jones v. Stanly*, 76 N. C. 355; *Re Debs*, 158 U. S. 564, 39 L. ed. 1092, 15 Sup. Ct. Rep. 900; *Boyson v. Thorn*, 21 L. R. A. 233, note, 98 Cal. 578, 33 Pac. 492; *Wabash R. Co. v. Hannan*, 56 Cent. L. J. 314, note; *Walsh v. Master Plumbers' Assn.* (Mo.) 56 Cent. L. J. 253, note; 1 Jaggard, Torts, §§ 204-207; 2 Addison, Torts, pp. 739 et seq.

Contracts in restraint of competition and trade are void and against the policy of this state.

Brown v. Jacobs' Pharmacy Co. 115 Ga. 429, 57 L. R. A. 547, 90 Am. St. Rep. 126, 41 S. E. 553; *Rakestraw v. Lanier*, 104 Ga. 188, 69 Am. St. Rep. 154, 30 S. E. 735; *Atlanta v. Stein*, 111 Ga. 789, 51 L. R. A. 335, 36 S. E. 932; *United States v. Addyston Pipe & Steel Co.* 46 L. R. A. 122, 29 C. C. A. 141, 54 U. S. App. 723, 85 Fed. 271; *Bailey v. Master Plumbers' Assn.* 102 Tenn. 99, 46 L. R. A. 561, 52 S. W. 853; *People v. Sheldon*, 139 N. Y. 251, 23 L. R. A. 221, 36 Am. St. Rep. 690, 34 N. E. 785; *Anti-monopoly Legislation from the Days of Elizabeth to the Anti-Trust Act of 1890*, 55 Cent. L. J. 144; *United States v. Northern Securities Co.* 120 Fed. 721; *Jackson v. Stanfield*, 137 Ind. 592, 23 L. R. A. 588, 36 N. E. 345, 37 N. E. 14; *Gregory v. Brunswick*, 6 Mann. & G. 205.

Any combination the object of which is to attempt by force, or threats, or intimidation, to control an employer in the determination as to whom he will employ or the wages he will pay is an unlawful conspiracy.

Eddy, Combinations, p. 506: *Brown v. Jacobs' Pharmacy Co.* 115 Ga. 429, 57 L. R. A. 547, 90 Am. St. Rep. 126, 41 S. E. 553.

Evans, J., delivered the opinion of the court:

The Doctor Blosser Company, a corporation, brought an action against a number of printing concerns using the club or trade name of the "Employing Printers' Club of Atlanta," and composed of individuals, firms, and corporations engaged in the book and job printing trade in the city of Atlanta, and whose names are set out in the record, asking an injunction and praying damages. The court granted the injunction, and exception is taken to this order. On the interlocutory hearing the defendants urged by demurrer the insufficiency of the facts pleaded to authorize the relief prayed. Notwithstanding the demurrer admitted the truth of all the facts which were well-pleaded, the plaintiff submitted proof tending to sustain all the essential allegations.

1-3. The complaint is that the defendants formed a combination among the employing printers to control and fix the price of printing done in the city of Atlanta, and, because the plaintiff refused to affiliate with the combination, they wrongfully interfered with the plaintiff's business, and maliciously induced its employees to break their contracts with it, and refuse to continue in its employment, to its injury and damage. A combination of individuals engaged in a particular line of business to compel one engaged in a similar business to sell his product at prices fixed by it is contrary to public policy, and void; and the members of such a combination, individually, and collectively, may, by appropriate injunction, be restrained from wrongfully interfering with the business of the one who is not a member of the combination. This principle is laid down in the well-considered case of *Brown v. Jacobs' Pharmacy Co.* 115 Ga. 429, 57 L. R. A. 547, 90 Am. St. Rep. 126, 41 S. E. 553, is supported both by reason and authority, and its application to the case in hand is readily apparent.

The facts alleged in the petition were as follows: The plaintiff was engaged in the city of Atlanta in the general business of a printer for the public, enjoying a large trade and doing a prosperous business. The defendants were also engaged in the printing business, and formed a combination or trust, called the "Employing Printers' Club of Atlanta, Georgia." This combination embraced nearly the entire printing and publishing fraternity of Atlanta except the newspapers, and its organization was "for the single and sole purpose of restraining trade, of absolutely defeating and destroying competition

among bidders for printing of any sort to be done in the city of Atlanta, and for maintaining an arbitrary and extortionate scale of prices upon any contracts that might be received for work done in the city." This combination or club had a written constitution and by-laws, a copy of which was appended to the petition. Among the objects of the club, as recited in its constitution, were "the maintenance of legitimate prices, the suppression of undue rivalry, and mutual protection from abuses or infringement upon our rights by others." The rules provided for a fixed minimum scale of prices, that no member should give any rebate or concession to a customer, and for a uniform discount only to other members of the association. Rule 8 was: "Never give customer an itemized estimate." The scheme of the defendants, who confederated under the name of the "Employing Printers' Club," was as follows: If a customer desiring to have printing or publishing done made application for a bid to any one of the members constituting the club, it was the understanding and agreement among all of the members thereof that the printer receiving the bid for work should name the price for which he was willing to undertake it, and thereupon should list the application, the name of the customer, and the proposition for doing the work, giving a complete description of the job to a manager appointed for that very purpose, and salaried by the members of the combination; and they in turn were bound severally to each other that, if they were also invited to make competitive bids, they would fix the price for such equal to or higher than that proposed by the first printer receiving the application and listing the bid. It was alleged that the combination enforced a rule between themselves, establishing a systematic way of handling the public printing for the city of Atlanta, under the operation of which each printer was to have his turn; the manager to keep track of this branch of the business, and notify the different members, when the city of Atlanta asked for bids, whose turn it was to do the work. They were to make the price and add 10 per cent, and charge the city, not only the fixed, arbitrary price, but also the additional 10 per cent on the fixed price. It was alleged that a committee from the Employing Printers' Club, who also represented the defendants, as members of the club, waited on the plaintiff, and advised its officers that it could not continue to employ union labor in its shop unless it became a member of the club. Plaintiff inquired of the committee the purpose and scope of the club, and was informed that it was a secret institution, and that it was necessary to become a member before

its secrets could be imparted. To prevent being deprived of union labor, which was the only labor obtainable, and ignorant of the real purposes of the club, the plaintiff became a member thereof. About October 1, 1901, plaintiff made a contract with the managers of the Wesleyan Christian Advocate to publish that periodical, and was proceeding to execute the contract, when it was notified by the Employing Printers' Club that it had violated the rules of the club in accepting such contract, and was fined \$468 for taking the contract. The club decided that the right to print that periodical belonged to the Foote & Davies Company, one of the defendants, and that the plaintiff should not have underbid that company. In addition to imposing the fine, the club ruled that at the end of the year 1902 the publication price of the Advocate for the year 1903 should be fixed by the Foote & Davies Company. The plaintiff was dissatisfied with this ruling, and resigned its membership in the club, whereupon plaintiff was notified by a committee from the club that, unless it paid the fine and came back into the club, all union labor would be called out of its shop. The plaintiff, persisting in its refusal to resume relationship with the club, was assured by a committee from the club that it had been reorganized on a legal basis. Upon this assurance the plaintiff resumed its membership in the club, and the fine was reduced to \$125. The major part of this fine was paid, and plaintiff resumed its membership because of the threat to call out the union labor from its shop, and to avoid the damages incident to the loss of this class of labor. In October, 1902, the Wesleyan Christian Advocate's managers applied to the plaintiff to print that paper during the year 1903, stating that they were aware of the existence of the printers' combination, but before they would pay more than they were paying they would withdraw their work from Atlanta, and place it elsewhere. Thereupon the plaintiff made them a bid which afforded a reasonable net profit on the proposed work. The Employing Printers' Club then met and sat in judgment on the plaintiff's action in taking the contract for the second time for the publication of this periodical, and adjudged that the plaintiff pay the Foote & Davies Company \$300 in cash to partly reimburse it for the loss of the profit on the publication of the Wesleyan Christian Advocate, and that the naming of the price for the publishing of this periodical "revert irrevocably" to the Foote & Davies Company at the expiration of the present contract. Several attempts were made to induce the plaintiff to comply with this edict, and it was threatened that, if it did not comply,

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the club would cause all union labor to leave its employment. The plaintiff refused to comply with the club's demand, and declined to affiliate longer with the club as a member, notifying it of this resolve. Then the club caused the pressmen, feeders, printers, and binders employed by the plaintiff to quit work, thereby shutting down the plaintiff's establishment, and rendering it impossible for it to conduct its business, or to execute existing contracts, or to undertake further employment in the line of its trade. Actual damages were alleged to have been sustained by the plaintiff in the sum of \$10,000. On the interlocutory hearing it appeared that some of the employees returned to the work, and that their respective unions refused to call a strike in the plaintiff's shop. The defendants then threatened that, unless the unions would call out its labor from the plaintiff's shop they would no longer observe the union regulations. In pursuance of this threat, some of the defendants had posted their respective businesses as "open shops," and the plaintiff's petition was filed at this juncture of affairs.

There can be no doubt that the facts alleged in the petition, if true (and the demurrer admits their truth), establish, not only a conspiracy to fix and control the price of printing in the city of Atlanta, but also a malicious interference with the business of the plaintiff. The scope and purpose of the Employing Printers' Club was to create a monopoly and stifle competition in the printing business. A mere agreement to do wrong is not actionable; but when the parties to such agreement do an overt act in furtherance of the illegal combination, resulting in injury to a third person, the conspiracy becomes actionable, and the conspirators are liable to the injured party for damages proximately flowing from their illegal conduct.

It is contended by the plaintiffs in error that, conceding that the combination among the defendants was an illegal one, the plaintiff in the court below was a party to it, and cannot be heard to complain in a court of equity. It is true that at one time the plaintiff was a member of the trust, but, when the trust essayed to discipline it, it repudiated the club, and informed its officers that it would no longer affiliate with the club. It was then that the club was proceeding to punish it by calling out its employees. The maxim that one must come into a court of equity with clean hands means that he must do equity as respects the defendant's rights in the particular matter of the suit. 1 Pom. Eq. Jur. § 397. "The rule that a complainant must come into equity with clean hands does not go so far as to prohibit a court of equity from

giving its aid to a bad or a faithless man. The dirt upon his hands must be his bad conduct in the transaction complained of. All complainants in equity are human beings, full of faults and sin, and I doubt if there is one case in ten in which the complainant is not somewhat to blame. If the complainant does equity himself, or offers to do it (except in those cases where the rule *in pari delicto*, etc., comes in), his hands are as clean as the court can require." *Ansley v. Wilson*, 50 Ga. 421. The plaintiff is not seeking to obtain any relief by virtue of his former connection with the club, and is not, therefore, *in pari delicto* with the defendants relatively to the cause of action which it brings against them. Its connection with the club ceased before filing the suit, and it has repudiated the club as an unholy alliance. Even in criminal law the *locus penitentiae* is recognized. The aggressor may repent, and abandon his felonious enterprise, and place himself in a position where he may rightfully invoke the law of self-defense in a subsequent occurrence. Besides, an unlawful combination in restraint of trade is a wrong to the public, as well as to the injured individual. If a man confederates with a burglar to break and enter a house, but abandons the criminal project, his agreement to join in the burglary will not justify an infliction of an injury upon his person by the burglar, and deprive him of his right of self-defense, merely because of the prior agreement to do a criminal act and the abandonment of his unlawful intention.

Independently of the conspiracy, the petition states a case of malicious interference with the plaintiff's contract of employment with its employees. At common law the remedies for breach of contract were confined to the contracting parties, and limited to direct damages and consequential damages proximately resulting from the act of him who is sued. This general rule admitted of one exception, and that was the right of action against a stranger for wrongfully enticing away a servant in violation of his contract of service with his master. The exception is said to have been based on the ancient statute of laborers. The early English cases limited the action to the enticement of menial servants, but the later cases, beginning with *Lumley v. Gye*, 2 El. & Bl. 216, have extended the doctrine beyond menial servants; and by the modern interpretation of this doctrine by the English courts the rule is extended to a malicious interference with any contract. A brief reference to a few English cases will serve to present the evolution and extension of 69 L. R. A.

the old common-law doctrine of malicious interference with a contract. *Lumley v. Gye*, 2 El. & Bl. 216, was a suit for the malicious procuring of an opera singer, who had agreed with the plaintiff to perform and sing at his theater, and nowhere else, for a certain time, to break her contract, and not perform or sing at the plaintiff's theater during the time for which she was engaged. It was there held that an action would lie for maliciously procuring a breach of contract to give exclusive personal service, provided the procurement was during the subsistence of the contract and produced damage; and that to sustain such an action it was not necessary that the employer and employee should stand in the strict relation of master and servant. The opinion was by a divided court. The majority of the judges were inclined to the opinion that an action would lie for the malicious procurement of the breach of any contract, though not for personal services, if by the procurement damage was intended to result, and did result, to the plaintiff. This case was followed in *Bowen v. Hall*, L. R. 6 Q. B. Div. 333. In 1893 the same question was before the court of appeal of the Queen's bench division (*Temperton v. Russell* [1893] 1 Q. B. Div. 715), and the cases of *Lumley v. Gye* and *Bowen v. Hall* were examined and approved; and these cases were there said to rest upon the principle that to maliciously procure a person to break a contractual relation, which all are bound by law to respect, is actionable; and that a right of action for maliciously procuring a breach of contract is not confined to contracts of personal service. By many it was thought that the House of Lord's case of *Allen v. Flood* [1898] A. C. 1, conflicted with the doctrine announced in *Temperton v. Russell*, or at least materially curtailed its scope. But in the later case of *Quinn v. Leatham* [1901] A. C. 495, both cases—*Temperton v. Russell* and *Allen v. Flood*—were elaborately reviewed and analyzed; and, after stating the scope and effect of the latter case, it was ruled that "a combination of two or more, without justification or excuse, to injure a man in his trade, by inducing his customers or servants to break their contracts with him, or not to deal with him or continue in his employment, is, if it results in damage to him, actionable." The Supreme Court of the United States approvingly cited the English cases of *Lumley v. Gye* and *Bowen v. Hall*, and reached the conclusion that, if one maliciously interferes with a contract to the injury of the other, the party injured may maintain an action against the wrongdoer.

Angle v. Chicago, St. P. M. & O. R. Co. 151 U. S. 1, 38 L. ed. 55, 14 Sup. Ct. Rep. 240. Though this rule is not universal in all the courts of last resort of our sister states, it is believed to have been followed in most of them. In the carefully prepared opinion in *Walker v. Cronin*, 107 Mass. 555, the court decided that a manufacturer is entitled to maintain an action against a third person, who, with the unlawful purpose of preventing him from carrying on his business, willfully induced many of his employees to leave his employment, whereby the manufacturer lost their services, and the profits and advantages which he would have derived therefrom. See also *Moran v. Dunphy*, 177 Mass. 485, 52 L. R. A. 115, 83 Am. St. Rep. 289, 59 N. E. 125. And the supreme court of North Carolina held in two cases (*Haskins v. Royster*, 70 N. C. 601, 16 Am. Rep. 780; *Jones v. Stanly*, 76 N. C. 355) that, if a person maliciously entices laborers or croppers to break their contract with their employer and desert his service, the employer may recover damages against such person.

In this state it has been held that when one man employs a laborer to work on his farm, and another man, knowing of such contract of employment, entices, hires, or persuades the laborer to leave the service of the first employer during the time for which he was so employed, the law gives to the party injured a right of action to recover damages. *Salter v. Howard*, 43 Ga. 601. From the reasoning of McCay, J., in *Barron v. Collins*, 49 Ga. 580, it would appear that he was inclined to the opinion that an action for the malicious breach of contract was limited to cases of servants. The declaration in that case alleged that A, having contracted with one Charles Barron that he, the said Charles, should furnish himself and his two daughters and one George Barron to work as laborers on the plaintiff's land for the year 1872, the plaintiff to furnish the land and mules, and the said Charles to receive one third and plaintiff two thirds of the crop, and that the defendant, knowing the said contract had not been abandoned, but still existed, employed the said Charles, his two daughters, and the said George to work for him for the year 1872. It was held on demurrer that no good cause of action was set forth. In the opinion it was said that the gist of the action was enticing away plaintiff's servants; and that the contract between the plaintiff and Charles Barron did not create the relation of master and servant, but that Charles Barron was a contractor, and not a servant. However, within the limits of a 69 L. R. A.

very brief opinion, it was pointed out that the declaration was defective in many other particulars. It was defective in not setting forth the nature of the damages. It was said, also, that perhaps the contract, resting in parol, was not binding, as it was not to be performed within a year. Nor did it appear that Charles Barron was authorized to contract for the service of the others. Inasmuch as the petition was defective in other vital particulars, the judgment of the court was not confined to the question of the malicious procurement of the breach of the contract. Attention is also called to the fact that this case was decided in 1873, when the principle under discussion was in its evolutionary stage. Speaking for myself, I believe the same reasons which support the principle that an action will lie for the malicious procurement of a breach of contract of personal service will cover every case where one person maliciously persuades and induces another to break any legal contract. In the case at bar the relation of master and servant did exist between the plaintiff and his employees, and, even applying the common-law rule of liability, the defendants would be answerable in damages to the plaintiff for a malicious procurement of the breach of contract by its employees. The term "malicious," used in this connection, is to be given a liberal meaning. The act is malicious when the thing done is with the knowledge of the plaintiff's rights, and with the intent to interfere therewith. It is a wanton interference with another's contractual rights. Ineffective persuasion to induce another to violate his contract would not, of itself, be actionable, but, if the persuasion be used for the purpose of injuring the plaintiff, or benefiting the defendant at the expense of the plaintiff, with a knowledge of the subsistence of the contract, it becomes a malicious act, and, if injury ensues from it, a cause of action accrues to the injured party. *Bowen v. Hall*, L. R. 6 Q. B. Div. 333. As was said by Crompton, J., in *Lumley v. Gye*, 2 El. & Bl. 216: "It must now be considered clear law that a person who wrongfully and maliciously, or, which is the same thing, with notice, interrupts the relation subsisting between master and servant, by procuring the servant to depart from the master's service, . . . is responsible at law." See *Doremus v. Hennessy*, 176 Ill. 608, 43 L. R. A. 797, 802, 68 Am. St. Rep. 203, 52 N. E. 924, 54 N. E. 524.

4. From the proof submitted it appeared that means other than persuasion were employed by the defendants to induce the plaintiff's employees to quit work. They

threatened the various labor unions that, unless the union labor of the plaintiff was called out, they would no longer exclusively employ union men, but would run what is known as an "open shop." This threat was being carried into execution when the plaintiff applied for the writ of injunction. The plan of attack on the plaintiff was to force the various labor unions to call out their members from the plaintiff's shop, under the threat that upon their refusal to do so the defendants would run their respective businesses under what is known as an open shop; that is, they would employ their labor without reference to their connection with the various unions. The several defendants had the undoubted right to employ any character of labor they might prefer. If they desired to supplant the union labor and substitute therefor nonunion labor, such action would be strictly within their legal right. But the record shows that practically all the skilled labor in this branch of business in the city of Atlanta belonged to the various labor unions, which had an agreement with the defendants that the defendants would hire only union employees, and that the unions would not permit their members to work for any employer who was not a party to the agreement. This agreement was incidental to the main purpose of the organization. It was a part of the plan to force all employing printers to become members of the Employing Printers' Club. The defendants were insisting on the observance of this agreement by the labor unions, and, upon their refusal to live up to the agreement, they were threatened with the *dête noire* of unionism,—the open shop. An injunction may be granted against the enforcement of an illegal agreement of dealers to injure the business of another person. *Jackson v. Stanfield*, 137 Ind. 592, 23 L. R. A. 588, 36 N. E. 345, 37 N. E. 14.

A court of equity will interpose by injunction to prevent the several members of an illegal combination from enforcing an agreement to the hurt and injury of one engaged in a competitive business. *Brown v. Jacobs' Pharmacy Co.* 115 Ga. 429, 57 L. R. A. 547, 90 Am. St. Rep. 126, 41 S. E. 553.

Under the facts in the record, the court properly enjoined the defendants from interfering with the plaintiff's business as a printer engaged in competitive trade, and from unlawfully influencing the labor organization from obstructing its business.

Judgment affirmed.

All the Justices concur.

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May C. WILSON, Impleaded, etc., *Plff. in Err.*,

v.

EXCHANGE BANK.

(..... Ga.)

- *1. In an action against the maker and indorser of a promissory note, joined in the same suit, the indorser may set off an individual claim against the plaintiff growing out of the transaction which gave rise to the execution of the note.
2. After a valid plea of set-off has been filed, the plaintiff is not entitled to dismiss his action so as to interfere with the rights of the defendant, except upon sufficient cause shown.

(March 25, 1905.)

ERROR to the City Court of Atlanta to review orders striking out defendant's plea of set-off, and dismissing, without her consent, an action brought to enforce payment of certain promissory notes. *Reversed.*

The facts are stated in the opinion.

Mr. Frank A. Arnold for plaintiff in error.

Messrs. Rosser & Brandon for defendant in error.

Candler, J., delivered the opinion of the court:

The Exchange Bank brought suit against Frank Williams, as maker, and May C. Wilson, as indorser, on a number of promissory notes. The petition alleged that the notes were made by Williams to the J. C. Wilson Coal & Lumber Company, under which name May C. Wilson was at the time doing business, and were indorsed by May C. Wilson. The defendants filed a plea in which they denied that at the time the notes were executed May C. Wilson was doing business under the name of the J. C. Wilson Coal & Lumber Company, and averred that that company was a corporation under the laws of Georgia. They also denied indebtedness on the notes, and averred that "plaintiff has received from defendant, May C. Wilson, \$874 on account of the transaction sued upon, and said plaintiff is indebted to defendant, May C. Wilson, the difference, \$474, which she pleads in recoupment, and asks judgment against plaintiff for said sum." Subsequently Mrs. Wilson offered an amendment to her plea,

*Headnotes by *CANDLER, J.*

NOTE.—As to the right of a surety jointly bound with his principal to offset against such joint indebtedness his individual claim against the creditor, see, in this series, *Clark v. Sullivan*, 13 L. R. A. 233, and *note*.

which the court, on objections of counsel for the plaintiff, disallowed. The court also, on oral motion, struck the plea of set-off, and later passed another order, "without the knowledge or consent of defendant, May C. Wilson," permitting the plaintiff to dismiss the case at its cost. Mrs. Wilson excepts to the refusal of her amendment, the order striking her plea, and the order allowing the plaintiff to dismiss.

1. As no reference is made in the brief of counsel for the plaintiff in error to the refusal of the amendment offered by Mrs. Wilson, the assignment of error on this ruling will be treated as having been abandoned, and we will pass to the controlling question in the case, viz., whether, in a suit on a promissory note, where both maker and indorser are joined in the suit, the indorser may set off an individual demand against the plaintiff's cause of action. This question is not without considerable difficulty. In the case of *Threlkeld v. Dobbins*, 45 Ga. 144, it was held broadly that "a debt due by the plaintiff to one of several defendants in a suit cannot be pleaded by the defendants as a set-off, unless there be some special cause shown." That case, however, was decided by only two judges, and hence is not binding upon us as authority; but, aside from that consideration, an examination of the facts upon which it was based will show that the headnote, from which the foregoing quotation was taken, is much broader than the actual question decided. It appeared that Threlkeld and another had executed to Dobbins their joint promissory note; that Dobbins owed Threlkeld a sum of money for cotton which he had sold for him, and for which he had not accounted; and that Dobbins had agreed that this sum should be entered as a credit on the joint note. It was held that this agreement was "such special claim" as could be set off against the plaintiff's demand on the note. The cases cited by counsel for the defendant in error as being in harmony with the decision in *Threlkeld v. Dobbins* are also cases where a joint demand was the subject of the suit, and one of the defendants sought to set off an individual claim. With one exception, they were suits against partnerships, the exception being a suit against joint makers of a promissory note. It seems to be well settled in Georgia, as in most of the states, that in a suit against two or more persons on a joint obligation set-off is not available to less than the entire number of defendants. The reason of this rule is plain. A joint obligation is indivisible. Each one of the obligors is bound to the same extent and in the same manner as all the others. A separate judgment against less than the entire number would be impossible; and in

this very fact of indivisibility lies the security to the obligee of accepting a joint obligation. That, however, is not this case. The maker and the indorser of a negotiable promissory note are severally, not jointly, bound by the instrument. Their contracts are essentially different. That of the maker is to pay the note when due, according to the terms of the writing. That of the indorser is that he will pay only on certain well-defined conditions precedent. Owing to the several nature of the contract, a suit against the maker and indorser in one action was not known to the law merchant; and it was necessary to obtain a judgment against the maker before the liability of the indorser was established. The suit against maker and indorser in one action is entirely of statutory origin. (14 Enc. Pl. & Pr. p. 452, and authorities cited in note), and the Georgia statute on the subject was not enacted until 1826. *Beckwith v. Carleton*, 14 Ga. 693. And see generally on this subject, *Johnson v. Platt*, 21 Ga. 135; *Lamar v. Cottle*, 27 Ga. 265; *Davis v. Bank of Fulton*, 31 Ga. 69; *Ware v. City Bank*, 59 Ga. 844. The defense of set-off was also unknown to the common law, because "the primitive notion of an action did not admit the possibility of a defendant being an actor and interposing a claim against the plaintiff to be tried in the one suit." Pomeroy, *Code Remedies*, 3d ed. § 729; *Waterman*, *Set-off*, 2d ed. § 10. By the statute of 2 Geo. II., chap. 27, § 13, it was enacted that, "where there are mutual debts between the plaintiff and defendant, . . . one debt may be set off against the other," etc. The different states of this country have all passed statutes the practical effect of which is the same as that of the English statute, though varying somewhat in phraseology. In Georgia it is provided that "between the parties themselves any mutual demands existing at the time of the commencement of the suit may be set off;" and that "set-off must be between the same parties, and in their own right." Civil Code 1895, §§ 3746, 3747. The exact meaning to be given to the expressions "mutual demands" and "same parties," as used in the statute, is the important question now to be decided. It seems to us nothing more than reasonable to hold that in a case like the present, where two or more defendants are joined in an action to which they are severally liable, and in which a separate judgment may be taken against them, a cross-demand in favor of any one of the defendants against the plaintiff would come within a fair construction of the requirement of mutuality; nor can we see the necessity, in such a case, of construing the words "same parties" to mean "all the

parties." We are aware that this view is in conflict with the English rule on the subject, and with the decisions of many of the courts of last resort of this country; but it is also in harmony with many American authorities of eminent respectability.

In Pomeroy's Code Remedies, 3d ed. § 755, the author says: "The provision found in nearly all the Codes that the counterclaim must exist 'in favor of a defendant and against a plaintiff between whom a several judgment might be had in the action,' implies that whenever the single defendant, or all the defendants jointly, may recover against one or some of the plaintiffs, and not against all, or whenever one, or some, of the defendants, and not all, may recover against the single plaintiff, or all the plaintiffs jointly, or whenever both of these possibilities are combined, a counterclaim may be interposed against the one or some of the plaintiffs, and not against all, and by the one or some of the defendants, and not by all. Such a severance in the recovery is possible when the right sought to be maintained on the one side and the liability to be enforced on the other are not originally joint." After a full discussion of numerous cases bearing on the subject, the author, in § 761, lays down the following rules: "First, when the defendants in an action are joint contractors, and are sued as such, no counterclaim can be made available which consists of a demand in favor of one, or some, of them. Secondly, when the defendants in an action are jointly and severally liable, although sued jointly, a counterclaim, consisting of a demand in favor of one, or some, of them, may, if otherwise without objection, be interposed. Thirdly, since it is possible, pursuant to express provisions of all the Codes, for persons severally liable to be sued jointly under certain circumstances in a legal action,—that is, in an action brought to recover a common money judgment,—a counterclaim in favor of one or more of such defendants may be pleaded and proved." In *Roberts v. Donovan*, 70 Cal. 108, 9 Pac. 180, 11 Pac. 599, it was held that one of two joint obligors could not set off an individual claim against the plaintiff's demand on the action; but in the opinion (p. 114 of 70 Cal., p. 182 of 9 Pac.) the following language was used: "The action is brought upon the joint bond of all the defendants. Were it a joint and several bond, no difficulty could arise; for where the cause of action is several, as well as joint, a several judgment may be entered without reference to the mere form of action." In some of the states it is held

flatly that the defense of set-off is not available to less than the entire number of defendants. See *Lemon v. Stevenson*, 36 Ill. 49; *Ryan v. Barger*, 16 Ill. 28; *Woods v. Harris*, 5 Blackf. 585; *Gordon v. Swift*, 46 Ind. 208; *Warren v. Wells*, 1 Met. 80; *Brooks v. Stackpole*, 168 Mass. 537, 47 N. E. 419; *Jones v. Gilreath*, 28 N. C. (6 Ired. L.) 338; *Corbett v. Hughes*, 75 Iowa, 282, 39 N. W. 500; *Banks v. Pike*, 15 Mo. 268. In *Trammell v. Harrell*, 4 Ark. 602, the supreme court of Arkansas, by a divided bench, held: "A defendant, or defendants, cannot set off a claim due to him or them by only one or a part of several plaintiffs; nor can one defendant of several set off a claim due to him alone from the plaintiff or plaintiffs; and whether the claim sued on, or that attempted to be set off, or both, are joint, or joint and several, makes no difference." Chief Justice Ringo, in a strong opinion, dissented from the judgment rendered; and so pertinent are the views expressed by him in the dissenting opinion to the point now under discussion that we quote therefrom as follows: "It is well understood that no set-off was allowed by the common law; and that the whole right of set-off in actions at law had its origin in certain statutes of England, the first of which gave it only in respect to a single class of demands; but it has been considerably enlarged and extended by subsequent acts of Parliament so as to embrace generally all liquidated damages or demands upon which an action of debt or indebitatus assumpsit would lie, but only where the demand to be set off is due in the same right from all of the plaintiffs to all of the defendants. And this I understand to be one of the most prominent and distinct features in all of the acts of Parliament upon the subject, and it is one which appears to have been introduced into the statutes of set-off of a majority of the states of the United States; and in such states there can be no doubt that a demand not due from all of the plaintiffs to all of the defendants cannot be admitted as set-off, because it is not within the provisions of law allowing such defense to be made. . . . The first section of our statute of set-off (Ark. Rev. Stat. chap. 139, p. 726), declares that, 'if two or more persons are mutually indebted to each other, by judgments, bonds, bills, notes, bargains, promises, or the like, and one of them commence an action against the other, one debt may be set off against the other, although such debts may be of a different nature. . . . The language here quoted, it will be perceived, does not in any way make the right of set-off to depend upon the number

of the defendants, . . . but makes it depend solely upon the existence of a mutual indebtedness between one or more of the persons suing and one or more of the persons sued. To illustrate my view of the statute, suppose A, B, and C indebted to E in \$1,000, and E at the same time indebted to A in the like sum of \$1,000. A sues E for the debt. Can E set off the debt due to him from A, B, and C? Certainly. Why? Because there exists between him and the plaintiff a mutual indebtedness. Each owes the other a debt, and, the law having made the debt of A, B, and C several as well as joint, E has an election to treat it as the individual debt of A, and, so regarding it, there is certainly, in the most strict understanding of the term, a mutuality of indebtedness between the parties A and E. But suppose the suit brought by E against A, B, and C, would not the same mutuality of indebtedness exist between A and E? I answer that it would, and that, according to the letter as well as the spirit of the statute, A would have a legal right to set off the debt due to him from E." Attention is directed to the similarity of the Arkansas statute under discussion by the learned chief justice and our own, and to the fact that in both the requirement of the law is that the demands shall be mutual. And in the subsequent case of *Loach v. Lambeth*, 14 Ark. 668, the principle laid down by the majority in *Trammell v. Harrell* was overruled, and by a unanimous decision the views expressed by the chief justice in his dissenting opinion in that case were adopted as the law applicable to the subject under discussion. See also *Burke v. Stillwell*, 23 Ark. 294. And for decisions of other states to a like effect, see *Pitcher v. Patrick*, Minor (Ala.) 321, 12 Am. Dec. 54; *Carson v. Barnes*, 1 Ala. 93; *Sledge v. Swift*, 53 Ala. 110; *Huddleston v. Askey*, 58 Ala. 218; *Riley v. Stallworth*, 56 Ala. 481; *Locke v. Locke*, 57 Ala. 475; *Childerston v. Hammon*, 9 Serg. & R. 68; *Robinson v. Beall*, 3 Yeates, 267; *Miller v. Kreiter*, 76 Pa. 78; *Dunn v. West*, 5 B. Mon. 377. In *Locke v. Locke*, 57 Ala. 475, the following language is used: "If, as the verdict tends to show, the set-off was due to only one of the defendants, this would constitute a good defense to plaintiff's action, but would not authorize a recovery for the excess, for the reason that such recovery would require a change, to that extent, of the parties to the judgment. In fact, it would, in effect, require two judgements; one in favor of one defendant for the certified balance, and the other in favor of all the defendants for the costs of the suit. This cannot be done in legal proceedings." Under the liberal pro-
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visions of our law as to judgments in legal proceedings, the objection urged by the Alabama court to a judgment for one of the defendants for the excess of his set-off would not apply. Once the facts are definitely ascertained, a judgment to fit those facts can easily be framed. And to the possible objection that the allowance of individual set-offs of one or more defendants would give rise to difficulty in the framing of a judgment to fit the facts it may be replied that the difficulty is one more of arithmetic than of law. Say that A is plaintiff in an action on a promissory note for \$100 executed by B and indorsed respectively by C, D, and E. A owes C \$100, D \$200, and E \$300. Each of the defendants answers separately or jointly, as the case may be, setting off his individual demand against the plaintiff, and the verdict of the jury is in favor of their contentions. The cross-demand of only one of the defendants could be applied to the extinguishment of the note sued on, for the application of a set-off is in the nature of a payment, and, of course, the original claim could only be legally paid once. But the other defendants, having been haled into court, and having, under the law, set up their counterclaim, would have the right to stay in court until their rights were adjudicated. And so judgment might be entered generally in favor of the defendant C, thus releasing the maker of the note, B and the other indorsers, D and E, and in favor of D and E, against the plaintiff respectively for \$200 and \$300.

In *Threlkeld v. Dobbins*, 45 Ga. 144, relied on as authority by counsel for the defendant in error, Judge McCay said: "Independently of the settled rule, under the English statutes of set-off, our Code provides that set-off must be between the same parties, and in their own right. Code, § 2850. This section of the Code, however, recognizes some special exceptions. Two are mentioned, to wit, the case of a surviving partner, and a debt due to the principal in a suit against the principal and security." Tracing back the latter of the two called exceptions to its origin, we have reached the conclusion that, instead of being an exception to the rule, it is within the rule recognized in Georgia from the beginning in regard to the law of set-off. The original act allowing set-off under the law of Georgia was passed in 1799, being part of the judiciary act. Prince's Dig. 425. It contained no reference whatever to suits against principal and security. The provision of the Code referred to by Judge McCay, which is now a part of Civil Code 1895,

§ 3747, made its appearance for the first time in Code 1863, § 2842, and was evidently codified from the decision of this court in the early case of *Harrison v. Henderson*, 4 Ga. 198. It was there held that in an action against principal and surety the principal might set off his individual demand against the plaintiff. In the opinion (p. 199) Judge Warner, after discussing the act of 1799, authorizing the plea of set-off, and quoting therefrom, said: "The objection urged against the set-off is that the demand of the plaintiff is a joint demand, and the debt offered to be set off is the separate demand of Harrison against the plaintiff. It is true, as a general rule, that a separate demand cannot be set off against a joint demand; but the plaintiff's demand here is several as well as joint. We must look to the original character of the contract; for the plaintiff, by pursuing his remedy against them as joint contractors, does not alter the original character of the contract itself. When we look at the contract, we see it is the separate contract of Harrison with the plaintiff, secured by the joint security of Sims." It will thus be seen that under the statute of set-off as originally enacted, which has not been amended in this respect, it was recognized that in a suit on a several obligation the defense was available to any one or more of the defendants; and the subsequent codification of this decision certainly did not operate to alter its effect. It will thus be seen that it is quite erroneous to argue that, because the codifiers have named two specific instances in which one or more of several codefendants may plead set-off, the plea cannot be interposed in any other case where more than one defendant is sued in the same action.

We have discussed this question at such great length, not only because of the apparent doubt cast upon it by the decision in the case of *Threlkeld v. Dobbins*, but also on account of its far-reaching importance to the commercial world. Applying what has been said to the facts of this case, our conclusion is that, the contract of Williams and that of Mrs. Wilson being several, it was competent for the latter to set off her individual claim against that of the plaintiff.

2. The defendant, May C. Wilson, having filed a valid plea of set-off, the plaintiff could not, without making some sort of showing, dismiss its action so as to prejudice her right to a hearing on the claim set up in her plea. Civil Code 1895, §§ 3754, 4970; *Simon v. Myers*, 68 Ga. 76. Judgment reversed.

All the Justices concur.
69 L. R. A.

Paolo PAVESICH, *Plff. in Err.*,
v.
NEW ENGLAND LIFE INSURANCE
COMPANY *et al.*

(..... Ga.)

- *1. The absence, for a long period of time, of a precedent for an asserted right is not conclusive evidence that the right does not exist. Where the case is new in principle, the courts cannot give a remedy, but, where the case is new only in instance, it is the duty of the courts to give relief by the application of recognized principles.
2. A right of privacy is derived from natural law, recognized by municipal law, and its existence can be inferred from expressions used by commentators and writers on the law as well as judges in decided cases.
3. The right of privacy is embraced within the absolute rights of personal security and personal liberty.
4. Personal security includes the right to exist, and the right to the enjoyment of life while existing, and is invaded, not only by a deprivation of life, but also by a deprivation of those things which are necessary to the enjoyment of life according to the nature, temperament, and lawful desires of the individual.
5. Personal liberty includes, not only freedom from physical restraint, but also the right "to be let alone," to determine one's mode of life,—whether it shall be a life of publicity or of privacy; and to order one's life and manage one's affairs in a manner that may be most agreeable to him so long as he does not violate the rights of others or of the public.
6. Liberty of speech and of the press, when exercised within the bounds of the constitutional guaranties, are limitations upon the exercise of the right of privacy.
7. The Constitution declares that the liberty of speech and of the press must not be abused, and the law will not permit the right of privacy to be asserted in such a way as to curtail or restrain such liberties. The one may be used to keep the other within lawful bounds, but neither can be lawfully used to destroy the other.
8. The right of privacy may be waived, either expressly or by implication, except as to those matters which law or public policy demands shall be kept private, but a waiver authorizes an invasion of the right only to such an extent as is to be necessarily inferred from the purpose for which the waiver is made. A waiver for one purpose, and in favor of one person or class, does not authorize an invasion for all purposes, or by all persons and classes.
9. One who seeks public office, or any person who claims from the public approval or patronage, waives his right of privacy to such an extent that he cannot restrain or impede the public in any

*Headnotes by COBB, J.

NOTE.—As to the right of privacy, see also, in this series, *Roberson v. Rochester Folding Box Co.* 59 L. R. A. 478, and footnote thereto.

proper investigation into the conduct of his private life which may throw light upon the question as to whether the public should bestow upon him the office which he seeks, or accord to him the approval or patronage which he asks. The holder of public office makes a waiver of a similar nature, and subjects his life at all times to closest scrutiny, in order that it may be determined whether the rights of the public are safe in his hands.

10. The conclusion and reasoning of the majority in the case of *Roberson v. Rochester Folding Box Company*, 64 N. E. 442, 59 L. R. A. 478, 89 Am. St. Rep. 828, 171 N. Y. 540, criticized and disapproved; and the reasoning of Judge Gray, in his dissenting opinion, adopted and followed.
11. The publication of a picture of a person, without his consent, as a part of an advertisement, for the purpose of exploiting the publisher's business, is a violation of the right of privacy of the person whose picture is reproduced, and entitles him to recover, without proof of special damage.
12. The publication of one's picture, without his consent, for such a purpose, is in no sense an exercise of the liberty of speech or of the press, within the meaning of those terms as used in the Constitution.
13. Words which are harmless in themselves may be libelous in the light of extrinsic facts.
14. A publication which imputes to one language which is known to those among whom he lives to contain statements which are false is libelous.
15. A publication of an advertisement of an insurance company, containing a person's picture, and a statement that the person has policies of insurance with the company, and is pleased with his investment, when in fact he has no such policies, is libelous, as having a tendency to create the impression among those who know the facts that the person whose picture is reproduced has told a wilful falsehood, either gratuitously, or for a consideration.
16. The petition was good as against a general demurrer, and the objections raised in the special demurrer were without merit.

(March 3, 1905.)

ERROR to the City Court of Atlanta to review a judgment in favor of defendants in an action brought to recover damages for the alleged infringement of plaintiff's right of privacy by the unauthorized publication of his portrait and alleged libelous matter in connection therewith. *Reversed.*

Statement by **Cobb, J.:**

Paolo Pavesich brought an action against the New England Mutual Life Insurance Company, a nonresident corporation, Thomas B. Lumpkin, its general agent, and J. Q. Adams, a photographer, both residing in the city of Atlanta. The allegations of the petition were, in substance, as follows: In an issue of the Atlanta Constitution, a newspaper published in the city of Atlanta, there appeared a likeness of the plaintiff, 69 L. R. A.

which would be easily recognized by his friends and acquaintances, placed by the side of the likeness of an ill-dressed and sickly looking person. Above the likeness of the plaintiff were the words: "Do it now. The man who did." Above the likeness of the other person were the words: "Do it while you can. The man who didn't." Below the two pictures were the words: "These two pictures tell their own story." Under the plaintiff's picture the following appeared: "In my healthy and productive period of life I bought insurance in the New England Mutual Life Insurance Co., of Boston, Mass., and to-day my family is protected and I am drawing an annual dividend on my paid-up policies." Under the other person's picture was a statement to the effect that he had not taken insurance and now realized his mistake. The statements were signed, "Thomas B. Lumpkin, General Agent." The picture of the plaintiff was taken from a negative obtained by the defendant Lumpkin, or some one by him authorized, from the defendant Adams, which was used with his consent, and with knowledge of the purpose for which it was to be used. The picture was made from the negative without the plaintiff's consent, at the instance of the defendant insurance company, through its agent, Lumpkin. Plaintiff is an artist by profession, and the publication is peculiarly offensive to him. The statement attributed to plaintiff in the publication is false and malicious. He never made any such statement, and has not, and never has had, a policy of life insurance with the defendant company. The publication is malicious, and tends to bring plaintiff into ridicule before the world, and especially with his friends and acquaintances, who know that he has no policy in the defendant company. The publication is a "trespass upon plaintiff's right of privacy, and was caused by breach of confidence and trust reposed" in the defendant Adams. The prayer was for damages in the sum of \$25,000. The petition was demurred to generally, and specially on the grounds that there was a misjoinder of defendants and causes of action, that no facts were set forth from which malice can be inferred, and that no special damages were alleged. The court sustained the general demurrer, and the plaintiff excepted.

Messrs. Westmoreland Brothers and M. M. Hirsch for plaintiff in error.

Messrs. John L. Hopkins & Sons, for defendants in error:

To charge one with doing a thing which the law authorizes to be done can never be the subject-matter of a libel.

Hollenbeck v. Hall, 103 Iowa, 214, 39 L.

R. A. 734, 64 Am. St. Rep. 175, 72 N. W. 518.

A libel must be, first, a false and malicious defamation, and, secondly, the reputation of the individual libeled must be injured by exposing him to public hatred, contempt, and ridicule.

Code, 3832.

So the word "defamation" implies, first, that the individual possessed good fame, and, secondly, that the thing written of him withdrew from him a portion of this, leaving him upon the whole with less than he had at first.

False statements which tend to promote the good character of a man, and do not in fact defame or injure, are not actionable.

Legg v. Dunleavy, 80 Mo. 558, 50 Am. Rep. 512; *Dun v. Maier*, 27 C. C. A. 100, 52 U. S. App. 381, 82 Fed. 169.

An innuendo cannot introduce new matter, nor change the natural meaning of the words.

Watters v. Retail Clerks' Union, No. 479, 120 Ga. 424, 47 S. E. 911.

The publication must have a personal, and not an impersonal, application.

Stewart v. Wilson, 23 Minn. 449.

The right of privacy has been repudiated by every court of last resort that has considered the subject-matter.

Schuyler v. Curtis, 27 Abb. N. C. 387, 15 N. Y. Supp. 787, 64 Hun, 594, 19 N. Y. Supp. 264, 30 Abb. N. C. 376, 24 N. Y. Supp. 509, 147 N. Y. 434, 31 L. R. A. 286, 49 Am. St. Rep. 671, 42 N. E. 22; *Marks v. Jaffa*, 6 Misc. 290, 26 N. Y. Supp. 908; *Murray v. Gast Lithographic & Engraving Co.* 8 Misc. 36, 28 N. Y. Supp. 271; *Roberson v. Rochester Folding Box Co.* 171 N. Y. 540, 59 L. R. A. 478, 89 Am. St. Rep. 828, 64 N. E. 442; *Atkinson v. John E. Doherty & Co.* 121 Mich. 372, 46 L. R. A. 219, 80 Am. St. Rep. 507, 80 N. W. 285.

Cobb, J., delivered the opinion of the court:

1-12. The petition really contains two counts,—one for a libel, and the other for a violation of the plaintiff's right of privacy. There was no special demurrer raising the objection that the counts were not properly arranged, as there was in *Cooper v. Portner Brewing Co.* 112 Ga. 894, 38 S. E. 91; and hence the petition is to be dealt with in relation to its substance, without reference to its form.

We will first deal with the general demurrer to the second count, which claimed damages on account of an alleged violation of the plaintiff's right of privacy. The question therefore to be determined is, whether an individual has a right of privacy which he can enforce, and which the courts will

protect against invasion. It is to be conceded that prior to 1890 every adjudicated case, both in this country and in England, which might be said to have involved a right of privacy, was not based upon the existence of such right, but was founded upon a supposed right of property, or a breach of trust or confidence, or the like, and that therefore a claim to a right of privacy, independent of a property or contractual right, or some right of a similar nature, had, up to that time, never been recognized in terms in any decision. The entire absence for a long period of time, even for centuries, of a precedent for an asserted right should have the effect to cause the courts to proceed with caution before recognizing the right, for fear that they may thereby invade the province of the law-making power; but such absence, even for all time, is not conclusive of the question as to the existence of the right. The novelty of the complaint is no objection, when an injury cognizable by law is shown to have been inflicted on the plaintiff. In such a case, "although there be no precedent, the common law will judge according to the law of nature and the public good." Where the case is new in principle, the courts have no authority to give a remedy, no matter how great the grievance; but where the case is only new in instance, and the sole question is upon the application of a recognized principle to a new case, "it will be just as competent to courts of justice to apply the principle to any case that may arise two centuries hence as it was two centuries ago." Broom's Legal Maxims, 8th ed. 193. This results from the application of the maxim, *Ubi jus ibi remedium*, which finds expression in our Code, where it is declared that "for every right there shall be a remedy, and every court having jurisdiction of the one may, if necessary, frame the other." Civil Code 1895, § 4929.

The individual surrenders to society many rights and privileges which he would be free to exercise in a state of nature, in exchange for the benefits which he receives as a member of society. But he is not presumed to surrender all those rights, and the public has no more right, without his consent, to invade the domain of those rights which it is necessarily to be presumed he has reserved, than he has to violate the valid regulations of the organized government under which he lives. The right of privacy has its foundation in the instincts of nature. It is recognized intuitively, consciousness being the witness that can be called to establish its existence. Any person whose intellect is in a normal condition recognizes at once that, as to each individual member of society, there are matters private, and

there are matters public so far as the individual is concerned. Each individual as instinctively resents any encroachment by the public upon his rights which are of a private nature as he does the withdrawal of those of his rights which are of a public nature. A right of privacy in matters purely private is therefore derived from natural law. This idea is embraced in the Roman's conception of justice, which "was not simply the external legality of acts, but the accord of external acts with the precepts of the law, prompted by internal impulse and free volition." Mackeldey's Roman Law, by Dropsie, § 123. It may be said to arise out of those laws sometimes characterized as "immutable," because they are natural, and so just at all times and in all places that no authority can either change or abolish them." 1 Domat's Civil Law, by Strahan, Cushing's ed. p. 49. It is one of those rights referred to by some law writers as "absolute,"—"such as would belong to their persons merely in a state of nature, and which every man is entitled to enjoy, whether out of society or in it." 1 Bl. Com. 123. Among the absolute rights referred to by the commentator just cited is the right of personal security and the right of personal liberty. In the first is embraced a person's right to a "legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation," and in the second is embraced "the power of locomotion, of changing situation, or moving one's person to whatsoever place one's own inclination may direct, without imprisonment or restraint, unless by due course of law." 1 Bl. Com. 129, 134.

While neither Sir William Blackstone nor any of the other writers on the principles of the common law have referred in terms to the right of privacy, the illustrations given by them as to what would be a violation of the absolute rights of individuals are not to be taken as exhaustive, but the language should be allowed to include any instance of a violation of such rights which is clearly within the true meaning and intent of the words used to declare the principle. When the law guarantees to one the right to the enjoyment of his life, it gives to him something more than the mere right to breathe and exist. While, of course, the most flagrant violation of this right would be deprivation of life, yet life itself may be spared, and the enjoyment of life entirely destroyed. An individual has a right to enjoy life in any way that may be most agreeable and pleasant to him, according to his temperament and nature, provided that in such enjoyment he does not invade the rights of his neighbor, or violate public law or policy. The right of personal security is not

fully accorded by allowing an individual to go through life in possession of all of his members, and his body unmarred; nor is his right to personal liberty fully accorded by merely allowing him to remain out of jail, or free from other physical restraints. The liberty which he derives from natural law, and which is recognized by municipal law, embraces far more than freedom from physical restraint. The term "liberty" is not to be so dwarfed, "but is deemed to embrace the right of a man to be free in the enjoyment of the faculties with which he has been endowed by his Creator, subject only to such restraints as are necessary for the common welfare. 'Liberty,' in its broad sense, as understood in this country, means the right, not only of freedom from servitude, imprisonment, or restraint, but the right of one to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation." See Brannon, Fourteenth Amendment, 111. Liberty includes the right to live as one will, so long as that will does not interfere with the rights of another, or of the public. One may desire to live a life of seclusion; another may desire to live a life of publicity; still another may wish to live a life of privacy as to certain matters, and of publicity as to others. One may wish to live a life of toil, where his work is of a nature that keeps him constantly before the public gaze, while another may wish to live a life of research and contemplation, only moving before the public at such times and under such circumstances as may be necessary to his actual existence. Each is entitled to a liberty of choice as to his manner of life, and neither an individual nor the public has a right to arbitrarily take away from him this liberty. See, in this connection, Cyc. Law Dict. (Shumaker & Longsdorf), and Bouvier, Law Dict., title *Liberty*. All will admit that the individual who desires to live a life of seclusion cannot be compelled, against his consent, to exhibit his person in any public place, unless such exhibition is demanded by the law of the land. He may be required to come from his place of seclusion to perform public duties,—to serve as a juror, and to testify as a witness, and the like; but, when the public duty is once performed, if he exercises his liberty to go again into seclusion, no one can deny him the right. One who desires to live a life of partial seclusion has a right to choose the times, places, and manner in which and at which he will submit himself to the public gaze. Subject to the limitation above referred to, the body of a person cannot be put on exhibition at any time or at any place without his consent. The right of

one to exhibit himself to the public at all proper times, in all proper places, and in a proper manner is embraced within the right of personal liberty. The right to withdraw from the public gaze at such times as a person may see fit, when his presence in public is not demanded by any rule of law, is also embraced within the right of personal liberty. Publicity in one instance, and privacy in the other, are each guaranteed. If personal liberty embraces the right of publicity, it no less embraces the correlative right of privacy: and this is no new idea in Georgia law. In *Wallace v. Georgia, O. & N. R. Co.* 14 Ga. 732, 22 S. E. 579, it was said: "Liberty of speech and of writing is secured by the Constitution, and incident thereto is the correlative liberty of silence, not less important nor less sacred." The right of privacy within certain limits is a right derived from natural law, recognized by the principles of municipal law, and guaranteed to persons in this state both by the Constitutions of the United States and of the state of Georgia, in those provisions which declare that no person shall be deprived of liberty except by due process of law.

While, in reaching the conclusion just stated, we have been deprived of the benefit of the light that would be shed on the question by decided cases and utterances of law writers directly dealing with the matter, we have been aided by many side lights in the law. The *injuria* of the Roman law, sometimes translated "injury," and at other times "outrage," and which is generally understood at this time to convey the idea of legal wrong, was held to embrace many acts resulting in damage for which the law would give redress. It embraced all of those wrongs which were the result of a direct invasion of the rights of the person and the rights of property which are enumerated in all of the commentaries on the common law, and which are so familiar to everyone at this time. But it included more. An outrage was committed, not only by striking with the fists or with the club or lash, but also by shouting until a crowd gathered around one, and it was an outrage or legal wrong to merely follow an honest woman or young boy or girl; and it was declared in unequivocal terms that these illustrations were not exhaustive, but that an injury or legal wrong was committed "by numberless other acts." Sanders, Justinian, Hammond's ed. 499; Poste's Inst. of Gaius, 3d ed. 449. The punishment of one who had not committed any assault upon another, or impeded in any way his right of locomotion, but who merely attracted public attention to the other as he was passing along a public highway or standing upon his private grounds, evidences the fact that the 69 L. R. A.

ancient law recognized that a person had a legal right "to be let alone," so long as he was not interfering with the rights of other individuals or of the public. This idea has been carried into the common law, and appears from time to time in various places; a conspicuous instance being in the case of private nuisances resulting from noise which interferes with one's enjoyment of his home, and this, too, where the noise is the result of the carrying on of a lawful occupation. Even in such cases where the noise is unnecessary, or is made at such times that one would have a right to quiet, the courts have interfered by injunction in behalf of the person complaining. See 2 Wood, Nuisances, 3d ed. pp. 827 *et seq.* It is true that these cases are generally based upon the ground that the noise is an invasion of a property right, but there is really no injury to the property, and the gist of the wrong is that the individual is disturbed in his right to have quiet. Under the Roman law, "to enter a man's house against his will, even to serve a summons, was regarded as an invasion of his privacy." Hunter, Roman Law, 3d ed. p. 149. This conception is the foundation of the common-law maxim that "every man's house is his castle;" and in *Semayne's Case*, 5 Coke, 91, 1 Smith, Lead. Cas. 228, where this maxim was applied, one of the points resolved was "that the house of everyone is to him as his castle and fortress, as well for his defense against injury and violence as for his repose." "Eavesdroppers, or such as listen under walls or windows or the eaves of a house to hearken after discourse, and thereupon to frame slanderous and mischievous tales," were a nuisance at common law, and indictable, and were required, in the discretion of the court, to find sureties for their good behavior. 4 Bl. Com. 168. The offense consisted in lingering about dwelling houses and other places where persons meet for private intercourse, and listening to what is said, and then tattling it abroad. 10 Am. & Eng. Enc. Law, 2d ed. p. 440. A common scold was at common law indictable as a public nuisance to her neighborhood. 4 Bl. Com. 168. And the reason for the punishment of such a character was not the protection of any property right of her neighbors, but the fact that her conduct was a disturbance of their right to quiet and repose; the offense being complete even when the party indicted committed it upon her own premises. Instances might be multiplied where the common law has both tacitly and expressly recognized the right of an individual to repose and privacy. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, which is so

fully protected both in the Constitutions of the United States and of this state (Civil Code 1895, §§ 6017, 5713), is not a right created by these instruments, but is an ancient right, which, on account of its gross violation at different times, was preserved from such attacks in the future by being made the subject of constitutional provisions. The right to search the papers or houses of another for the purpose of enforcing a claim of one individual against another in a civil proceeding, or in the maintenance of a mere private right, was never recognized at common law, but such search was confined entirely to cases of public prosecutions; and even in those cases the legality of the search was formerly doubted, and it has been said that it crept into the law by imperceptible practice. 25 Am. & Eng. Enc. Law, 2d ed. p. 145. The refusal to allow such search as an aid to the assertion of a mere private right, and its allowance sparingly to aid in maintaining the rights of the public, is an implied recognition of the existence of a right of privacy, for the law on the subject of unreasonable searches cannot be based upon any other principle than the right of a person to be secure from invasion by the public into matters of a private nature, which can only be properly termed his right of privacy.

The right of privacy, however, like every other right that rests in the individual, may be waived by him, or by anyone authorized by him, or by anyone whom the law empowers to act in his behalf, provided the effect of his waiver will not be such as to bring before the public those matters of a purely private nature which express law or public policy demands shall be kept private. This waiver may be either express or implied, but the existence of the waiver carries with it the right to an invasion of privacy only to such an extent as may be legitimately necessary and proper in dealing with the matter which has brought about the waiver. It may be waived for one purpose, and still asserted for another; it may be waived in behalf of one class, and retained as against another class; it may be waived as to one individual, and retained as against all other persons. The most striking illustration of a waiver is where one either seeks or allows himself to be presented as a candidate for public office. He thereby waives any right to restrain or impede the public in any proper investigation into the conduct of his private life which may throw light upon his qualifications for the office, or the advisability of imposing upon him the public trust which the office carries. But even in this case the waiver does not extend into those matters and transactions of private life which are wholly foreign, and can throw no light

whatever upon the question as to his competency for the office, or the propriety of bestowing it upon him. One who holds public office makes a waiver of a similar character,—that is, that his life may be subjected at all times to the closest scrutiny in order to determine whether the rights of the public are safe in his hands,—but beyond this the waiver does not extend. So it is in reference to those belonging to the learned professions, who by their calling place themselves before the public, and thereby consent that their private lives may be scrutinized for the purpose of determining whether it is to the interest of those whose patronage they seek to place their interests in their hands. In short, any person who engages in any pursuit, or occupation, or calling, which calls for the approval or patronage of the public submits his private life to examination by those to whom he addresses his call, to any extent that may be necessary to determine whether it is wise and proper and expedient to accord to him the approval or patronage which he seeks.

It may be said that to establish a liberty of privacy would involve in numerous cases the perplexing question to determine where this liberty ended, and the rights of others and of the public began. This affords no reason for not recognizing the liberty of privacy, and giving to the person aggrieved legal redress against the wrongdoer, in a case where it is clearly shown that a legal wrong has been done. It may be that there will arise many cases which lay near the border line which marks the right of privacy, on the one hand, and the right of another individual or of the public, on the other. But this is true in regard to numerous other rights which the law recognizes as resting in the individual. In regard to cases that may arise under the right of privacy, as in cases that arise under other rights where the line of demarcation is to be determined, the safeguard of the individual, on the one hand, and of the public, on the other, is the wisdom and integrity of the judiciary. Each person has a liberty of privacy, and every other person has, as against him, liberty in reference to other matters, and the line where these liberties impinge upon each other may in a given case be hard to define; but that such a case may arise can afford no more reason for denying to one his liberty of privacy than it would to deny to another his liberty, whatever it may be. In every action for a tort it is necessary for the court to determine whether the right claimed has a legal existence, and for the jury to determine whether such right has been invaded, and to assess the damages if their finding is in favor of the plaintiff. This burden which rests upon

the court in every case of the character referred to is all that will be imposed upon it in actions brought for a violation of the right of privacy. No greater difficulties will be encountered in such cases in determining the existence of the right than often will be encountered in determining the existence of other rights sought to be enforced by action. The courts may proceed in cases involving the violation of a right of privacy as in other cases of a similar nature, and the juries may in the same manner proceed to a determination of those questions which the law requires to be submitted for their consideration. With honest and fearless trial judges to pass in the first instance upon the question of law as to the existence of the right in each case, whose decisions are subject to review by the court of last resort, and with fair and impartial juries to pass upon the questions of fact involved, and assess the damages in the event of a recovery, whose verdict is, under our law, in all cases subject to supervision and scrutiny by the trial judge, within the limits of a legal discretion, there need be no more fear that the right of privacy will be the occasion of unjustifiable litigation, oppression, or wrong than that the existence of many other rights in the law would bring about such results.

The liberty of privacy exists, has been recognized by the law, and is entitled to continual recognition. But it must be kept within its proper limits, and in its exercise must be made to accord with the rights of those who have other liberties, as well as the rights of any person who may be properly interested in the matters which are claimed to be of purely private concern. Publicity in many cases is absolutely essential to the welfare of the public. Privacy in other matters is not only essential to the welfare of the individual, but also to the well-being of society. The law stamping the unbreakable seal of privacy upon communications between husband and wife, attorney and client, and similar provisions of the law, is a recognition, not only of the right of privacy, but that, for the public good, some matters of private concern are not to be made public, even with the consent of those interested.

It therefore follows from what has been said that a violation of the right of privacy is a direct invasion of a legal right of the individual. It is a tort, and it is not necessary that special damages should have accrued from its violation in order to entitle the aggrieved party to recover. Civil Code 1895, § 3807. In an action for an invasion of such right the damages to be recovered are those for which the law authorizes a recovery in torts of that character, and, if

the law authorizes a recovery of damages for wounded feelings in other torts of a similar nature, such damages would be recoverable in an action for a violation of this right.

The stumbling block which many have encountered in the way of a recognition of the existence of a right of privacy has been that the recognition of such right would inevitably tend to curtail the liberty of speech and of the press. The right to speak and the right of privacy have been coexistent. Each is a natural right, each exists, and each must be recognized and enforced with due respect for the other. The right to convey one's thoughts by writing or printing grows out of, but does not enlarge in any way, the natural right of speech. It simply authorizes one to take advantage of those mediums of expression which the ingenuity of man has contrived for broadening and making more effective the influences of that which was formerly confined to mere oral utterances. The right to speak and write and print has been at different times in the world's history seriously invaded by those who, for their own selfish purposes, desired to take away from others such privileges, and consequently these rights have been made the subject of provisions in the Constitutions of the United States and of this state. The Constitution of the United States prohibits Congress from passing any law "abridging the freedom of speech or of the press." Civil Code 1895, § 6014. The Constitution of this state declares: "No law shall ever be passed to curtail or restrain the liberty of speech or of the press." Civil Code 1895, § 5712. Judge Cooley says: "The constitutional liberty of speech and of the press, as we understand it, implies a right to freely utter and publish whatever the citizen may please, and to be protected against any responsibility for so doing, except so far as such publications, from their blasphemy, obscenity, or scandalous character, may be a public offense, or as by their falsehood and malice they may injuriously affect the standing, reputation, or pecuniary interests of individuals. Or, to state the same thing in somewhat different words, we understand liberty of speech and of the press to imply, not only liberty to publish, but complete immunity from legal censure and punishment for the publication, so long as it is not harmful in its character, when tested by such standards as the law affords. For these standards we must look to the common-law rules which were in force when the constitutional guaranties were established, and in reference to which they have been adopted." Cooley, Const. Lim. 5th ed. p. 521. In *King v. St. Asaph*, 3 T. R. 428, note, Lord Mansfield said: "The

liberty of the press consists in printing without any previous license, subject to the consequence of law." Chancellor Kent, while judge of the supreme court of New York, 394, *People v. Croswell*, 3 Johns. Cas. 337, 394, Appx., adopted as a definition of the phrase "liberty of the press" what was said by Gen. Hamilton in his brief in that case, where it was set forth that "the liberty of the press consists in the right to publish, with impunity, truth, with good motives, and for justifiable ends, whether it respects government, magistracy, or individuals;" and the learned jurist declared that this definition was perfectly correct, comprehensive, and accurate. Mr. Justice Story defined the phrase to mean "that every man shall have a right to speak, write, and print his opinions upon any subject whatsoever, without any prior restraint, so, always, that he does not injure any other person in his rights, person, property, or reputation, and so, always, that he does not thereby disturb the public peace or attempt to subvert the government." 2 Story, Const. § 1880. See also 18 Am. & Eng. Enc. Law, 2d ed. p. 1125.

The Constitution of this state declares what is meant by "liberty of speech" and "liberty of the press" in the following words: "Any person may speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that liberty." Civil Code 1895, § 5712. The right preserved and guaranteed against invasion by the Constitution is therefore the right to utter, to write, and to print one's sentiments, subject only to the limitation that in so doing he shall not be guilty of an abuse of this privilege, by invading the legal rights of others. The Constitution uses the word "sentiments," but it is used in the sense of thoughts, ideas, opinions. To make intelligent, forceful, and effective an expression of opinion, it may be necessary to refer to the life, conduct, and character of a person; and, so long as the truth is adhered to, the right of privacy of another cannot be said to have been invaded by one who speaks, or writes, or prints, provided the reference to such person, and the manner in which he is referred to, is reasonably and legitimately proper in an expression of opinion on the subject that is under investigation. It will therefore be seen that the right of privacy must in some particulars yield to the right of speech and of the press. It is well recognized that slander is an abuse of the liberty of speech, and that a libel is an abuse of the liberty to write and print; but it is nowhere expressly declared in the law that these are the only abuses of such rights. And that the law makes the truth in suits for slander and in prosecutions and suits for libel a complete defense may not necessa-

riety make the publication of the truth the legal right of every person, nor prevent it from being in some cases a legal wrong. The truth may be spoken, written, or printed about all matters of a public nature, as well as matters of a private nature in which the public has a legitimate interest. The truth may be uttered and printed in reference to the life, character, and conduct of individuals whenever it is necessary to the full exercise of the right to express one's sentiments on any and all subjects that may be proper matter for discussion. But there may arise cases where the speaking or printing of the truth might be considered an abuse of the liberty of speech and of the press, as in a case where matters of purely private concern, wholly foreign to a legitimate expression of opinion on the subject under discussion, are injected into the discussion for no other purpose and with no other motive than to annoy and harass the individual referred to. Such cases might be of rare occurrence, but, if such should arise, the party aggrieved may not be without a remedy. The right of privacy is unquestionably limited by the right to speak and print. It may be said that to give liberty of speech and of the press such a wide scope as has been indicated would impose a very serious limitation upon the right of privacy, but, if it does, it is due to the fact that the law considers that the welfare of the public is better subserved by maintaining the liberty of speech and of the press than by allowing an individual to assert his right of privacy in such a way as to interfere with the free expression of one's sentiments, and the publication of every matter in which the public may be legitimately interested. In many cases the law required the individual to surrender some of his natural and private rights for the benefit of the public, and this is true in reference to some phases of the right of privacy as well as other legal rights. Those to whom the right to speak and write and print is guaranteed must not abuse this right; nor must one in whom the right of privacy exists abuse this right. The law will no more permit an abuse by the one than by the other. Liberty of speech and of the press is and has been a useful instrument to keep the individual within limits of lawful, decent, and proper conduct; and the right of privacy may be well used within its proper limits to keep those who speak and write and print within the legitimate bounds of the constitutional guaranties of such rights. One may be used as a check upon the other, but neither can be lawfully used for the other's destruction.

There is nothing in the ruling made in the present case to conflict with the deci-

sion in *Chapman v. Western U. Teleg. Co.* 88 Ga. 783, 17 L. R. A. 430, 30 Am. St. Rep. 183, 15 S. E. 901. It was held in that case that in an action against a telegraph company for a failure to deliver a message in due time, and thereby preventing the sender from going to bedside of his sick brother, damages on account of mental pain and suffering could not be recovered. The effect of that decision is simply that in an action upon a contract, or in an action sounding in tort for a breach of duty growing out of the contract, damages for mental pain and suffering cannot be recovered, when no other damages have been sustained. Mr. Justice Lumpkin, in his opinion, distinctly recognizes that where there has been an invasion of a right, from which the law would presume damages to flow, additional damages for pain and suffering might be recovered.

It seems that the first case in this country where the right of privacy was invoked as the foundation for an application to the courts for relief was the unreported case of *Manola v. Stevens*, which was an application for injunction to the supreme court of New York, filed on June 15, 1890. The complainant alleged that while she was playing in the Broadway Theatre, dressed as required by her role, she was, by means of a flash light, photographed surreptitiously and without her consent, from one of the boxes, by the defendant, and she prayed that an injunction issue to restrain the use of the photograph. An interlocutory injunction was granted *ex parte*. At the time set for a hearing there was no appearance for the defendant, and the injunction was made permanent. See 4 Harvard Law Rev. 195, note 7. The article in this magazine which refers to the case above mentioned appeared in 1890, and was written by Samuel D. Warren and Louis D. Brandeis. In it the authors ably and forcefully maintained the existence of a right of privacy, and the article attracted much attention at the time. It was conceded by the authors that there was no decided case in which the right of privacy was distinctly asserted and recognized, but it was asserted that there were many cases from which it would appear that this right really existed, although the judgment in each case was put upon other grounds when the plaintiff was granted the relief prayed. The cases especially referred to were *Yovatt v. Wingard* (1820) 1 Jac. & W. 394; *Abernethy v. Hutchinson* (1825) 3 L. J. Ch. 209; *Prince Albert v. Strange* (1849) 2 De G. & S. 652; *Tuck v. Priestler* (1887) L. R. 19 Q. B. Div. 639; *Pollard v. Photographic Co.* (1888) L. R. 40 Ch. Div. 345. The first three of these cases related respectively to the publication of recipes,

writings, and etchings, which the complainant in each case alleged were either published, or about to be published, without his consent; and an injunction was granted in the first case upon the ground that the publication of the recipes was the result of the breach of trust and confidence, and in the other two cases upon this ground as well as upon the ground that the complainant had a property right in the writings and etchings. The *Tuck* and *Pollard Cases* dealt with the publication of pictures; the former being where one was employed to make copies of a picture owned by the plaintiff, and the latter where a photographer was employed to take a photograph of the complainant; the defendant in each instance being about to use the copies in his possession without the consent of the plaintiff. An injunction was granted in the *Tuck Case* on the ground that the sale of the copies would be a breach of contract, and in the *Pollard Case* the decision was rested upon the right of property, although a finding that the publication would be a breach of contract and of trust was authorized. Attention is called to the fact that in *Prince Albert's Case* [1 Macn. & G. 25] while the decision was put upon the ground above stated, Lord Cottenham declared that, with respect to the acts of the defendants, "privacy is the right invaded."

It must be conceded that the numerous cases decided before 1890 in which equity has interfered to restrain the publication of letters, writings, papers, etc., have all been based either upon the recognition of a right of property, or upon the fact that the publication would be a breach of contract, confidence, or trust. It is well settled that, if any contract or property right or trust relation has been violated, damages are recoverable. There are many cases which sustain such a doctrine. Cases involving the right of privacy that have arisen since 1890 will now be considered:

In *Mackenzie v. Soden Mineral Springs Co.* (1891) 27 Abb. N. C. 402, 18 N. Y. Supp. 240, an injunction was granted by the New York supreme court, special term, at the instance of a physician, to restrain the publication of an unauthorized recommendation of a medicinal preparation under his name, upon the grounds that such publication would be injurious to his professional reputation, and "an infringement of his right to the sole use of his own name," and prejudicial to public interest. While this case was not based upon the right of privacy, that right was impliedly recognized.

The first reported case in which the right of privacy was expressly recognized was the case of *Schuyler v. Curtis* (1891) 27 Abb.

N. C. 387, 15 N. Y. Supp. 787, where Justice O'Brien, of the supreme court of New York, granted an injunction to restrain the making and public exhibition of a statue of a deceased person, upon the ground that it was not shown that she was a public character. This judgment was affirmed by the supreme court, general term, by Van Brunt and Barrett, JJ., in an opinion by the former, in which the rule was laid down that a person, whether a public character or not, has a right to enjoin the making and placing on exhibition of his statue, and, he being dead, a relative has this right. 64 Hun, 594, 19 N. Y. Supp. 264. When the case came before the supreme court, special term, in 1893, the judgment of the general term was followed, and in an opinion by Ingraham, J., the rule was announced that a court of equity, at the instance of one of the relatives of a deceased person, will enjoin the making and placing on public exhibition of a statue of the deceased by unauthorized persons, which the complaining relatives unite in alleging will cause them pain and distress, and will be considered by them a disgrace; and this, too, whether or not the court be of the opinion that the proposed representation should produce the alleged effect, and that such unauthorized act is not within the provision of the state Constitution which secures to each person the right to freely speak, write, and publish his sentiments on all subjects. 30 Abb. N. C. 376, 24 N. Y. Supp. 509. The statue which it was proposed to exhibit was in no sense a caricature, and the exhibition of the same would not have been a libel upon the deceased.

In 1893, in *Marks v. Jaffa*, 6 Misc. 290, 26 N. Y. Supp. 908, an injunction was granted by the superior court of New York city, special term, to restrain the publication of a picture of the plaintiff in the defendant's newspaper, with an invitation to the readers of the paper to vote on the question of the popularity of the plaintiff, as compared with another person, whose picture was also published in such newspaper. McAdam, J., in the opinion said: "No newspaper or institution, no matter how worthy, has the right to use the name or picture of anyone for such a purpose without his consent." The decision was apparently based upon the case of *Schuyler v. Curtis*, above referred to.

In 1893 an application was made to Judge Colt, of the United States circuit court for the district of Massachusetts, by the widow and children of George H. Corliss, to enjoin the publication and sale of a biographical sketch of Mr. Corliss, and from printing and selling his picture in connection therewith. The bill did not allege that the publication

contained any matter which was scandalous, libelous, or false, or that it affected any right of property, but the relief was prayed upon the ground that the publication was an injury to the feelings of the plaintiffs, and against their express prohibition. An injunction was refused as to the biography on the ground that Mr. Corliss was a public man, in the same sense as authors or artists are public men; but an injunction was granted as to the publication of the picture upon the ground that the publisher had obtained a copy of the photograph upon certain conditions, and the publication would be a violation of those conditions. Subsequently a motion was made to dissolve the injunction on the ground that the photograph from which the copies were made was not obtained in the manner above referred to, but from a copy which was obtained in a lawful way; and the injunction was dissolved upon the ground that neither a public character, nor his family after his death, has a right to enjoin the publication of his portrait, when the publication would not be a violation of a contract or a breach of trust or confidence. Judge Colt, in the opinion, uses this language: "Independently of the question of contract, I believe the law to be that a private individual has a right to be protected in the representation of his portrait in any form, that this is a property, as well as a personal, right, and that it belongs to the same class of rights which forbids the reproduction of a private manuscript or painting, or the publication of private letters, or of oral lectures delivered by a teacher to his class, or the revelation of the contents of a merchant's books by a clerk." *Corliss v. E. W. Walker Co.* 31 L. R. A. 283, 57 Fed. 434, 64 Fed. 280. It is to be noted that the ruling in this case goes no further than that a public character has so waived his right of privacy, if he ever had it, as to authorize the publication of his life and his picture, not only without his consent, but also without the consent of his family after his death, when there is nothing in the biography or the picture which will reflect discredit upon the subject.

In 1894, in *Murray v. Gast Lithographic & Engraving Co.* 8 Misc. 36, 28 N. Y. Supp. 271,—a case decided by the court of common pleas of New York city and county,—it was held that a person cannot sue to enjoin the publication of a portrait of his infant child, or for damages caused thereby. This decision was undoubtedly correct, for, if there was any right to sue for a violation of the right of privacy, the cause of action was in the child, and not in the parent.

In 1895 the case of *Schuyler v. Curtis* reached the court of appeals of New York,

and the judgment of the lower court was reversed. 147 N. Y. 436, 31 L. R. A. 286, 49 Am. St. Rep. 671, 42 N. E. 22. It was held that, if any right of privacy, in so far as it includes the right to prevent the public from making pictures or statues commemorative of the worth and services of the subject, exists at all, it does not survive after death, and cannot be enforced by the relatives of the deceased. The opinion was delivered by Judge Peckham, in the course of which he uses this language: "If the defendants had projected such a work in the lifetime of Mrs. Schuyler, it would, perhaps, have been a violation of her individual right of privacy, because it might be contended that she had never occupied such a position towards the public as would have authorized such action by anyone so long as it was in opposition to her wishes." Judge Gray dissented, saying in his opinion: "I cannot see why the right of privacy is not a form of property, as much as is the right of complete immunity of one's person." This case settles nothing as to the existence of a right of privacy, but merely rules that, if it exists at all, it is a personal right, and dies with the person.

In *Atkinson v. John E. Doherty & Co.* 121 Mich. 372, 46 L. R. A. 219, 80 Am. St. Rep. 507, 80 N. W. 285,—a case decided in 1899,—the supreme court of Michigan held that the use of the name and likeness of a deceased person as a label for a brand of cigars cannot be restrained by injunction, so long as they do not constitute a libel. Many, if not at all, the cases above referred to, in reference to the right of privacy, are mentioned and reviewed in this case. While this decision apparently lays down the broad proposition that the right of privacy does not exist to such an extent as to prohibit one from publishing the picture of another without his consent, in reality the only question necessary to have been decided was whether this right of privacy was personal, and died with the person; and therefore the decision, on its facts, is authoritative no further than the decision of the New York court of appeals in *Schuyler v. Curtis*. While the right of privacy is personal, and may die with the person, we do not desire to be understood as assenting to the proposition that the relatives of the deceased cannot, in a proper case, protect the memory of their kinsman, not only from defamation, but also from an invasion into the affairs of his private life after his death. This question is not now involved, but we do not wish anything said to be understood as committing us in any way to the doctrine that, against the consent of relatives, the private affairs of a deceased person may be published, and his

picture or statue exhibited. We call attention to the ruling in *Jacobus v. Congregation of Children of Israel*, 107 Ga. 518, 73 Am. St. Rep. 141, 33 S. E. 853, that damages may be recovered by the relative of a deceased person, who is the owner of an easement of burial in a cemetery lot, for the disinterment of the dead body, and that, if the injury has been wanton and malicious, or the result of gross negligence and a reckless disregard of the rights of others, exemplary damages may be awarded, in estimating which the injury to the natural feelings of the plaintiff may be taken into consideration. If damages for wounded feelings can be recovered in such a case for the wanton removal of the bleaching bones of the deceased relative, it would seem, for a stronger reason, that such damages ought to be allowed to be recovered when those matters which the deceased had jealously guarded from the public during his lifetime, and his portrait, which was likewise protected from the public gaze, are made public property after his death.

In *Roberson v. Rochester Folding Box Co.* (1901) 64 App. Div. 30, 71 N. Y. Supp. 876, decided by the appellate division of the supreme court of New York, it appeared that lithographic likenesses of a young woman, bearing the words "Flour of the Family," were, without her consent, printed and used by a flour-milling company to advertise its goods. The declaration alleged that in consequence of the circulation of such lithographs the plaintiff's good name had been attacked, and she had been greatly humiliated and made sick, and been obliged to employ a physician, and prayed for an injunction against the further use of the lithographs, and for damages. It was held that the declaration was not demurrable. It was also held that, if a right of property was necessary to entitle the plaintiff to maintain the action, the case might stand upon the right of property which everyone has in his own body. This case came before the court of appeals of New York in 1902, and the judgment was reversed. 171 N. Y. 540, 59 L. R. A. 478, 89 Am. St. Rep. 828, 64 N. E. 442. This is the first and only decision by a court of last resort involving the existence of a right of privacy. The decision was by a divided court; Chief Judge Parker and three of the associate judges concurring in a ruling that the complaint set forth no cause of action, either at law or in equity, while Judge Gray, with whom concurred two of the associate judges, filed a dissenting opinion, in which it was maintained that the injunction should have been granted. While the ruling of the majority is limited in its effect to the unwarranted publication of

the picture of another for advertising purposes, the reasoning of Judge Parker goes, to the extent of denying the existence in the law of a right of privacy, "founded upon the claim that a man has the right to pass through this world . . . without having his picture published, his business enterprises discussed, . . . or his eccentricities commented upon, . . . whether the comment be favorable or otherwise." The reasoning of the majority is, in substance, that there is no decided case, either in England or in this country, in which such a right is distinctly recognized; that every case that might be relied on to establish the right was placed expressly upon other grounds, not involving the application of this right in any sense; that the right is not referred to by the commentators and writers upon the common law or the principles of equity; that the existence of the right is not to be legitimately inferred from anything that is said by any of such writers; and that a recognition of the existence of the right would bring about a vast amount of litigation; and that in many instances where the right would be asserted it would be difficult, if not impossible, to determine the line of demarcation between the plaintiff's right of privacy and the well-established rights of others and of the public. For these reasons the conclusion is reached that the right does not exist, has never existed, and cannot be enforced as a legal right. We have no fault to find with what is said by the distinguished and learned judge who voiced the views of the majority as to the existence of decided cases, and agree with him in his analysis of the various cases which he reviews,—that the judgment in each was based upon other grounds than the existence of a right of privacy. We also agree with him so far as he asserts that the writers upon the common law and the principles of equity do not in express terms refer to this right. But we are utterly at variance with him in his conclusion that the existence of this right cannot be legitimately inferred from what has been said by commentators upon the legal rights of individuals, and from expressions which have fallen from judges in their reasoning in cases where the exercise of the right was not directly involved. So far as the judgment in the case is based upon the argument *ab inconvenienti*, all that is necessary to be said is that this argument has no place in the case if the right invoked has an existence in the law. But if it were proper to use this argument at all, it could be said with great force that as to certain matters the individual feels and knows that he has a right to exercise the liberty of privacy, and that

he has a right to resent any invasion of this liberty, and, if the law will not protect him against invasion, the individual will, to protect himself and those to whom he owes protection, use those weapons with which nature has provided him, as well as those which the ingenuity of man has placed within his reach. Thus the peace and good order of society would be disturbed by each individual becoming a law unto himself to determine when and under what circumstances he should avenge the outrage which has been perpetrated upon him or a member of his family. The true lawyer, when called to the discharge of judicial functions, has in all times, as a general rule, displayed remarkable conservatism; and, wherever it was legally possible to base a judgment upon principles which had been recognized by a long course of judicial decision, this has been done, in preference to applying a principle which might be considered novel. It was for this reason that the numerous cases, both in England and in this country, which really protected the right of privacy, were not placed upon the existence of this right, but were allowed to rest upon principles derived from the law of property, trust, and contract. Any candid mind will, however, be compelled to concede that, in order to give relief in many of those cases, it required a severe strain to bring them within the recognized rules which were sought to be applied. The desire to avoid the novelty of recognizing a principle which had not been theretofore recognized was avoided in such cases by the novelty of straining a well-recognized principle to cover a state of facts to which it had never before been applied. This conservatism of the judiciary has sometimes unconsciously led judges to the conclusion that, because the case was novel, the right claimed did not exist. With all due respect to Chief Judge Parker and his associates who concurred with him, we think the conclusion reached by them was the result of an unconscious yielding to the feeling of conservatism which naturally arises in the mind of a judge who faces a proposition which is novel. The valuable influence upon society and upon the welfare of the public of the conservatism of the lawyer, whether at the bar or upon the bench, cannot be overestimated; but this conservatism should not go to the extent of refusing to recognize a right which the instincts of nature prove to exist, and which nothing in judicial decision, legal history, or writings upon the law can be called to demonstrate its nonexistence as a legal right.

We think that what should have been a proper judgment in the *Roberson Case* was that contended for by Judge Gray in his dis-

senting opinion, from which we quote as follows:

"The right of privacy, or the right of the individual to be let alone, is a personal right, which is not without judicial recognition. It is the complement of the right to the immunity of one's person. The individual has always been entitled to be protected in the exclusive use and enjoyment of that which is his own. The common law regarded his person and property as inviolate, and he has the absolute right to be let alone. Cooley, Torts, p. 29. The principle is fundamental and essential in organized society that everyone, in exercising a personal right and in the use of his property, shall respect the rights and properties of others. He must so conduct himself, in the enjoyment of the rights and privileges which belong to him as a member of society, as that he shall prejudice no one in the possession and enjoyment of those which are exclusively his. When, as here, there is an alleged invasion of some personal right or privilege, the absence of exact precedent, and the fact that early commentators upon the common law have no discussion upon the subject, are of no material importance in awarding equitable relief. That the exercise of the preventive power of a court of equity is demanded in a novel case is not a fatal objection. . . .

"As I have suggested, that the exercise of this peculiar preventive power of a court of equity is not found in some precisely analogous case furnishes no valid objection at all to the assumption of jurisdiction, if the particular circumstances of the case show the performance, or the threatened performance, of an act by a defendant which is wrongful, because constituting an invasion, in some novel form, of a right to something which is, or should be, conceded to be the plaintiff's, and as to which the law provides no adequate remedy. It would be a justifiable exercise of power, whether the principle of interference be rested upon analogy to some established common-law principle, or whether it is one of natural justice. . . .

"Instantaneous photography is a modern invention, and affords the means of securing a portraiture of an individual's face and form in *invitum* their owner. While, so far forth as it merely does that, although a species of aggression, I concede it to be an irremediable and irrepressible feature of the social evolution. But if it is to be permitted that the portraiture may be put to commercial or other uses for gain, by the publication of prints therefrom, then an act of invasion of the individual's privacy results, possibly more formidable and more painful in its consequences than an actual bodily

assault might be. Security of person is as necessary as the security of property, and for that complete personal security which will result in the peaceful and wholesome enjoyment of one's privileges as a member of society there should be afforded protection, not only against the scandalous portraiture and display of one's features and person, but against the display and use thereof for another's commercial purposes or gain. The proposition is to me an inconceivable one that these defendants may unauthorizedly use the likeness of this young woman upon their advertisement as a method of attracting widespread public attention to their wares, and that she must submit to the mortifying notoriety, without right to invoke the exercise of the preventive power of a court of equity. Such a view, as it seems to me, must have been unduly influenced by a failure to find precedents in analogous cases, or some declaration by the great commentators upon the law of a common-law principle which would precisely apply to and govern the action, without taking into consideration that, in the existing state of society, new conditions affecting the relations of persons demand the broader extension of those legal principles which underlie the immunity of one's person from attack. I think that such a view is unduly restricted, too, by a search for some property which has been invaded by the defendants' acts. Property is not necessarily the thing itself which is owned. It is the right of the owner in relation to it. The right to be protected in one's possession of a thing, or in one's privileges belonging to him as an individual, or secured to him as a member of the commonwealth, is property, and, as such, entitled to the protection of the law. The protective power of equity is not exercised upon the tangible thing, but upon the right to enjoy it, and so it is called forth for the protection of the right to that which is one's exclusive possession, as a property right. It seems to me that the principle which is applicable is analogous to that upon which courts of equity have interfered to protect the right of privacy in cases of private writings, or of other unpublished products of the mind. . . .

"I think that this plaintiff has the same property in the right to be protected against the use of her face for defendants' commercial purposes as she would have if they were publishing her literary compositions. The right would be conceded if she had sat for her photograph, but, if her face or her portraiture has a value, the value is hers exclusively until the use be granted away to the public. Any other principle of de-

cision, in my opinion, is as repugnant to equity as it is shocking to reason. . . .

"The right to grant the injunction does not depend upon the existence of the property which one has in some contractual form. It depends upon the existence of property in any right which belongs to a person. . . .

"It would be, in my opinion, an extraordinary view, which, while conceding the right of a person to be protected against the unauthorized circulation of an unpublished lecture, letter, drawing, or other ideal property, yet would deny the same protection to a person whose portrait was unauthorizedly obtained and made use of for commercial purposes. The injury to the plaintiff is irreparable, because she cannot be wholly compensated in damages for the various consequences entailed by defendants' acts. The only complete relief is an injunction restraining their continuance. Whether, as incidental to that equitable relief, she should be able to recover only nominal damages, is not material, for the issuance of the injunction does not, in such a case, depend upon the amount of the damages, in dollars and cents."

The effect of the reasoning of the learned judge whose words have just been quoted is to establish conclusively the correctness of the conclusion which we have reached, and we prefer to adopt as our own his reasoning, in his own words, rather than to paraphrase them into our own.

The decision of the court of appeals of New York in the *Roberson Case* gave rise to numerous articles in the different law magazines of high standing in the country,—some by the editors and others by contributors. In some the conclusion of the majority of the court was approved, in others the views of the dissenting judges were commended, and in still others the case and similar cases were referred to as apparently establishing that the claim of the majority was correct, but regret was expressed that the necessity was such that the courts could not recognize the right asserted. An editorial in the *American Law Review* (volume 36, p. 636) said: "The decision under review shocks and wounds the ordinary sense of justice of mankind. We have heard it alluded to only in terms of regret." There were also articles referring to other cases cited which deal with the question as to the existence of a right of privacy. See 36 *Am. Law Rev.* 614, 634; 34 *Am. Law Reg. N. S.* 134; 41 *Am. Law Reg. N. S.* 669; 1 *Col. Law Rev.* 491; 2 *Col. Law Rev.* 437; 44 *Alb. L. J.* 428; 55 *Cent. L. J.* 123; 57 *Cent. L. J.* 361. See also *North American Review* (September, 1902), 361; 22 *Am. & Eng. Enc. Law*, 2d ed. p. 1311; note to *Roberson* 69 *L. R. A.*

v. Rochester Folding Box Co. 89 *Am. St. Rep.* 844; note to *Corliss v. E. W. Walker Co.* 31 *L. R. A.* 283. Articles on the subject of the right of privacy have also appeared in 12 *Yale L. J.* 35; 24 *Nat. Corp. Rep.* 709; 25 *Nat. Corp. Rep.* 183, 415; 6 *Law Notes*, 79; and *Case and Comment*; 36 *Chicago Legal News*, 126 (July, 1902); but these articles were not accessible to us at the time this opinion was written.

As we have already said, cases may arise where it is difficult to determine on which side of the line of demarcation which separates the right of privacy from the well-established rights of others they are to be found; but we have little difficulty in arriving at the conclusion that the present case is one in which it has been established that the right of privacy has been invaded, and invaded by one who cannot claim exemption under the constitutional guaranties of freedom of speech and of the press. The form and features of the plaintiff are his own. The defendant insurance company and its agent had no more authority to display them in public for the purpose of advertising the business in which they were engaged than they would have had to compel the plaintiff to place himself upon exhibition for this purpose. The latter procedure would have been unauthorized and unjustifiable, as everyone will admit, and the former was equally an invasion of the rights of his person. Nothing appears from which it is to be inferred that the plaintiff has waived his right to determine himself where his picture should be displayed in favor of the advertising right of the defendants. The mere fact that he is an artist does not of itself establish a waiver of this right, so that his picture might be used for advertising purposes. If he displayed in public his works as an artist, he would, of course, subject his works and his character as an artist, and possibly his character and conduct as a man, to such scrutiny and criticism as would be legitimate and proper to determine whether he was entitled to rank as an artist, and should be accorded recognition as such by the public. But it is by no means clear that even this would have authorized the publication of his picture. The constitutional right to speak and print does not necessarily carry with it the right to reproduce the form and features of man. The plaintiff was in no sense a public character, even if a different rule in regard to the publication of one's picture should be applied to such characters. It is not necessary in this case to hold—nor are we prepared to do so—that the mere fact that a man has become what is called a public character, either by aspiring to public office, or by holding public office, or by

exercising a profession which places him before the public, or by engaging in a business which has necessarily a public nature, gives to everyone the right to print and circulate his picture. To use the language of Hooker, J., in *Atkinson v. John E. Doherty & Co.* 121 Mich. 372, 46 L. R. A. 219, 80 Am. St. Rep. 507, 80 N. W. 285: "We are loath to believe that the man who makes himself useful to mankind surrenders any right to privacy thereby, or that, because he permits his picture to be published by one person and for one purpose, he is forever thereafter precluded from enjoying any of his rights." It may be that the aspirant for public office, or one in official position, impliedly consents that the public may gaze, not only upon him, but upon his picture, but we are not prepared now to hold that even this is true. It would seem to us that even the President of the United States, in the lofty position which he occupies, has some rights in reference to matters of this kind which he does not forfeit by aspiring to or accepting the highest office within the gift of the people of the several states. While no person who has ever held this position, and probably no person who has ever held public office, has even objected, or ever will object, to the reproduction of his picture in reputable newspapers, magazines, and periodicals, still it cannot be that the mere fact that a man aspires to public office or holds public office subjects him to the humiliation and mortification of having his picture displayed in places where he would never go to be gazed upon, at times when, and under circumstances where, if he were personally present, the sensibilities of his nature would be severely shocked. If one's picture may be used by another for advertising purposes, it may be reproduced and exhibited anywhere. If it may be used in a newspaper, it may be used on a poster or a placard. It may be posted upon the walls of private dwellings or upon the streets. It may ornament the bar of the saloon keeper or decorate the walls of a brothel. By becoming a member of society neither man nor woman can be presumed to have consented to such uses of the impression of their faces and features upon paper or upon canvas. The conclusion reached by us seems to be so thoroughly in accord with natural justice, with the principles of the law of every civilized nation, and especially with the elastic principles of the common law, and so thoroughly in harmony with those principles as molded under the influence of American institutions, that it seems strange to us that not only four of the judges of one of the most distinguished and learned courts of the Union, but also lawyers of learning and ability, have found 69 L. R. A.

an insurmountable stumbling block in the path that leads to a recognition of the right which would give to persons like the plaintiff in this case and the young woman in the *Roberson Case* redress for the legal wrong, or what is by some of the law writers called the outrage, perpetrated by the unauthorized use of their pictures for advertising purposes.

What we have ruled cannot be in any sense construed as an abridgment of the liberty of speech and of the press as guaranteed in the Constitution. Whether the reproduction of a likeness of another which is free from caricature can in any sense be declared to be an exercise of the right to publish one's sentiments, certain it is that one who, merely for advertising purposes, and from mercenary motives, publishes the likeness of another without his consent, cannot be said, in so doing, to have exercised the right to publish his sentiments. The publication of a good likeness of another, accompanying a libelous article, would give a right of action. The publication of a caricature is generally, if not always, a libel. Whether the right to print a good likeness of another is an incident to a right to express one's sentiments in reference to a subject with which the person whose likeness is published is connected, is a question upon which we cannot, under the present record, make any authoritative decision; but it would seem that a holding that the publication of a likeness under such circumstances without the consent of the person whose likeness is published would be giving to the word "sentiment" a very extended meaning. The use of a pen portrait might be allowable in some cases where the use of an actual portrait was not permissible. There is in the publication of one's picture for advertising purposes not the slightest semblance of an expression of an idea, a thought, or an opinion, within the meaning of the constitutional provision which guarantees to a person the right to publish his sentiments on any subject. Such conduct is not embraced within the liberty to print, but is a serious invasion of one's right of privacy, and may in many cases, according to the circumstances of the publication and the uses to which it is put, cause damages to flow which are irreparable in their nature. The knowledge that one's features and form are being used for such a purpose, and displayed in such places as such advertisements are often liable to be found, brings not only the person of an extremely sensitive nature, but even the individual of ordinary sensibility, to a realization that his liberty has been taken away from him; and, as long as the advertiser uses him for these purposes, he cannot be otherwise than

conscious of the fact that he is for the time being under the control of another, that he is no longer free, and that he is in reality a slave, without hope of freedom, held to service by a merciless master; and if a man of true instincts, or even of ordinary sensibilities, no one can be more conscious of his enthrallment than he is.

So thoroughly satisfied are we that the law recognizes, within proper limits, as a legal right, the right of privacy, and that the publication of one's picture without his consent by another as an advertisement, for the mere purpose of increasing the profits and gains of the advertiser, is an invasion of this right, that we venture to predict that the day will come that the American bar will marvel that a contrary view was ever entertained by judges of eminence and ability, just as in the present day we stand amazed that Lord Coke should have combated with all the force of his vigorous nature the proposition that the court of chancery had jurisdiction to entertain an application for injunction to restrain the enforcement of a common-law judgment which had been obtained by fraud, and that Lord Hale, with perfect composure of manner and complete satisfaction of soul, imposed the death penalty for witchcraft upon ignorant and harmless women.

13-15. It is now to be determined whether what may be called the first count in the petition set forth a cause of action for libel, as against a general demurrer. The publication did not mention the plaintiff's name, but it did contain a likeness of him that his friends and acquaintances would readily recognize as his, and the words of the publication printed under the likeness were put into the mouth of him whose likeness was published. It was, so far as his friends and acquaintances were concerned, the same as if his name had been signed to the printed words. In these words he was made to say, in effect, that he had secured insurance with the defendant company; that on this account his family were protected, and he was receiving an income from an annual dividend on paid-up policies. These words are harmless in themselves. Standing alone, they contain nothing, and carry no inference of anything that is disgraceful, to be ashamed of, or calculated to bring one into reproach. When, in an action for libel, the words declared on are harmless in themselves, and the petition alleges no extrinsic fact which would show that the words might be taken in other than their ordinary sense, a cause of action for a libel is not sufficiently set forth. *Stewart v. Wilson*, 23 Minn. 449. If, in the light of extrinsic facts, words apparently harmless are such as to convey to

the mind of the reader who is acquainted with the extrinsic facts a meaning which will be calculated to expose the person about whom the words are used to contempt or ridicule, then such harmless words become libelous, and an action is well brought, although no special damages may be alleged. *Behre v. National Cash Register Co.* 100 Ga. 213, 62 Am. St. Rep. 320, 27 S. E. 986; *Holmes v. Clisby*, 118 Ga. 823, 45 S. E. 684; *Central R. Co. v. Sheftall*, 118 Ga. 865, 45 S. E. 687.

It is alleged that the plaintiff did not have, and never had had, a policy of insurance with the defendant company, and that this fact was known to his friends and acquaintances. In the light of these allegations, the words attributed to the plaintiff become absolutely false, and those who are acquainted with the facts, upon reading the statement, would naturally ask, "For what purpose was this falsehood written?" It was either gratuitous, or it was for a consideration; and, whichever conclusion might be reached, the person to whom the words were attributed would become contemptible in the mind of the reader. He would become at once a self-confessed liar. If he lied gratuitously, he would receive and merit the contempt of all persons having a correct conception of moral principles. If he lied for a consideration, he would become odious to every decent individual. See *Colvard v. Black*, 110 Ga. 643, 36 S. E. 80. It seems clear to us that a jury could find from the facts alleged that the publication, in the light of the extrinsic facts, was libelous, and the plaintiff was entitled to have this question submitted to the jury. *Beazley v. Reid*, 68 Ga. 380; *Holmes v. Clisby*, 121 Ga. 241, 104 Am. St. Rep. 103, 48 S. E. 934.

16. Having reached the conclusion that each count in the petition set forth a cause of action as against a general demurrer, it remains now to be determined whether any of the objections raised in the special demurrer were well taken. It is said that there was a misjoinder of parties in that Adams should not be joined with the other defendants, or either of them, in the count for libel or the count for a violation of the right of privacy. The allegations of the petition are sufficient to show that the three defendants were joint wrongdoers, and were therefore not improperly joined in the same action. A further objection was that there was a misjoinder of causes of action, in that there was an attempt to join a cause of action *ex delicto* (the libel) with a cause of action *ex contractu* (the violation of the right of privacy). While the petition does allege that the violation of the right of privacy was the result of a breach of trust

or confidence reposed in Adams, still it is distinctly charged that it is a trespass upon his right of privacy; and, construing the petition as a whole, it is manifest that the pleader intended to bring an action for a tort. It was further objected that no facts were alleged from which the charge of malice can be legally drawn, and that it did not appear from the allegations of the petition that any ridicule befell petitioner by reason of the publication. The publication, in the light of the extrinsic facts, being a libel, the law would infer malice, and it was not necessary to allege that any ridicule actually befell the petitioner; all that is necessary to constitute the publication a libel being that the statements should be of such a character as had a tendency to bring the plaintiff into contempt or ridicule. • The court erred in dismissing the petition.

Judgment reversed.

All the Justices concur.

Willis HOPKINS, Impleaded, etc., *Plff. in Err.*,
v.

STATE of Georgia.

(.....Ga.....)

***Playing pool under an agreement among the players that the one losing the game shall pay for the use of the table is betting at a pool table, within the meaning of Penal Code 1895, § 401, providing that, "if any person shall . . . bet . . . at any . . . pool table, he shall be guilty of a misdemeanor."** The fact that the state imposes a specific tax on the keeper of a pool table does not affect the question.

(March 25, 1905.)

ERROR to the Superior Court for Bartow County to review a judgment convicting defendant of gaming. *Affirmed.*

The facts are stated in the opinion.

Messrs. W. M. Graham and W. I. Heyward, for plaintiff in error:

That the rules of the game require the party beaten to pay the table fee does not constitute playing for money.

Williams v. State, 12 Smedes & M. 58; *Pryor v. Com.* 2 Dana, 298; *McAulry v. State*, 7 Yerg. 526; *Garner v. State*, 5 Yerg.

***Headnote by FISH, P. J.**

NOTE.—For a case in this series holding that an agreement by the owners of race horses to divide equally all premiums and stake money offered on races, awarded to any of the horses, is not void as a wagering contract, see *Hankings v. Ottinger*, 40 L. R. A. 76.

As to legality of betting generally, see *Bernard v. Taylor*, 18 L. R. A. 859, and *note*.
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160; *Anthony v. State*, 4 Humph. 85; *Iseley v. State*, 8 Blackf. 403; *Hale v. State*, 8 Tex. 171; *Jackson v. State*, 4 Ind. 560; *Harbaugh v. People*, 40 Ill. 294; *Blewett v. State*, 34 Miss. 606; *People v. Sergeant*, 8 Cow. 140.

To constitute gaming one must expect profit by the game.

Blewett v. State, 34 Miss. 614.

Mr. Sam P. Maddox, for defendant in error:

Playing for the price of the game is gambling.

Desty, Criminal Law, § 101 B; *State v. Book*, 41 Iowa, 550, 20 Am. Rep. 609; *Ward v. State*, 17 Ohio St. 32; *Mount v. State*, 7 Ind. 654; *State v. Bishel*, 39 Iowa, 42.

That such tables were licensed makes no difference.

State v. Doon, R. M. Charl. (Ga.) 1.

Fish, P. J., delivered the opinion of the court:

Willis Hopkins, Mose Reed, and Creek Kincaid were indicted for playing and betting "together for money or other things of value at a pool table." On the trial of Hopkins, the witness introduced in behalf of the state testified that he saw Hopkins and the other two defendants play several games of pool together, at the time and place charged in the indictment, "The price of each game being 15 cents; the same being 5 cents a cue for each player using a cue. Under an agreement between the players, the one losing the game—that is, the one putting the least number of balls in the pockets—was to pay for the game. Several games were played in this way, the losing party always paying for the game. The pool table was run and owned by Henry Kay, but he was not playing." Hopkins was found guilty. His motion for a new trial being overruled, he excepted.

The question whether playing a game such as billiards, pool, tenpins, etc., under an agreement among the players that the loser is to pay the rent or charge imposed by the keeper of the table or alley for its use, is gaming, has never been decided by this court. There is an irreconcilable conflict of authority among the courts of other states where this question has arisen. In *State v. Records*, 4 Harr. (Del.) 554, it was held to be betting, where the players at tenpins risked only the price of the game. In *State v. Leighton*, 23 N. H. 167, the defendants were indicted for unlawfully keeping a gaming place "for money, hire, gain, and reward." At the trial it appeared that it was contrary to the rules of the room to play for money, but that it was the general custom for the party defeated in a game to pay for the use of the table, for which the

defendants charged a shilling per game. It was held that this was a gaming for money. The court said: "The defendants in this case made a profit from the use of the billiard tables. For the 'hire' of them they were paid a shilling a game. The persons who resorted there played for the hire. In substance, they played for a shilling a game. The loser paid and the owner received the sum. By an understanding among the players, the money won was to be applied towards defraying the expenses of the tables, but still it was money won at play, and upon the chance of the play, and not on any collateral matter." In *Mount v. State*, 7 Ind. 654, the accused was charged with the violation of an act which provided that "every person who shall, by playing or betting at or upon any game or wager whatever, either lose or win any article of value, shall be fined," etc. The information charged that Groff owned and kept a tenpin alley for hire; that Mount and Miller hired of him the use of the alley to play one game of tenpins, for which they agreed to pay him 10 cents; "and that, in pursuance of said hiring," Mount and Miller played a game, by which Mount won of Miller 5 cents, the half of the hire of the alley, by then and there unlawfully betting and wagering with him the 5 cents on the result of the game. In the opinion in the case, Davison, J., said: "It is insisted that the information does not show a case within the statute. To constitute unlawful gaming, there must be a game played, and upon its result some article of value must be lost and won. Here was such game, and the only point of inquiry is, Was any article of value won by the defendant? His liability to Groff was paid by Miller, because, in the event of being unsuccessful, he had stipulated to pay it. This payment, though made to Groff, was for the use of the defendant; and the transaction was, in effect, the same as if the amount lost and won had been paid to the defendant instead of Groff, and he had received it from the defendant." In *Hamilton v. State*, 75 Ind. 586, it was held that suffering parties to play upon a billiard table, where nothing is risked but the hire of the table, came within the purview of a statute providing that any person who should keep or suffer his building, etc., to be used for gaming, should be fined, etc. In *Alexander v. State*, 99 Ind. 450, it was held: "A charge in an indictment that the defendant played a game of pool upon a pool table with another person, and thereby won money from him, is sustained by proof that the parties played under an arrangement that the losing party should pay the owner of the table the amount charged for the use of it, and that 69 L. R. A.

the defendant won the games, and the other party paid for them." The court said: "To whom the money was directly paid was not so material as the fact that the game decided who should pay it, and who should profit by the payment. If appellant had lost the games, he would have lost the amount charged for them. He won the games, and thereby won the amount charged for them, or at least one half of that amount. At the end of each game he was 10 cents better off than if he had lost the game, and he was 5 cents better off than he would have been if, without any chance or hazard, each party had paid for his cue. That he did not actually handle the money, it seems to us, can make no difference." To the same effect, see *Ward v. State*, 17 Ohio St. 32; *State v. Book*, 41 Iowa, 550, 20 Am. Rep. 609; *State v. Miller*, 53 Iowa, 154, 4 N. W. 900; *Tuttle v. State*, 1 Tex. App. 364; *State v. Howery*, 41 Tex. 506; *Hall v. State* (Tex. Crim. App.) 34 S. W. 122; *Mayo v. State* (Tex. Crim. App.) 82 S. W. 515; *Murphy v. Rogers*, 151 Mass. 118, 24 N. E. 35. Cases in which rulings to the contrary have been made are *People v. Sergeant*, 8 Cow. 139; *Harbaugh v. People*, 40 Ill. 294; *Blewett v. State*, 34 Miss. 606; *People ex rel. Healey v. Forbes*, 52 Hun, 30, 4 N. Y. Supp. 757; *State v. Hall*, 32 N. J. L. 165; *State v. Quaid*, 43 La. Ann. 1076, 26 Am. St. Rep. 207, 10 So. 183. These rulings were put mainly on the ground that, to constitute gaming or betting, one or the other of the parties must expect to profit by the game, and that in playing billiards, pool, etc., the loser to pay the table hire, neither of the parties expected a profit. Section 401 of the Penal Code of 1895 declares: "If any person shall play and bet for money, or other thing of value, at any game played with cards, dice, or balls; or shall play and bet for money, or other thing of value, at any table of whatever name, kind, or description, for gaming; or shall bet at any game of ninepins, or any other number of pins, or at any billiard or pool table—he shall be guilty of a misdemeanor." The question, therefore, is, Did the evidence in the case under consideration show that the accused bet at a pool table; that is, that he laid a wager or staked money or anything of value at such table? We are of opinion that he did. He hazarded the payment of 10 cents, for the other two players, to the keeper of the table, and took the chance of relieving himself of his own obligation to such keeper. It is uniformly held that playing games to determine which of the players shall pay for drinks, food, or cigars, etc., for the use of the players, is gaming. 14 Am. & Eng. Enc. Law, p. 670, and citations. The use of the table for the

purpose of amusement and recreation, when such use must be paid for, is as much a thing of value as the drinks, food, or cigars. The players enjoy the drinks, food, or cigars, and they enjoy the use of the table, cues, and balls. For each of these things money must be paid, and, without the arrangement among the players by which the loser of the game must pay for what they all enjoy, each player would have to pay for his own share thereof, unless someone made him a gift of the same. If three men were to play a game of pool to decide which one of them should pay for the hire of a horse and vehicle for the temporary use of the three, would not each of them be engaged in betting with the other two upon the result of the game? Would not the loser lose, and the winners win, something of value? We think so. The hire of the horse and vehicle would be a thing of value wagered on the result of the game. And under the circumstances disclosed by the evidence in this case, so was the hire of the pool table for the use of the players while they played a game thereon. If two men were to each owe the keeper of a pool or billiard table \$1, and were to play a game upon the table under an agreement that the loser should pay both debts, the effect would be the same as if each bet the other \$1 on the result of the game. We can see no difference in principle between such a case and one in which the playing of the game creates the debt or debts to the keeper of the table, which the players agree the loser of the game must pay. The evident purpose of the statute was to prohibit all forms of gambling with cards, dice, or balls, or at any table, of whatever name, and the fact of the insignificance of the amount wagered is immaterial. As the accused introduced no evidence, and his statement was, in substance, the same as the testimony of the witness for the state, the verdict was demanded. The charge of the court excepted to—being, in effect, that, if the jury believed the facts of the case to be as stated by the witness for the state, they should find the accused guilty—was in accordance with the law of the case.

The fact that the state imposes a tax upon every keeper of a pool table does not affect the case. The licensing of a pool or billiard table does not authorize betting at such table. In *State v. Doon*, R. M. Charl. (Ga.) 1, it was held that "the fact that a tax is imposed upon a faro table does not authorize the use of it for gaming."

Judgment affirmed.

All the Justices concur.
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CENTRAL OF GEORGIA RAILWAY COMPANY

v.

AUGUSTA BROKERAGE COMPANY.

(.....Ga.....)

*1. The rule promulgated by the railroad commission of this state, that carriers, "in the conduct of their intrastate business, shall afford to all persons equal facilities in the transportation and delivery of freight," prohibits discrimination against shippers, not against commodities.

a. As to issuing through bills of lading, or furnishing its cars to connecting carriers, in order that shipments may be carried to ultimate destination without reloading at terminal points, a carrier may discriminate against cotton seed, provided all shippers of that commodity are treated alike.

b. That such discrimination is dictated by the business interests of the carrier, and really affects but a single shipper, because he is the only person at a terminal point who is engaged in shipping cotton seed out of the state, cannot alter the matter.

c. The carrier may at any time change its policy as to furnishing shippers of a certain commodity privileges which, under the law, it is not bound to extend to them.

d. That a case on trial has been before the supreme court, and that court has held that the plaintiff's petition sets forth a cause of action, is of no concern to the jury; nor should they be instructed as to the law upon abstract propositions wholly disconnected with the issues of fact they are called on to determine.

2. The operation of rule 36 of the railroad commission of Georgia is, by its own terms, limited to intrastate shipments; and unjust discrimination against shippers engaged in interstate commerce, as to the matter of issuing through bills of lading or furnishing reshipping facilities at terminal points within this state, does not constitute a violation of that rule.

3. Where a plaintiff sues to recover punitive damages for a particular wrongful act, and relies, as evidencing the animus with which that act was committed, upon the commission of a wholly independent act, done at a different time and place, the defendant should be advised by the plaintiff's pleadings of the case he is expected to meet.

(March 27, 1905.)

*Headnotes by EVANS, J.

NOTE.—As to right of carrier to fix lower rate for petroleum carried in tank cars than for petroleum in barrels, see *State ex rel. Kohler v. Cincinnati, W. & B. R. Co.* 7 L. R. A. 319.

As to right to fix lower rate for carrying coal to be used for manufacturing purposes than for coal to be sold by dealers, see *Hoover v. Pennsylvania R. Co.* 22 L. R. A. 263.

ERROR with cross bill of exceptions to review a judgment of the Circuit Court for Richmond County in favor of plaintiff in an action brought to recover damages for alleged violation of a statute against discrimination by railway carriers; defendant excepting to a refusal to grant a new trial after judgment against it; and plaintiff excepting to rulings made during the trial. *Reversed on defendant's exception.*

The facts are stated in the opinion.

Messrs. Lawton & Cunningham and J. C. C. Black, for plaintiff in error:

A railroad company is not bound to ship beyond the terminus of its own line. If it does engage in such a contract, it is entirely a voluntary contract.

Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co. 110 U. S. 667, 28 L. ed. 291, 4 Sup. Ct. Rep. 185; *Post v. Southern R. Co.* 103 Tenn. 184, 55 L. R. A. 481, 52 S. W. 306; *Little Rock & M. R. Co. v. St. Louis, I. M. & S. R. Co.* 2 Inters. Com. Rep. 762, 41 Fed. 559; *Chicago & A. R. Co. v. Pennsylvania Co.* 1 Inters. Com. Rep. 360; *Little Rock & M. R. Co. v. East Tennessee, V. & G. R. Co.* 2 Inters. Com. Rep. 454; *Capehart v. Louisville & N. R. Co.* 3 Inters. Com. Rep. 278; *New York, N. H. & H. R. Co. v. Platt*, 7 Inters. Com. Rep. 324; *Diamond Mills v. Boston & M. R. Co.* 9 Inters. Com. Rep. 315; *Railroad Commission v. Louisville & N. R. Co.* 10 Inters. Com. Rep. 173; *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.* 2 L. R. A. 289, 2 Inters. Com. Rep. 351, 37 Fed. 567; *St. Louis Drayage Co. v. Louisville & N. R. Co.* 5 Inters. Com. Rep. 137, 65 Fed. 39; *Gulf, O. & S. F. R. Co. v. Miami S. S. Co.* 30 C. C. A. 142, 52 U. S. App. 732, 86 Fed. 407; *Coles v. Central R. & Bkg. Co.* 86 Ga. 251, 12 S. E. 749; *State v. Wrightsville & T. R. Co.* 104 Ga. 437, 30 S. E. 891.

A common carrier is not bound to issue a bill of lading for the transportation of freight beyond its terminus.

Richmond & D. R. Co. v. Shomo, 90 Ga. 500, 16 S. E. 220.

There cannot be any unjust discrimination against cotton seed as a commodity of traffic, unless the denial of the privilege to cotton seed gives some competitive traffic some advantage in the markets over cotton seed.

Cattle Raisers' Asso. v. Ft. Worth & D. C. R. Co. 7 Inters. Com. Rep. 513; *Pennsylvania Millers' State Asso. v. Philadelphia & R. R. Co.* 8 Inters. Com. Rep. 531; *Railroad Commission v. Louisville & N. R. Co.* 10 Inters. Com. Rep. 173.

Mr. William H. Fleming, for defendant in error:

Where the law requires a jury to give 60 L. R. A.

exemplary damages, a verdict should not be set aside unless it is grossly excessive.

13 Cyc. Law & Proc. p. 105; *Monongahela Nav. Co. v. United States*, 148 U. S. 326, 37 L. ed. 468, 13 Sup. Ct. Rep. 622.

Evans, J., delivered the opinion of the court:

When this case was before this court on a former occasion, it was held that the plaintiff's petition set forth a cause of action, and that the special demurrers urged against it were not well taken. 121 Ga. 48, 48 S. E. 714. A trial upon the merits was had in the court below, and resulted in a verdict for \$3,005 in favor of the plaintiff. A motion for a new trial, presented in behalf of the defendant railway company, was overruled, and it excepted. By a cross bill of exceptions the plaintiff brings under review various rulings made during the progress of the trial which were adverse to it.

1. The gravamen of the brokerage company's complaint was that the railway company had, in violation of a rule promulgated by the railroad commission of this state, providing that carriers, "in the conduct of their intrastate business, shall afford to all persons equal facilities in the transportation and delivery of freight," wrongfully refused to place a car loaded with cotton seed on a side track in the rear of its warehouse, refused to allow reshipment of its cars at Augusta, and that the company's refusal so to do was in pursuance of a predetermined plan to drive the plaintiff out of the business of buying cotton seed at points along the railway company's line of road. As evidencing that such was the purpose of the railway company, the plaintiff alleged that it had also refused to issue through bills of lading from a station in Burke county to points beyond its line, notwithstanding the common practice of the railway company was to issue such bills of lading to other patrons. The evidence, however, disclosed that the railway company, while issuing through bills of lading on shipments of general merchandise, declined to do so on shipments of cotton seed, and in this respect there was no discrimination against the plaintiff. It further appeared that, although the plaintiff had asked that a through bill of lading on a shipment of cotton seed at the Burke county station should be issued to one of two points in Georgia beyond the railway company's line, the request was not made in good faith, and the plaintiff would not have accepted the bills of lading if the railway company had signified its willingness to issue them. The trial judge nevertheless instructed the jury that, should they believe the defendant company discriminated against the plaintiff as

to issuing through bills of lading on intrastate shipments, this would be a violation of rule 36 of the railroad commission, and the plaintiff would be entitled to recover such damages as resulted, and the jury could visit upon the railway company exemplary damages if they found its refusal to issue to the plaintiff through bills of lading was wilful. The court further instructed the jury as follows: "If it is the common practice of a railroad company to allow reshipping privileges or through bills of lading for all classes of merchandise generally, it cannot arbitrarily select any one class of merchandise, and refuse such privileges to dealers in that class of merchandise. In order to justify such discrimination, there would have to be differences in the circumstances and conditions of shipment." These and other instructions of similar import are excepted to on the ground that they were not authorized either by the law or the evidence, and were highly prejudicial to the railway company.

The first of these instructions certainly ought not to have been given. The plaintiff was not suing for damages resulting from the refusal of the railway company to issue a through bill of lading from the station in Burke county. The plaintiff could not, in the city court of Richmond county, recover damages for a tort committed in Burke county; and, moreover, had the plaintiff sued in the latter county, no recovery of damages because of such refusal would have been authorized, for the evidence shows that the application for a through bill of lading on an intrastate shipment was not bona fide. The plaintiff really wanted a through bill of lading to some South Carolina point. Had the railway company issued through bills of lading to other shippers of cotton seed at the Burke county station, but declined to accord like privileges to the plaintiff, this fact would, as was held when this case was here before, afford competent evidence touching the alleged purpose of the railway company to break up the plaintiff's business. However, the plaintiff failed to establish any such unjust discrimination, and therefore what occurred at that station really had no bearing on the case, unless the court was right in the view of the law expressed in the charge which we have above quoted.

The rule of the railroad commission alleged to have been violated prohibits discrimination against shippers, not against commodities. All shippers of a given commodity must be treated alike, but the carrier is not bound to have fixed and unvarying rules applicable alike to each and all kinds of freight, or to any given class of freight when shipped in car-load lots. In

the first place, it was optional with the railway company whether or not it would adopt the custom of issuing any through bills of lading or delivering its cars at Augusta to connecting carriers in order that freight might, without reloading on cars furnished by them, be reshipped in bulk. *Coles v. Central R. & Bkg. Co.* 86 Ga. 251, 12 S. E. 749. It could, without committing itself to any duty of so handling raw commodities, issue through bills of lading, or afford such reshipping facilities to shippers of manufactured articles or any other kind of freight it might choose to handle in that way. In the absence of any duty imposed by law, it could even arbitrarily so conduct its business in this respect as to discriminate between cotton seed and grain, lumber, or other products. Counsel for the railway company very frankly concede that it had a "policy" which governed its decision in not issuing through bills of lading on shipments of cotton seed from points along its line, or allowing facilities at Augusta for the reshipment of that product in bulk over competing lines. This policy was doubtless a purely selfish one, inasmuch as the railway company looked to its own material business interests, rather than to those of the plaintiff or other brokers engaged in handling cotton seed. But the plaintiff also had a "policy." It was not a philanthropic one. The situation may thus be summarized: The oil mills at Augusta depended largely for a supply of cotton seed upon the territory through which ran the defendant railway company's line. They delivered to it their manufactured products for shipment, so the railway company got a short haul on the raw cotton seed, and also a long haul on the reshipments made over its line of the manufactured products. It was not to the business interests of the railway company that cotton seed grown at local stations on its Augusta & Savannah branch should be shipped to oil mills located in South Carolina, for none of the manufactured products could then be secured for reshipment, at a high rate, over its road. Its interests dictated that the cotton seed should stop at Augusta, and be manufactured into oil and by-products by the mills located at that point. The railway company therefore determined that it would not, by voluntarily granting facilities to shippers which it was under no legal duty to afford, supply the means of diverting from its road profitable shipments which it otherwise would receive. On the other hand, the material business interests of the brokerage company demanded that it should be granted such facilities. It was a free lance, in open competition with the oil mills at Augusta in the buying of cotton seed at the lowest price possible, and

all the seed purchased by it was shipped from Augusta over the Southern Railway to South Carolina mills. To reload shipments at Augusta for the South Carolina trip was expensive. To get through bills of lading, or to secure the consent of the defendant company that its loaded cars be delivered to the Southern Railway at Augusta, so that the seed might be carried to its ultimate destination without reloading, would render the business of the brokerage company profitable, the business of the Augusta oil mills less remunerative. Their interests and those of the defendant railway company were coincident. Its interests and those of the brokerage company conflicted. The railway company acted as the average business man would have done; that is all. In declining to grant the privileges which the brokerage company wished to enjoy, the railway company merely adopted a policy which was within its legal rights as a carrier. *State v. Wrightsville & T. R. Co.* 104 Ga. 437, 30 S. E. 891. That the brokerage company may have been the only broker in Augusta or elsewhere affected by this policy cannot alter the case. As a shipper, it was not discriminated against, though one of the commodities it handled was, incidentally. The railway company had the undoubted right to refuse to make through shipments of any freight, or to permit its cars to leave its line of road, however they might be loaded. To compel it to adopt a policy whereby no discrimination against a particular commodity would result would not necessarily benefit the brokerage company, but might react to its disadvantage, and be inimical to the interests of shippers of other commodities, for it would then be within the power of the carrier to decline to deliver its cars for carriage over other lines under any circumstances. It may be that for this reason our railroad commission has not deemed it wise to attempt to prohibit any discrimination between different commodities belonging to a general class of freight.

If, as the evidence discloses, none of the patrons of the defendant company were granted the privilege, at Augusta, of having shipments of cotton seed in its cars turned over to connecting lines for transportation in bulk without reloading, then the plaintiff is not entitled to recover damages because of the railway company's refusal to accord it this privilege, and the evidence bearing upon the "policy" of the carrier in this regard was not competent for the purpose of sustaining the plaintiff's contention that the purpose of the defendant was to drive it out of business. Animus cannot be inferred from what one does while acting strictly within his legal rights. That during the previous cotton season the car-

rier had granted the privilege sought by the brokerage company cannot affect the matter at all. The carrier could change its policy at any time it saw fit, and the plaintiff had timely notice of its intention to withdraw this privilege at the close of that season.

What is said above disposes of a number of assignments of error made upon the charge of the court, and also of exceptions taken to the refusal of the court to give in charge pertinent requests which were in accord with the law as herein announced. The only contention of the plaintiff which the evidence tended to sustain was that the defendant had wrongfully refused to place a car loaded with cotton seed on the side track in the rear of plaintiff's warehouse, and that the purpose of the railway company in refusing to do so was to put the plaintiff to unnecessary expense in reloading at a different place, and thus discourage its engaging in the buying and shipping of cotton seed. There was proof of aggravating circumstances attending this discrimination against the plaintiff and in favor of the local oil mills, and the jury were warranted in reaching the conclusion that the conduct of the railway company was wilful, and in pursuance of a predetermined plan to throw every obstacle in the way of the plaintiff to prevent shipment of seed into South Carolina. But the case was not fairly or correctly presented to the jury, and a new trial must result.

At the request of plaintiff's counsel, the court informed the jury that, in a decision on one branch of this case, the supreme court had settled the law of it in favor of the plaintiff, holding that, if the plaintiff sustained by evidence the allegations of the declaration as to the conduct of the railway company with regard to intrastate business, the plaintiff would be entitled to recover. Complaint is made of this instruction on the ground that it was prejudicial to the defendant, in that it conveyed the impression to the jury that the supreme court had practically decided the case against the defendant, and it had no valid defense. Suffice it to say that the charge was at least irrelevant to any issue before the jury, and could serve no legitimate purpose in their determination of the case. Two other instructions are justly complained of as being inapplicable to the facts of the case, and therefore inappropriate and misleading. One was to the effect that, while it was no proper business of a common carrier to facilitate particular enterprises or to build up new industries, yet, as the carrier depended for its very existence upon the will of the people, it was bound to deal fairly with the public, furnish reasonable transportation facilities, and to put all of its patrons upon

an absolute equality. The other instruction, was as follows: "A railroad company cannot discriminate in favor of a shipper who is able to furnish a large amount of freight over one engaged in the same business who is unable to furnish the same quantity; at least, where both ship in car-load lots."

2. Another question presented for determination, both by the main bill and the cross bill of exceptions, is whether or not the court correctly interpreted and presented to the jury the meaning and effect of rule 36 of the railroad commission, in so far as interstate shipments were concerned. The operation of that rule is, by its own terms, limited to intrastate shipments, and therefore cannot be held to apply to shipments originating in this state but destined for points beyond its borders. A bill of lading issued from a station in Georgia to one in South Carolina would evidence an interstate shipment, whether it was to be carried all the way by the initial carrier or was to be delivered by it at some intermediate point to a connecting carrier for transportation to ultimate destination. The ultimate destination of a shipment intended to take one continuous journey would determine its character in this respect. Facilities afforded for carrying through a cargo in bulk, without reloading at an intermediate point, would attach, according to the circumstances, to either interstate or to intrastate commerce. A failure to afford equal facilities to all shippers engaged in interstate commerce would not be a violation of rule 36. The instructions of the court to this effect were correct, but might properly have been more specifically applied to the facts by giving the request to charge on this subject presented by counsel for the railway company. The plaintiff appears to have been engaged altogether in making interstate shipments of cotton seed, no delivery being made to the plaintiff in Augusta except for the purpose of reloading on Southern Railway cars, in order that the seed might make one continuous journey from Georgia into South Carolina.

3. The plaintiff, in its petition, complained of a refusal by the railway company, on December 9, 1903, to deliver one car of the cotton seed on a side track in the rear of the plaintiff's warehouse, and for this alleged tort both actual and punitive damages were claimed. At the trial the plaintiff offered to prove that shortly before and shortly after that date the defendant refused to deliver other car-load lots of cotton seed on that side track; the evidence being offered, counsel announced, for the purpose of proving plaintiff's contention that the defendant had a predetermined plan to drive plaintiff out of the cotton-seed business, and

for the further purpose of showing aggravating circumstances. Upon the objection of the railway company that the plaintiff had not alleged any of these matters of aggravation, the court excluded the evidence. The plaintiff also offered to prove by a witness that about January 12, 1904, he had seen certain bills of lading covering shipments of cotton seed from Midville, Georgia, to Manning, South Carolina, issued by the defendant to Allan W. Jones, in whose name the shipments had been made, although the seed was the property of the brokerage company. On the ground that the bills of lading were the best evidence of what were their contents, this testimony was excluded. Plaintiff then attempted to prove by the same witness that these shipments came through Augusta, and witness knew of his own knowledge that the cotton seed was not there reshipped or transferred to other cars, and had duly reached Manning, South Carolina. Counsel stated that the purpose of this testimony was to show that through bills of lading must have been issued, for otherwise the shipments could not, without reshipment at Augusta, have reached Manning, South Carolina. The defendant objected to the introduction of this testimony, and the court excluded it on the ground that it related to transactions which took place after the filing of the suit. To all of these rulings exception is taken in the cross bill. Each of them was, we think, correct.

"The assessment of damages is usually governed by the situation or condition of affairs existing at the time the action is brought." 13 Cyc. Law & Proc. p. 177. The general rule as to the recovery of special damages is, where they are not such as naturally flow from the wrongful act complained of, that "it is necessary, in order to prevent surprise to the defendant, that the declaration state specifically and in detail the damages sought to be recovered," which involves making a statement of the facts upon which the plaintiff relies for a recovery thereof. Id. p. 176. Where "a wilful wrong is committed, evidence of matters tending to aggravate the damages, when necessarily or legally arising from the act complained of, is admissible without special averment." Id. pp. 175, 176. But it is apparent that, where a plaintiff sues for a given wrongful act, and relies, as evidencing the motive with which that act was committed, upon another wholly independent act, done at a different time and place, the defendant should be advised by the plaintiff's pleadings of the case he is expected to meet. A case bearing directly upon this proposition is that of *Leavitt v. Cutler*, 37 Wis. 46, which was a suit for damages be-

cause of a breach of a contract of marriage. The court held: "In such an action the fact that plaintiff has been seduced by defendant by means of the alleged promise of marriage may be shown to enhance the damages, if it is alleged in the complaint, but not otherwise." See also *Klopper v. Bromme*, 26 Wis. 372, 376. In the present case the defendant company could hardly have been expected to be prepared to meet charges that, after suit was commenced, it had committed certain specific acts which were wrongful, and which tended to prove that the acts complained of in the petition were wilfully committed; nor was the defendant put upon notice that the plaintiff

would attempt to prove, as an aggravating circumstance, that on given occasions prior to the commencement of the action the defendant had wrongfully refused to place on plaintiff's side track cars other than the one described by number in the petition. Had the plaintiff undertaken to amend its pleadings, the defendant could have claimed surprise. Certainly, the testimony offered was not admissible under the pleadings as they stood.

Judgment on main bill of exceptions reversed; on cross bill affirmed.

All the Justices concur.

WEST VIRGINIA SUPREME COURT OF APPEALS.

Catharine R. GRIFFITH *et al.*, Appts.,
v.
BLACKWATER BOOM & LUMBER COM-
PANY *et al.*

Albert THOMPSON, Appt.,
v.
SAME.

(55 W. Va. 604.)

*1. When an executory contract with a corporation, necessitating, in its execution, work, labor, and the expenditure of money for materials, machinery, tools, and appliances, and the construction of roads and other improvements, as well as in carrying on the work, is termi-

*Headnotes by POFFENBARGER, P.

NOTE.—Recovering for services and expenses under a running contract with a corporation ended by its insolvency and dissolution.

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nated by dissolution of the corporation in consequence of its insolvency, the contractor is entitled to compensation for services rendered by him in pursuance of the contract until the date of its termination, and to reimbursement for his actual and necessary outlay and expenses as aforesaid, subject to a deduction of all sums paid to him by the corporation, and of the value of such materials, machinery, and other property on hand.

2. When such a contract between a corporation and one of its directors has been entered into openly and without fraud, and the disinterested directors and stockholders are fully informed of its terms, and permit it to be partly executed without disapproval or notice of an intention on their part to annul it, the same rule of compensation and reimbursement to the contractor applies upon the subsequent abrogation of the contract by a court of equity at the instance of the stockholders and creditors of the corporation.

3. When, in such case, large expendi-

X. Remedies.

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XI. Construction and effect of statutes, 153.

XII. Conclusion, 155.

I. Scope of note.

It is purposed, by this note, to display the cases wherein one who had a running contract with a corporation, which was in process of execution and required him to perform services and make outlays, was rendered unable to go on and complete his contract in consequence of the insolvency of the corporation, with its resulting dissolution.

To elucidate the subject, enough cases have been gathered to show what, as a general rule, constitutes a breach of such a contract, and is the measure of damages when a contract of this character is broken by the party requiring the services.

The effect of the death of one of the parties to such a contract upon its continuance is barely alluded to here and there, not treated, for the reason that this branch of the subject is sufficiently covered by two earlier notes in

tures have been made by the contractor in the construction and repair of river dams, bridges, and roads belonging to the corporation, for the driving and hauling of timber, and upon timber partially prepared for delivery under the contract, and a sale of the corporate property, free and discharged from the contract, is made under a decree of the court, directing it to be offered for sale both subject to and free from the contract, the contractor is entitled to compensation and reimbursement as aforesaid out of the assets of the company, although he afterwards purchases the corporate property and obtains the benefit of such improvements.

4. When a contract is broken, it is the duty of the injured party to minimize the loss and injury, when it is practicable to do so, by a reasonable outlay of money;

this series, to wit, the note on *Recovery for services on contract interrupted by sickness or death*, appended to the case of *Parker v. Macomber*, 16 L. R. A. 858, and the note on *Effect on contract of the death of a party thereto*, appended to the case of *Drummond v. Crane*, 23 L. R. A. 707.

In addition to these notes, the reader also should consult the note to *Lenoir v. Linville Improv. Co.* 51 L. R. A. 146, on *Effect of the appointment of a receiver or an assignee for creditors of a corporation on the compensation of officers, agents, or employees for unexpired term of employment*, to which this note is, in a sense, supplementary.

II. Breaches of contracts in general.

If a survey of the decisions as to what in general constitutes a breach of contract calling for the performance of services with incidental expenditure on the part of the employing party, ignoring the circumstance that such employer was a corporation and the contract came to an end by its insolvency and civil death, be made, the following citations will exemplify the current of the authorities, and disclose the underlying principles which prevail.

It is familiar law that "if, at the time of making the contract, the thing promised be possible in itself, it is no excuse for nonperformance that its performance became subsequently impossible from causes beyond the control of the promisor." *Southern Bldg. & L. Assn. v. Price*, 88 Md. 155, 42 L. R. A. 206, 41 Atl. 53.

Where the obligation of a contractor requires an expenditure of a large sum in preparation to enable him to perform his contract, and a continuous readiness to perform it, the law implies a duty in the other party to do whatever is necessary to enable him to comply with his promise or covenant. *United States v. Speed*, 8 Wall. 77, 19 L. ed. 449.

If a construction contract requires payments to be made on account from time to time as the work progresses, and such payments are not made, the contractor is justified in stopping work, and may recover for what he has done. *Stringtown & B. Turnp. Road Co. v. Riley*, 8 Ky. L. Rep. 267.

Where one agrees to perform a service or work for another, which necessarily requires time and progress in its performance, and is to

but such outlay is to be allowed him as a part of his damages.

5. When a contractor, by reason of the termination of a partly executed contract, is entitled to compensation for services and outlay, part of which have been made in executing permanent improvements, the services and expenditures relating to such improvements are not apportioned between the executed and unexecuted parts of the contract.

6. When, in the prosecution of work under his contract for cutting logs and hauling and driving them to a mill by means of a railroad, tramroads, and booms and dams in a river, constructed by him for the purpose, the contractor puts in timber to the same mill, by means of the same improvements, for others, not keeping separate accounts of the expenditures, it is not error to allow him, upon an inquiry as to

receive compensation therefor if that other puts an end to the performance either before it begins or while it is in progress, the first party, though able and willing to proceed, cannot recover the stipulated compensation, but only damages for a breach of the contract; and such damages will, in general, consist of his outlay already incurred and the profits he would have realized had he been permitted to finish the work; or, in case the compensation is divisible, he may recover for the work already performed, and damages for being prevented from completing his contract. *Hambly v. Delaware, M. & V. R. Co.* 21 Fed. 541.

It is a misapprehension of law to suppose that the death of one of the contracting parties puts an end to a contract in course of performance. For a breach after, as well as before, the death of such party, his estate will be liable to respond in damages. *Smith v. Wilmington Coal Min. & Mfg. Co.* 83 Ill. 498.

Generally speaking, contracts bind executors and administrators, though not named. Where, however, personal considerations are of the foundation of a contract, as in cases of principal and agent, master and servant, the death of either party puts an end to the relation, and, in respect of service after death, the contract is dissolved, unless there is a stipulation to the contrary. *Farrow v. Wilson*, L. R. 4 C. P. 744.

It is the general rule that death does not absolve one from his contracts; but an exception to this rule is that, when performance of a contract depends upon the continued existence of a person or thing, if such person or thing perish before the contract is performed, the impossibility of performance terminates the contract. *Yerrington v. Greene*, 7 R. I. 589, 84 Am. Dec. 578.

Where a contract creates between the parties to it merely a personal relation, the death of either party dissolves that relation. *Howe Sewing Mach. Co. v. Rosensteel*, 24 Fed. 583.

When the performance of a contract depends upon the continued existence of a person or thing, and such continued existence is assumed as the basis of the agreement, the death of the person, or destruction of the thing, terminates the obligation. *People v. O'Brien*, 111 N. Y. 1, 2 L. R. A. 266, 7 Am. St. Rep. 684, 18 N. E. 692; *Lorillard v. Clyde*, 142 N. Y. 456, 24 L. R. A. 113, 37 N. E. 489.

Death, or a disability which renders perform-

the amount necessary to compensate him for his services and outlay, when he has been prevented from completing his contract, to charge up his entire outlay on all the work done, and credit all sums received on account thereof, when it is shown that all the work was profitable so far as executed, and that the accounts cannot be separated.

(Dent, J., dissents.)

(April 1, 1904.)

APPEALS by plaintiffs and defendant Thompson from a decree of the Circuit Court for Tucker County overruling exceptions to a commissioner's report settling the amounts which should be allowed under a contract of the defendant corporation, which

ance impossible, discharges a contract to capitalize an enterprise and look to it for reimbursement when the capitalist is to manage the undertaking, since it involves his personal service and skill. *Marvel v. Phillips*, 162 Mass. 399, 26 L. R. A. 416, 44 Am. St. Rep. 370, 38 N. E. 1117.

Contracts for personal services must be treated as entire, and not divisible; hence, there can be but one breach and one recovery upon default, no matter if the wages are payable by instalments or at stated periods. *Barnes Bros. v. Black Diamond Coal Co.* 101 Tenn. 354, 47 S. W. 498.

A servant wrongfully dismissed in the middle of his term may either treat his contract of employment as rescinded and bring *indebitatus assumpsit*, or he may sue on the contract; but he cannot do both. *Goodman v. Pocock*, 15 Q. B. 576.

One employed by a mercantile firm for a year upon a fixed salary, and whose employment is terminated within the year by the insolvency and bankruptcy of his employers, is entitled to prove his claim for damages against the estate in bankruptcy, and to participate in the distribution thereof, for his right of action is immediate upon the breach of his contract, and the bankruptcy is no defense. *Re Silverman*, 101 Fed. 219.

For admission to proof in bankruptcy a claim need not arise before the adjudication, nor need the contract upon which it arises be broken before the bankruptcy; it is sufficient that the breach and the bankruptcy be coincident. To some extent, bankruptcy operates as a breach of the bankrupt's contracts. Bankruptcy may be treated as a breach of the bankrupt's contracts analogous to a complete repudiation of a contract before the time to perform arises, or to a complete disablement from performing the contract. The test of provability is this: If the bankrupt at the time of his bankruptcy, by disabling himself from performing the contract, or by repudiating its obligation, could give the other party the right to sue at once for damages, to be assessed either at law or in equity, then such other party may prove his damages in bankruptcy on the ground that the bankruptcy is equivalent to disablement and repudiation. *Re Pettingill*, 137 Fed. 143.

An assignment by an insolvent contractor to trustees for creditors of all his effects, including the contract, is not *per se* an abandonment 60 L. R. A.

had been annulled by the court. *Modified and affirmed.*

The case sufficiently appears in the opinion.

Messrs. C. W. Dailey, Taylor Morrison, Benjamin A. Richmond, P. J. Crogan, W. B. Maxwell, and L. D. Strader for appellants.

Messrs. Hubbard & Hubbard, A. G. Dayton, Ira F. Robinson, and William C. Clayton for appellees.

Poffenbarger, P., delivered the opinion of the court:

This is a somewhat complicated and a hotly contested case, which has been in this court on a former appeal. As then passed upon it is reported in 46 W. Va. 56, 33 S.

of such contract, so as to justify the other party thereto in treating it as at an end without an attempt to put the contractor in default by performing on its part. *New England Iron Co. v. Gilbert Elev. R. Co.* 91 N. Y. 153.

A contract with an author to write a book for publication in a particular series of works issued periodically by the publishers is not abrogated by the abandonment of the series before the work is completed, when the author is able and willing to perform. *Planché v. Colburn*, 5 Car. & P. 58, 8 Bing. 14.

III. *The measure of damages in such cases.*

It is frequently difficult, in administering the law, to apply a proper rule of damages, and the decisions upon the subject are not harmonious. The cardinal rule undoubtedly is that the one party shall recover all the damages which have been occasioned by the breach of the contract by the other party. But this rule is modified by two others: The damages must flow directly and naturally from the breach, and they must be certain both in their nature and in respect of the cause from which they proceed. Speculative, contingent, and remote damages, not directly traceable to the breach, are excluded,—damages only are allowed which the parties are fairly supposed to have contemplated on contracting as naturally flowing from its violation. *Rochester Lantern Co. v. Stiles & P. Press Co.* 135 N. Y. 209, 31 N. E. 1018.

The safest rule of damage, and the one supported by the general current of authorities, in cases where a contractor is prevented by the acts of the other party from performing his contract, is the difference between the cost of doing the work and what the contractor was to receive for it, making reasonable deduction for the less time engaged, and for release from the care, trouble, risk, and responsibility attending a full execution of the contract. *United States v. Speed*, 8 Wall. 77, 19 L. ed. 449.

But this rule is but one aspect of a more general one. The primary measure of damages is the amount of the contractor's loss, and that loss falls under two heads,—actual outlay and anticipated profits. *United States v. Behan*, 110 U. S. 338, 28 L. ed. 168, 4 Sup. Ct. Rep. 81.

Where a contractor injured by the stoppage of a contract elects to rescind it, he can recover only the value of his services actually performed as upon a *quantum meruit*, not dam-

E. 125, where the nature of the controversy and the history of the transactions out of which it arose are substantially set forth. It was impossible there, as it is here, to give in detail, or even enumerate, all that is contained in the old record of more than 700 pages, to which nearly 300 pages have since been added.

After the case was remanded to the circuit court for further proceedings according to the principles announced by this court upon the former appeal, it was referred to a commissioner with directions to report, first, what would be a just and reasonable compensation to Albert Thompson for labor and money necessarily expended in part performance of his contract; second, upon the request of any interested party, to make a

statement of such expenditures under the contract until the entry of the decree of August 4, 1893, showing allowances to him for his time, labor, and all sums paid by him for the time and labor of others, and expended by him in equipment and material necessary to carry out such contracts, all sums paid for cutting, hauling, skidding, and driving logs, timber, and tanbark, all reasonable sums paid subcontractors by reason of the obligation of their contract, and all other items reasonably and necessarily paid by him in part performance of the contract, allowing him interest upon the sums so expended, and crediting said account with all sums paid to him by said company or its receiver, or realized from the sale of any materials or equipments; and, third, the

ages for a breach of the contract either for outlay or loss of profits; but, when he elects to go for damages for the breach of the contract, the first and most obvious damage to be shown is the amount which he has expended on the faith of the contract, including a fair allowance for his own time and services. If he chooses to go further, he may claim for the loss of anticipated profits, subject to the rules of law as to the character of the profits which may be thus claimed. *Ibid.*

The general rule is well settled that a party to a contract where labor is to be performed, upon the breach of that contract by the other party, has two remedies open to him. He may sue upon the contract and recover damages for its breach, or he may ignore the contract and sue for labor and services rendered and expenses incurred from which he has derived no benefit. *Hemminger v. Western Assur. Co.* 95 Mich. 355, 54 N. W. 949.

When by the act of the other party one who has contracted to cut, haul, and deliver logs is prevented from proceeding with his contract, the rule of damages for the breach is to ascertain the profits he would have earned had he gone on and completed his contract. If, however, this rule cannot be applied from the peculiar nature of the contract, as, for instance, where a fixed time for its continuance is not agreed upon, nor is a definite quantity of logs to be delivered under it, a different rule of damage applies. In such a case preparatory work, done as a necessary preliminary to the performance of the contract, may be allowed for to the extent of its reasonable cost. *Brent v. Parker*, 23 Fla. 200, 1 So. 780.

In what was pronounced a leading case upon the subject of damages for breach of contract by preventing performance (*Vide*, *United States v. Speed*, 8 Wall. 77, 19 L. ed. 449; *United States v. Behan*, 110 U. S. 338, 28 L. ed. 168, 4 Sup. Ct. Rep. 81) *Beardsley*, J., stated the rule of damage in the case of a construction contract where the defendants stopped the work in the midst of its performance from lack of funds to pay. I think, he says, the plaintiffs are entitled to recover the amount they would have realized had they been allowed fully to execute their contract. The defendants are not to gain by their wrongful act, nor is that to deprive the plaintiffs of the advantages they had secured by the contract, and which would have resulted to them from its performance. The

jury must, therefore, ascertain what it would probably have cost them to complete the contract over and above the materials on hand; including the value of the marble required, the labor of quarrying and preparing it for use, the expense of transportation, superintendence, and insurance against all hazards, with every other expense incident to the fulfilment of the undertaking. The aggregate of these expenditures is to be deducted from the amount which would be payable for the performance of this part of the contract according to the prices therein stipulated, and the balance will be the damages which the jury should allow. *Master-ton v. Brooklyn*, 7 Hill, 61, 42 Am. Dec. 38.

The rule which precludes the allowance of profits by way of damages for the breach of an executory contract is not a primary rule, but a deduction from the more general and fundamental rule which requires damages in all cases to be shown by clear and satisfactory evidence to have been actually sustained. By the common law damages for a breach of contract must be proved to a certainty, not left to speculation or conjecture; and this excludes anticipated profits, although there is nothing in their nature which *per se* prevents their allowance. Profits which would certainly have been realized but for the breach are recoverable; those which are contingent or speculative are not. *Griffin v. Colver*, 16 N. Y. 489, 69 Am. Dec. 718.

A plaintiff is entitled to recover the expenses incurred by him in preparing to perform a contract which without his fault the defendant has put an end to, where the expected profits under the contract are too speculative to admit of clear and direct proof. *O'Connell v. Rosso*, 56 Ark. 603, 20 S. W. 531.

The general rule in regard to damages which may be recovered for a breach of a contract is that remote or consequential damages are not allowed if not traceable solely to the breach, or if incapable of exact computation; but any necessary expense which one of the contractors incurs in complying with the contract is recoverable. *Bryan v. Southwestern R. Co.* 41 Ga. 71.

Where two parties lawfully contract upon good consideration, and one is ready and willing, and makes preparation, to perform on his part, but is prevented from so doing by the other, he can recover all damages sustained in consequence of that other's default, including his necessary expenses in making preparation.

amount due Thompson for work and labor performed and money expended in the prosecution of the contract under the direction of the receiver until June 23, 1893, when the work was suspended by order of the court, and the amount due him for expenditures, work, and labor from the 23d day of June, 1893, until the 4th day of August, 1893, when the sale of the property of the Black-water Boom & Lumber Company was confirmed.

The commissioner reported that there was due Thompson as of the 12th day of June, 1901, \$85,642.02, returning with his report a full statement of all sums paid out and expended by Thompson in the prosecution of said work, and all sums paid to him on account thereof, as well as the proceeds of the

sales of property used by him in the performance of said work as equipments, such as horses, wagons, locomotives, cars, steel rails, etc. Upon exceptions sustained by the court, the amount so found was reduced to \$84,794.91 and a decree entered therefor. Of this amount, about \$48,000 is principal, and the balance interest. Numerous exceptions to the report, urged in the court below and overruled, are insisted upon here, and there is much difference of opinion as to the true interpretation of the former decision of this court. For the appellants it is insisted that, under the principles so announced, the item of \$14,749.34, mentioned in the opinion at page 65 of 46 W. Va., page 128, 33 S. E., which, without interest, was originally \$12,399.63, for work done on

Kenwood Bridge Co. v. Dunderdale, 50 Ill. App. 581.

Where loss of profits cannot be proved, the plaintiff in an action upon the breach of a contract is entitled to recover the expenses and outlay he incurred in preparing to perform on his part. *Athletic Baseball Asso. v. St. Louis Sportsman's Park & Club Asso.* 67 Mo. App. 653.

One who contracts with another to furnish materials and build therewith a structure at a stipulated price, and who is prevented from completing his work by the acts of the other, is entitled to recover, *inter alia* items of damage, the expense of preparing such materials for their destined places in the structure. *Shulte v. Hennessy*, 40 Iowa, 352.

Where anticipated profits are too speculative and uncertain to be shown by competent proof, he who is entitled to recover for the breach of a contract to furnish an ample supply of natural gas wherewith to run his enterprise is entitled to recover his expenses in attempting to run it and the rental value, or, in lieu thereof, the interest on the cost of his plant. *Paola Gas Co. v. Paola Glass Co.* 56 Kan. 614, 54 Am. St. Rep. 598, 44 Pac. 621.

Where one contracts with a railroad to provide a water supply at a designated station at a stipulated monthly compensation, he undertaking to build and maintain a tank and apparatus for the purpose, upon a breach of the contract by the railroad by abandoning its station at that point, he may recover as damages the difference between the cost of such tank and apparatus and their actual value after the departure of the road, if he retains the property, or the difference between such cost and the sum realized, if he sells for the best obtainable price. *New Orleans, J. & G. N. R. Co. v. Echols*, 54 Miss. 264.

When, by the terms of a contract for work and labor, the full price is not to be paid until the completion of the work, and that becomes impossible by the act of the law, the contractor is entitled to recover for the amount of his labor. *Jones v. Judd*, 4 N. Y. 411, *Approved in Wolfe v. Howes*, 20 N. Y. 197, 75 Am. Dec. 388.

Referring to the case of a person who has contracted to labor for a definite term and is prevented by sickness from fulfilling his contract, *Balcom, J.*, of the New York court of appeals, says: He should have the amount of his 69 L. R. A.

recovery reduced from the contract price by the damages sustained by the employer in consequence of his inability to complete the full term of service. This rule, he says, is equitable, and should be applied in such cases. The servant is not to be regarded as violating his contract because sickness or death prevents his fulfilling it. His failure is his misfortune, not his fault. The employer should neither gain nor lose by it. The rule is just to both. It needs no vindication, for it is so well grounded in good sense as to commend itself. It is a common-sense rule, and common sense is the basis of all just law. *Clark v. Gilbert*, 26 N. Y. 279, 84 Am. Dec. 180.

If the performance of a building contract be suspended by the financial embarrassment of the owner, and not afterwards resumed, the contractor may recover, among other items of damage, the expense he has incurred in making articles necessary to enable him to perform his contract. *O'Connell v. Main & T. Streets Hotel Co.* 90 Cal. 515, 27 Pac. 278.

A contractor for the construction of a road, whose contract entitles him to payment in installments from time to time as his work progresses, is justified, upon default in paying the installments, in stopping further work, and has a right to recover in *quantum meruit* for the work he has performed. *Porter v. Arrowhead Reservoir Co.* 100 Cal. 500, 35 Pac. 146.

IV. How corporations are dissolved.

A corporation may go out of existence in one of four ways: (1) By expiration of its term of life as limited in its charter; (2) by act of the legislature repealing or annulling its charter; (3) by the judgment or decree of a court of competent jurisdiction dissolving it for non-user or misuse of its franchise, or because of some act or omission working a forfeiture; and (4) by voluntary surrender of its charter.

When the time limited by the charter of a corporation expires the corporation is dead *de facto*, and no judicial determination of the fact is needful; the dissolution in such a case is declared by the act of the legislature itself. *Sturges v. Vanderbilt*, 73 N. Y. 384.

It is a well-settled principle that a dissolution by forfeiture is effected only by judicial proceedings against the corporation, taken for the purpose, followed by a hearing, or an opportunity to be heard, and a judgment rendered

logs cut by Thompson, but not delivered so as to entitle him to demand payment therefor at the time the decree of sale was entered, is the only sum that can now be allowed him.

Counsel for the appellee say this court regarded and treated the contract as having been rescinded, and declared it to be so, and ordered that Thompson be put *in statu quo*,—reimbursed for all his outlay, and made whole. The court say, in the opinion: "A partly executed executory contract could be avoided before its final execution, but the executing party thereto should be placed *in statu quo*, in absence of fraud, by compensation in the nature of a *quantum meruit* for money and labor expended under such contract." In conclu-

sion the court said: "Having partly executed his contracts, Albert Thompson is entitled to recover a just and reasonable compensation for the necessary expenditure of labor and money under his stocking contract, less the sums paid him; but he is not entitled to recover the large profits claimed by him. As the sum of \$14,749.34 is an alleged part of such expenditure, it should not have been decreed until the true amount thereof had been ascertained and determined. This amount, when ascertained and determined by reason of the adoption of the stocking contract by the receiver, under direction of the court, and thereby preventing Albert Thompson from perfecting his statutory lien therefor, under § 8, chap. 75, Code [1899], will be a prior lien

thereon. *National Pabluoque Bank v. First Nat. Bank*, 36 Conn. 325, 4 Am. Rep. 80.

In cases of dissolution of a corporation as a consequence of insolvency, nonuser, misuser, or some other cause of forfeiture of the corporate franchises, it is well settled that dissolution does not take effect until judicially decreed. *Sturges v. Vanderbilt*, 73 N. Y. 884.

In the absence of a governing statute a corporation aggregate, chartered for an unlimited time, may, by the concurrent consent of the state which created it and its stockholders, be dissolved. *Revere v. Boston Copper Co.* 15 Pick. 351.

A company not incorporated for any determinate time, and in its nature perpetual, cannot dissolve itself, and terminate its own existence at its own will, by a bare notice to the executive department of the state which chartered it. *Ibid.*

A corporation does not cease to exist until its dissolution is effected in a manner provided by law. *Taylor v. Holmes*, 14 Fed. 498.

A corporation may surrender its charter to the sovereign power, but there must be some definite act of surrender and an acceptance by the sovereign. Mere nonuser of its powers is no surrender of them, nor does it warrant a court in presuming an abandonment of its franchise. *Ibid.*

The adoption by stockholders of a resolution that the corporation be dissolved does not terminate the corporate existence. *New York Marble Iron Works v. Smith*, 4 Duer, 362.

To effect the dissolution of a corporation by resolution of stockholders, either the state must accept a surrender of the charter, or else a court must decree dissolution. *Ibid.*

A corporation may dissolve itself and end its corporate existence by voluntarily surrendering its franchise to the state, but the state must accept to complete the dissolution. *Combes v. Keyes* (*Combes v. Milwaukee & M. R. Co.*) 89 Wis. 297, 27 L. R. A. 369, 46 Am. St. Rep. 839, 62 N. W. 89.

The dissolution of a corporation is not voluntary when, becoming embarrassed and unable to continue business, its creditors force a receivership, and the corporate assets turn out to be insufficient to meet its liabilities, merely because its officers consent to such dissolution. *Griffith v. Blackwater Boom & Lumber Co.* 46 W. Va. 56, 33 S. E. 125.

The mortgaging of all the property, assets, 99 L. R. A.

and franchisees of a corporation by consent and authority of the legislature, and the subsequent foreclosure of such mortgage, and sale of the mortgaged property and franchise, work a dissolution of the corporation. *Combes v. Keyes* (*Combes v. Milwaukee & M. R. Co.*) 89 Wis. 297, 27 L. R. A. 369, 46 Am. St. Rep. 839, 62 N. W. 89.

A transfer by a corporation, although it is not shown to be insolvent, of all its property, which suspends and terminates the regular business of the grantor, and is made and accepted with that purpose and intention, has the practical effect to dissolve such corporation, and subject it to a forfeiture of its charter at the instance of the state, since it voluntarily strips itself of all its property and assets, and becomes incapable, and intends to be and stay unable, to perform its corporate duties. *Cole v. Millerton Iron Co.* 133 N. Y. 164, 28 Am. St. Rep. 615, 30 N. E. 847.

When the charter of a corporation gives its creditors a direct action against its stockholders, but only after its dissolution, the courts will treat such dissolution as effected so as to give a creditor his remedy against a shareholder if the stockholders have done all in their power to dissolve the corporation. *Slee v. Bloom*, 19 Johns. 475, 10 Am. Dec. 273.

After a corporation has been stripped of all its property, and for a quarter of a century has failed to exercise any corporate franchise, elect any officers, or maintain any office, a surrender of its franchise will be presumed. *Combes v. Keyes* (*Combes v. Milwaukee & M. R. Co.*) 89 Wis. 297, 27 L. R. A. 369, 46 Am. St. Rep. 839, 62 N. W. 89, Citing *Brandon Iron Co. v. Gleason*, 24 Vt. 228.

V. When dissolution is not effected.

The only modes known to the common law of dissolving a corporation were, by the death of all its members; by the act of the legislature; by a surrender of the charter accepted by the government; or by a forfeiture of the franchise, which could only take place upon a judgment of a competent tribunal in a proceeding in behalf of the state. Neither a court of law, nor a court of equity, had jurisdiction to decree the forfeiture of a corporate charter, or the dissolution of a corporation at the suit of an individual. *Folger v. Columbian Ins. Co.* 99 Mass. 267, 96 Am. Dec. 747.

on the assets of the corporation in the hands of the receiver." The substance of this conclusion is incorporated in points 3 and 4 of the syllabus. In the opinion of the court, the contract was voidable on the part of the Blackwater Boom & Lumber Company, and the court, having succeeded to its rights in the administration of its affairs, abrogated it by selling the property of said company free from the obligation of Thompson's contract; but it held, nevertheless, as stated, that he is entitled to compensation, and the only question to determine is the amount thereof.

The termination of Thompson's contract, as decided on the former appeal, rests upon two grounds. The first is that the corporation was unable, because of financial em-

barrassment, to further proceed with its business; and the other that, as Thompson was a director of the company at the time the contract was entered into, it was voidable at the election of the stockholders. It is not, therefore, the ordinary case of a wrongful prevention of the performance of a contract, nor is it a case of settlement of the equities or legal rights of the parties upon the rescission of a contract.

The principle of law underlying the first ground upon which the contract was declared to have terminated is announced in *People v. Globe Mut. L. Ins. Co.* 91 N. Y. 174, 1 Am. & Eng. Corp. Cas. 586. This doctrine is that, where performance of a contract by a corporation is prevented by its dissolution at the instance of the state or

Neither the insolvency of a corporation, nor its failure to elect officers, operates as a dissolution, or as a virtual surrender of its charter. *Taylor v. Holmes*, 14 Fed. 498.

The mere fact that a corporation has failed to pay its debts, and has ceased to carry on its lawful and ordinary business for such a length of time as, according to a statute of the state which created it, warrants its dissolution, does not, *per se*, in the absence of an act of the legislature or the judgment of a court dissolving, work a dissolution so as to prevent or abate ordinary legal proceedings against it by its creditors. *Ibid.*

The resignation of all its officers does not, *per se*, operate to destroy the existence of a corporation. Officers and agents are necessary to manage the affairs of a corporation, but the corporation may exist so as to maintain succession, and hold and preserve its franchises, though its functions be for the time suspended for want of means of action. *Muscatine Turn Verein v. Funck*, 18 Iowa, 469.

It is a settled rule that, although the neglect of a corporation to reappoint its officers may in certain cases suspend its existence, it cannot be thus extinguished to the injury of creditors. *Brown v. Union Ins. Co.* 3 La. Ann. 177.

An exception to the rule that failure to elect officers does not work a dissolution of a corporation appeared in *Slee v. Bloom*, 19 Johns. 475, 10 Am. Dec. 273. It was said that, as the shareholders had done all they could to dissolve the company, the court would to give a creditor his remedy against a shareholder, and treat the dissolution as effected. It was upon this ground that the Louisiana supreme court distinguished the case in applying the general rule. *Ibid.*

The mere insolvency of a corporation, and an assignment of all its property to trustees for the benefit of creditors, followed by a suspension of its ordinary business, are not equivalent to a dissolution. *New England Iron Co. v. Gilbert Elev. R. Co.* 91 N. Y., 153.

A corporation is not dissolved by the mere bringing of a suit alleging insolvency, and obtaining the appointment of a receiver. *Kinsman v. Flisk*, 37 App. Div. 443, 56 N. Y. Supp. 33.

Insolvency, suspension of business, and a receivership, alone, do not extinguish corporate life in New Jersey. They may justify the chancellor in declaring the charter forfeited and void, but the assets may, on the other hand, prove sufficient to pay creditors in full, and 69 L. R. A.

justify the discharge of the receiver and the resumption of the corporate business. This falls short of the civil death of the corporation until the final decree, and consequently the rule that the death of the master terminates the servant's contract does not apply to bar a corporate employee's claim for damages for breach of his contract by the insolvency of the corporation. *Spader v. Mural Decoration Mfg. Co.* 47 N. J. Eq. 18, 20 Atl. 378.

The mere appointment and qualification of a receiver of a national bank at the instance of the comptroller of the currency for failure to redeem its notes does not work a forfeiture of the franchise and a dissolution of the banking corporation, so as to bar a creditor from maintaining suit against the bank to establish the validity of his claim. *National Pahuloque Bank v. First Nat. Bank*, 86 Conn. 325, 4 Am. Rep. 80.

The mere insolvency and the appointment of a receiver of a corporation are not equivalent to its dissolution, even though it is restrained by judicial order from transacting any more business. *City Ins. Co. v. Commercial Bank*, 68 Ill. 348.

The appointment of a receiver to take and distribute among creditors and stockholders all the property of a corporation, while sometimes spoken of as a virtual dissolution, does not extinguish the franchise, terminate the legal existence, or render the corporation incapable of being sued at law or in equity. *Folger v. Columbian Ins. Co.* 99 Mass. 267, 96 Am. Dec. 747.

The fact that a foreign building and loan association has been put in the hands of a receiver in its home state, and forbidden to continue business, does not relieve it from liability to pay back his investment to a resident member, who has given due notice of his withdrawal as required by the corporate by-laws, notwithstanding the association is unable to make collections, only after which, according to its by-laws, it is bound to pay. *Southern Bldg. & L. Assn. v. Price*, 88 Md. 155, 42 L. R. A. 206, 41 Atl. 53.

VI. The earlier common-law doctrine concerning the effect of dissolution.

"The text-books and cases decided are uniform in their language,—that the real estate held by the corporation at its civil death reverts to the grantor and his heirs; that the

power creating it, it may annul its contracts, and, in doing so, does not commit any breach of the contract. The act of annulment is deemed to be that of the state, and not of the corporation, and gives the contractor no right to claim damages as for a breach of his contract. Whether, in such case, the contractor is entitled to be reimbursed for his outlay and expenses is not determined in that case, for the reason that no such question was involved. The demand set up and denied was founded upon a contract of employment as agent, and the damages claimed were for anticipated profits. Such termination of the contract does not imply that it was not a valid contract, imposing obligations and conferring rights up until the moment of the dissolution. The

contract in such case cannot be considered to have been void *ab initio*. A long list of cases turning upon this principle will be found in the note to the case above cited, as reported in 1 Am. & Eng. Corp. Cas., holding that the parties to an entire contract of such a nature as indicates that they, in entering into it, must have contemplated the possibility of its termination by act of the law or of God, or by some cause beyond their power, are, upon the happening of such event, relieved from its obligations, so far as it remains unexecuted, upon the theory that though, in form, it was an entire and indivisible contract, yet, as the parties must have had in view the contingency which rendered it impossible of further execution, or gave right to terminate it, it was in fact

personal estate vests in the people, or, in England, in the Crown; and that the debts due to and from the corporation are totally extinguished; so that neither the stockholders, nor the directors or trustees, of the corporation can recover, or be charged with, them in their natural capacity." *Commercial Bank v. Lockwood*, 2 Harr. (Del.) 8.

At common law an absolute and unqualified dissolution of a corporation by a decree of forfeiture or legislative repeal extinguishes all debts due to or from it, puts an end to all its rights of action and property, and it can no longer sue or be sued, or do any lawful act. *National Pabuloque Bank v. First Nat. Bank*, 36 Conn. 325, 4 Am. Rep. 80.

The doctrine of the common law, that, upon the dissolution of a corporation, debts due to or from it are extinguished, results necessarily from the fact that, the corporation having expired, whether by its own limitation, by surrender or abandonment of its members, or judgment of dissolution, there is no one in law to sue or be sued. *Hightower v. Thornton*, 8 Ga. 486, 52 Am. Dec. 412.

The elementary writers, both in England and in the United States, everywhere assert distinctly that debts due to and from a corporation are extinguished by its dissolution, unless prevented by the terms of the charter itself, or by *aliunde* legislation; that in the courts of both countries this doctrine is too well settled to be overthrown or shaken; and that such debts are so totally extinguished that the members of the corporation cannot recover or be charged with them in their natural capacities. *Moultrie v. Smiley*, 16 Ga. 289.

Upon the dissolution or civil death of a corporation all its real estate, by the strict rule of the common law, reverts to the original owners or their heirs, and all its personal estate vests in the Crown, in England, and the state here, and all debts due to or from it are, by operation of law, extinguished. *Life Asso. of America v. Fassett*, 102 Ill. 315.

At common law dissolution implied that the corporation had wholly ceased to exist for any purpose, so that suits brought by or against it abated, and a judgment thereafter rendered against it was a nullity; that its title to property ceased to exist, and all legal remedies to enforce debts due by or to it became extinguished. *Bowe v. Minnesota Milk Co.* 44 Minn. 470, 47 N. W. 151.
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The rule of the common law in respect of the reversion to the grantor of real estate, vesting in the Crown of personal property, and extinguishment of debts and credits of corporations when they were dissolved, had its origin when corporations were either municipal, ecclesiastical, or eleemosynary, and business corporations were unknown. There were no stockholders or natural persons entitled to the assets of dead corporations, and, as in the case of an individual dying without heirs, the personality went to the King, and to prevent the realty from escheating to the King it reverted to the donor, upon the ground that, the grant being made to a body corporate for public or charitable uses, it was made only for life. *Shayne v. Evening Post Pub. Co.* 168 N. Y. 70, 55 L. R. A. 777, 85 Am. St. Rep. 654, 61 N. E. 115.

At common law every grant of land to a corporation was a grant for life of the body politic, conferring a power of alienation, but coupled with a reservation of the reversion if the land should not be aliened during the life of the corporation. And as, by statute, the common law of England in all its parts, where not inconsistent with constitutional and statutory law, was adopted and continued in force in South Carolina the legal title to the real estate of a private corporation (not a moneyed or trading company) reverted upon its dissolution to, and vested in, the grantor or his heirs, although the conveyance to the corporation was in fee. *St. Philip's Church v. Zion Presby. Church*, 23 S. C. 297.

The common-law rule, whereby, upon the civil death of a corporation, all its unsold real estate reverted to its grantor, all its personal estate vested in the state, and all debts due to or from it were extinguished, so that neither the stockholders, directors, nor trustees, could recover or be charged with the debts in their natural capacity, was applied by the supreme court of Tennessee, to prevent a recovery upon a note secured by a deed of trust executed to the Bank of Tennessee after the charter of that corporation had expired. *White v. Campbell*, 5 Humph. 38.

The court there held both deed and note inoperative and void, saying, in answer to the argument that the maker fairly owed the debt, and intended to secure the stockholders: "We cannot recognize the existence of stockholders of a defunct corporation, and we cannot . . . go behind the note and deed to hunt for a dif-

and in law a divisible contract, contrary to its form, and recovery is allowed for such part of the contract as has been performed, but profits which would have arisen from further and future performance are denied and refused. *Mumma v. Potomac Co.* 8 Pet. 286, 8 L. ed. 947; *Fenton v. Clark*, 11 Vt. 557; *Fuller v. Broxon*, 11 Met. 440; *Ryan v. Dayton*, 25 Conn. 188, 65 Am. Dec. 560; *Willington v. West Boylston*, 4 Pick. 101; *Yerrington v. Greene*, 7 R. I. 589, 84 Am. Dec. 578; *Stewart v. Loring*, 5 Allen, 306, 81 Am. Dec. 747; *Knight v. Bean*, 22 Me. 531; *Merrill v. Suffolk Bank*, 31 Me. 57, 50 Am. Dec. 649; *Read v. Frankfort Bank*, 23 Me. 321; *Farrow v. Wilson*, L. R. 4 C. P. 744; *Tasker v. Shepherd*, 6 Hurlst. & N. 575; *Charnley v. Winstanley*, 5 East, 266;

ferent payee and a different *cestui que trust* from that mentioned in the instrument." *Ibid.*

On the dissolution of a Tennessee corporation its real estate reverts back to the original grantor or his heirs. *Acklin v. Paschal*,* 48 Tex. 147, Citing *White v. Campbell*, 5 Humph. 38.

At common law, upon the death or dissolution of a corporation its real property reverted to the donors, and its personal property escheated to the King, while the debts due to and from it were thereby extinguished, and all actions pending for or against it abated. *Wallamet Falls Canal & Lock Co. v. Kittredge*, 5 Sawy. 44.

The doctrine of the common law as to the effect of the dissolution of a corporation upon its real and personal property, debts and credits, had its origin when corporations were either municipal or ecclesiastical, and were dissolved for abuse or nonuse of their powers. Their real estate, which usually was acquired as a donation to public or pious uses, was held to revert, upon the cessation of the use, to the donors, and their personal property to escheat to the King for want of owners. In these cases there were no stockholders who were entitled, equitably or otherwise, to the assets of dead corporations, and, as in the case of a natural person dying without heirs, the personality went to the King; but, to prevent the real estate from escheating to the Crown, it was held to revert to the donor, upon the theory that it was made over to the corporation only for its life. *Ibid.*

VII. Comment and criticism concerning it.

According to the old settled law of the land, says Kent (Com. § 33, p. 307), where there is no special statute provision to the contrary, upon the civil death of a corporation all its real estate, remaining unsold, reverts back to the original grantor and his heirs. The debts due to and from the corporation are all extinguished. Neither the stockholders, nor the directors or trustees of the corporation, can recover those debts, or be charged with them in their natural capacity. All the personal estate of the corporation vests in the people as succeeding to this right and prerogative of the Crown at common law.

It is observed, in the appended note to the 10th edition, the rule of the common law has in fact become obsolete and odious. It has never been applied to insolvent or dissolved moneyed

Taylor v. Caldwell, 3 Best & S. 826; *Rhodes v. Forwood*, L. R. 1 App. Cas. 256; *Thurnell v. Balbernie*, 2 Mees. & W. 786; *Brogden v. Marriott*, 2 Scott, 703; *Worsley v. Wood*, 6 T. R. 710; *Davison v. Mure*, 3 Dougl. 28; *Milner v. Field*, 5 Exch. 829; *Morgan v. Birnie*, 9 Bing. 672; *People v. Manning*, 8 Cow. 297, 18 Am. Dec. 451; *Carpenter v. Stevens*, 12 Wend. 589; *Wolfe v. Howes*, 24 Barb. 174; *Fahy v. North*, 19 Barb. 341; *Spalding v. Rosa*, 71 N. Y. 40, 27 Am. Rep. 7; *Sturges v. Vanderbilt*, 73 N. Y. 390; *Smith v. Brady*, 17 N. Y. 173, 72 Am. Dec. 442; *Walker v. Tucker*, 70 Ill. 527; *Orr v. Ward*, 73 Ill. 318; *Hercules Mut. Life Assur. Soc. v. Brinker*, 77 N. Y. 435. By far the greater number of these cases involve contracts for compensation to agents and serv-

corporations in England. The sound doctrine now is, as shown by statutes and judicial decisions, that the capital and debts of banking and other moneyed corporations constitute a trust fund and pledge for the payment of creditors and stockholders; and a court of equity will lay hold of the fund, and see that it is duly collected and applied.

And in *Hightower v. Thornton*, 8 Ga. 486, 52 Am. Dec. 412, Lumpkin, J., quotes Chancellor Kent approvingly as having given his professional opinion, which was read on the argument of *Nevitt v. Bank of Port Gibson*, 6 Smiles & M. 513, in which "he asserts that there is not an instance in the English law in which the funds of an insolvent or forfeited moneyed institution have been permitted to be abandoned, and creditors denied redress and payment out of them; and he adds that, to permit the odious and obsolete doctrine of ancient date, before moneyed institutions were introduced, to be now applied to the dissolution of a bank, perhaps by its own mismanagement and abuse, so that all its assets were to be considered as dispersed to the wind, without any owner or power any where to collect and justly apply them, would be a disgrace to any civilized state."

Of the doctrine of the common law as stated in the text-books, Campbell, J., of the United States Supreme Court, remarked that "the consequences are visited without any discrimination; the losses are imposed upon those who are not blameworthy, and the benefits are accumulated upon those who are without desert." *Bacon v. Robertson*, 18 How. 480, 15 L. ed. 499.

According to common-law principles the debts of a corporation either to it or from it are extinguished by its dissolution; nor are its members liable in their individual characters for any part of its debts. Its lands revert to the donors. Its personality goes to the commonwealth. "If these things be so (and there is no reasonable doubt about it), they are grossly unjust," said Tucker, P., for the Virginia court of appeals, in 1836. "It cannot be just that the members of a joint-stock company should forfeit their property to the commonwealth by the expiration of their charter. It cannot be just that the land which they have purchased and paid for should revert to the grantor, who has already received value for it. It cannot be just that those who are indebted to the corporation

ants, in which no demand for money laid out and expended in preparation for, and execution of, the contract was made or could have been set up. Hence in none of them is that question passed upon. The doctrine of the case of *People v. Globe Mut. L. Ins. Co.* 91 N. Y. 174, is examined, and repudiated as unsound, and at variance with the principles of law in *Rosenbaum v. United States Credit System Co.* 61 N. J. L. 543, 40 Atl. 591. Speaking for the court, Chancellor McGill said: "It appears to us that the material fact that the corporation defendant is a stock company, and that its capital stands as a trust fund for the payment of its debts, is lost sight of. Such a company may become insolvent, and its charter may be forfeited, when its assets may be more than

sufficient to pay its debts. Everyone who deals with such a corporation does so in view of the trust fund its capital provides, and the security that fund is intended to afford. The stockholders who provide the fund invite confidence because of it, that through such confidence their venture may be profitable to them. The mere statement of this situation makes conspicuous the injustice of any course of reasoning which will return to the stockholders their capital before satisfaction of all losses induced by faith in it shall be made. The state creates corporations, and requires of them the provision of such a trust fund, and, when it destroys their corporate existence, natural justice requires that it shall provide for distribution of the fund, so that no part of it

(a bank, for instance) should be absolved from their engagements; and still less that, by a forfeiture of its charter, those to whom it is indebted should lose their just demands." *Rider v. Nelson & A. Union Factory*, 7 Leigh, 154, 30 Am. Dec. 495.

The doctrine that the debts of a corporation both to and from it are extinguished by its dissolution is odious. A majority of the American states have, by enlightened legislation, interposed to prevent, to ward off, the iniquitous consequence of this common-law rule, the existence of which is a disgrace to a civilized state. Such is the rule, however, but a court is not called upon to extend it one jot or tittle beyond the reason which gave it birth. *Thornton v. Lane*, 11 Ga. 459.

When a corporation is dissolved by having lived out its term, and there is no saving statute, following the rule of the common law its real estate reverts to the grantor, its personal property goes to the state, and its choses in action, debts, etc., are extinguished. *Fox v. Horah*, 36 N. C. (1 Ired. Eq.) 358, 36 Am. Dec. 48.

Judge Thompson (5 *Thomp. Corp.* § 6720) referred to this decision as being "in accordance with the barbarous rule of the common law;" and said it was "probably the last case of its kind."

But its doctrine was reiterated and applied more than twenty years later (1863) in the case of *Malloy v. Mallett*, 59 N. C. (6 Jones, Eq.) 345.

Later, however (1879), the court virtually repudiated the doctrine. Speaking of these decisions, it said that they were made, and their conclusions were reached, after full discussion and careful consideration by able jurists, and its reluctance to disturb them after so long an acquiescence by the profession could be overcome only by the clearest convictions of their error. But, it was added, they rested upon strictly legal principles, well settled by authority, and carried to logical results; and a remedy existed in calling in to exercise, in behalf of creditors and others interested, the equitable jurisdiction of the court. And, regarding the debts and other property of the dissolved corporation as the property of its creditors, a court of equity would reach forth and rather up and collect the assets though there were no legal owner, and would distribute them 69 L. R. A.

to creditors first and stockholders afterwards. *Von Glahn v. De Rosset*, 81 N. C. 467.

And finally (1897) the doctrine was emphatically repudiated, and the decision in *Fox v. Horah*, 36 N. C. (1 Ired. Eq.) 358, 36 Am. Dec. 48, *supra*, expressly overruled; and it was questioned whether the common law ever really sanctioned a rule so plainly "not founded upon justice and reason, nor approved by experience." *Wilson v. Leary*, 120 N. C. 90, 38 L. R. A. 240, 58 Am. St. Rep. 778, 26 S. E. 630.

The case of *Fox v. Horah*, 36 N. C. (1 Ired. Eq.) 358, 36 Am. Dec. 48, was fully analyzed, explained, distinguished, and circumscribed in *Moultrie v. Smiley*, 16 Ga. 289.

Mr. Cook (2 *Corp.* 5th ed. § 641), advertising to the alleged common-law doctrine that, upon the dissolution of a corporation, all its assets belonged to the state, and all its debts were canceled, and its acceptance in text-books and decisions for more than a century, says that, nevertheless, the courts uniformly refused to apply it, and resorted to various devices and fictions to avoid doing so; and finally, in 1899, an English court, in the case of *Re Higginson* [1899] 1 Q. B. 325, denied that such doctrine ever was the common law, and showed that in the 17th and 18th centuries many corporations were dissolved, and in no single case was such doctrine ever applied.

The authorities for the proposition that, on the dissolution of a corporation, aggregate debts due to or from it are extinguished, says Wright, J., of the English Queen's bench, in the case to which Mr. Cook referred, are by no means clear or satisfactory. In 1 Bl. Com. 484, and in 2 Kyd, *Corporations*, 510, and in Grant, *Corporations*, 303, such a proposition is stated, but in terms which suggest that no more is meant than that after the dissolution the individuals who were members or officers of the corporation cannot sue or be sued in respect of its rights or obligations; and this is all that is established by the cases there cited. The American decision in the case of *Bank of Vincennes v. State*, 1 Blackf. 267, 12 Am. Dec. 234, relies on these authorities as supporting the general proposition, but it does not advert to this qualification, or add new references to authority, and the authorities cited do not in any way support the proposition, except as qualified. Grant is explicit in the same case, but does not refer to any authority which, so far as I can see, has any bearing on the matter. Nor do the old au-

shall be returned to those who offer it as security for the action of others, until the latter shall have all the protection against loss in their undertaking that it is capable of affording."

Other cases more analogous to the one now under consideration hold that the effect of the dissolution of a corporation upon unexpired or executory contracts is to excuse further performance and render them nugatory as to so much as remains unperformed, but to entitle the obligee to damages for the breach of the contract to be paid out of the assets of the dissolved corporation. 10 Cyc. Law & Proc. p. 1312. Thus, in *Schleider v. Dielman*, 44 La. Ann. 463, 10 So. 934, the court held the dissolution of the corporation to be a breach of the contract, giving

the other party the right to recover what he has already expended toward the performance of it and the profits which he would have realized by performance. *Re Wiltshire Iron Co. L. R. 3 Ch. 443*, holds that where a sale of personal property has been made by a corporation which is dissolved before delivery of the property, the purchaser has a valid claim for damages for the breach of the contract, payable out of the assets of the company. In *Spader v. Mural Decoration Mfg. Co.* 47 N. J. Eq. 18, 20 Atl. 378, it is held that where a person was employed by a corporation for a term of years for a fixed salary, and before the expiration of the term the corporation became insolvent, and a receiver was appointed to wind up its affairs, the employee was en-

thorities as to the effect of dissolution of municipal and other corporations add anything decisive to the question. In the 17th and 18th centuries corporations aggregate constituted by charter or letters patent were numerous, and questions frequently occurred as to the effect upon their rights and obligations of dissolution, revival, and reincorporation with or without change of name or constitution. I cannot find that in any case the rights or obligations of a corporation were held to be affected by a technical dissolution. Nor, on the other hand, can I find a case in which such a question has been decided where the corporation had not been revived, or some provision made by statute or charter with reference to its obligations. *Re Illeginson* [1899] 1 Q. B. 325.

There is in the opinion of Lumpkin, J., in *Moultrie v. Smiley*, 16 Ga. 289, a very full and learned examination into the origin, reason for, extent and limitations of the rule that debts due to and from a corporation are extinguished by its dissolution. It is too long to give here *in extenso*, and cannot, without sacrifice, be abstracted. The reader will do well to supplement this note by perusing it.

VIII. The trust-fund, or "American," doctrine.

The trust-fund doctrine, called frequently the "American" doctrine, was formulated by Mr. Justice Story.

"It appears to me," said that jurist in *Wood v. Dummer*, 3 Mason, 308, Fed. Cas. No. 17,944, "very clear upon general principles, as well as the legislative intention, that the capital stock of banks is to be deemed a pledge or trust fund for the payment of the debts contracted by the bank. . . . To me this point appears so plain upon principles of law, as well as common sense, that I cannot be brought into any doubt that the charters of our banks make the capital stock a trust fund for the payment of all the debts of the corporation."

And, in conformity with these views, he held that the capital stock of a bank is a trust fund for creditors, and, upon the division of it, the stockholders take it subject to all the equities attached to it. They are privies to the trust, and receive it *cum onere*. *Ibid*.

And, on the dissolution of a banking corporation, the bill holders and the stockholders have each equitable claims, but those of bill holders possess a prior exclusive equity. *Ibid*.

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The idea that the property of insolvent corporations is held by them in trust for creditors,—is a trust estate in their hands,—and to be administered by chancery as such, is said to have originated in a dictum of Story, J., in *Wood v. Dummer*, 3 Mason, 308, Fed. Cas. No. 17,944, and to have no existence at common law. It has not been adopted in England, but is distinctly a creature of some courts in this country, and is styled the "American doctrine." *O'Bear Jewelry Co. v. Volfer*, 106 Ala. 205, 28 L. R. A. 707, 54 Am. St. Rep. 31, 17 So. 525.

The trust-fund doctrine is usually stated in the decisions in terms quite broad and general. Thus:—

The property of an insolvent trading corporation while under the control of its officers being a trust fund in their hands for the benefit of its creditors, a court of equity, which never allows a trust to fail for want of a trustee, will see to the execution of the trust, although by the dissolution of the corporation the legal title to its property has been changed. *Curran v. Arkansas*, 15 How. 304, 14 L. ed. 705.

In contrast to the rule of the common law, the rule in equity was that while, upon dissolution, a corporation ceased to exist, yet its property was impressed with a trust in favor of its creditors and stockholders as beneficiaries, whose interests equity would protect by appointing a trustee if necessary to execute the trust. *Bowe v. Minnesota Milk Co.* 44 Minn. 480, 47 N. W. 151.

When a corporation is dissolved, discontinues its business, makes a general assignment, or does any other act indicating positive insolvency, its property thereafter is affected by an equitable lien or trust for the benefit of all its creditors, and these may individually be restrained by injunctions against appropriating the corporate assets to the payment of their claims. *McClaren v. Union Roller Mills & Elevator Co.* 95 Tenn. 696, 35 S. W. 88.

It is well settled that the property of a corporation is a trust fund in the hands of its directors for the benefit of creditors and stockholders,—that is, to the extent of preventing the directors from dealing with it to their own advantage, or in disregard of the rights of the creditors and stockholders. *Goodin v. Cincinnati & W. Canal Co.* 18 Ohio St. 169, 98 Am. Dec. 95.

In the view of equity the property of a dis-

titled to damages for the breach of his contract, payable *pro rata* out of the assets in the hands of the receiver.

In treating of this subject, Cook on Corporations, § 641, says: "It was formerly believed to be the common law that upon the dissolution of a corporation all its assets belonged to the state, and all its debts were canceled, and that the creditors were not entitled to anything from the assets. This remarkable theory has been stated and restated in text-books and decisions of the courts for over one hundred years. It is found in Blackstone's Commentaries and in the old works of Kyd on Corporations and Grant on Corporations. The courts, however, while upholding the rule theoretically, have quite uniformly refused to apply such a

doctrine, and have invented various theories, fictions, and arguments for avoiding this supposed doctrine of the common law. Finally, in 1899, an English court denied that the common law ever countenanced such confiscation, and showed that in the seventeenth and eighteenth centuries many corporations were dissolved, and that in not a single case was any such doctrine applied. It again may be said that, although the common law has its reproaches, this is not one of them. The American courts have always refused to follow the supposed common-law rule on this subject." The same work says, at § 642: "As already seen, the old rule that upon dissolution all debts by or to the corporation are rendered unenforceable is no longer the law. It has been

solved corporation constitutes a trust fund pledged to the payment of creditors and stockholders. Broughton v. Pensacola, 93 U. S. 266, 23 L. ed. 806.

The property of an insolvent corporation constitutes a trust fund pledged to the payment of all its debts equally and ratably. Butler v. Cockrill, 20 C. C. A. 122, 36 U. S. App. 702, 73 Fed. 945.

It is a very plain proposition that the stock and property of every corporation are to be regarded as a trust fund for the payment of its debts, and its creditors have a lien and the right to priority of payment over any stockholder. Bartlett v. Drew, 57 N. Y. 587. Followed in Hastings v. Drew, 76 N. Y. 9.

In Nevitt v. Bank of Port Gibson, 6 Smedes & M. 513, said Lumpkin, J., of the supreme court of Georgia, "nearly all the learning on this subject was exhausted, it having been twice argued with singular diligence and ability. And there, as everywhere else where the question has been raised, a majority of the court held that the property and debts due to and belonging to the bank was a trust fund subject to the cognizance and control of a court of equity for the benefit of creditors. Hightower v. Thornton, 8 Ga. 486, 52 Am. Dec. 412.

The authorities are uniform that, in case a corporation is insolvent, its directors and officers are trustees for its creditors, and must manage its property and assets with strict regard to their interests, and, if they themselves are creditors, they cannot secure any preference or advantage over other creditors while managing the insolvent corporation. Haywood v. Lincoln Lumber Co. 64 Wis. 639, 26 N. W. 184.

The assets of an insolvent corporation are a trust fund for the benefit of creditors and stockholders. Sands v. Kimbark, 27 N. Y. 148.

While a corporation continues solvent, its officials are agents or trustees for its shareholders, but owe duty or obligation to none others. But the moment a corporation becomes insolvent its assets must be regarded as a trust fund for the payment of all its creditors, and the directors occupy the position of trustees,—a fiduciary relation which forbids them to take the trust property and apply it to the payment of corporate debts due to themselves. Beach v. Miller, 130 Ill. 162, 17 Am. St. Rep. 291, 22 N. E. 464.

A corporation being insolvent and ceasing to 69 L. R. A.

prosecute the business for which it was created, its assets become a trust fund in the hands of its directors, to be used by them in paying the corporate creditors. Stough v. Ponca Mill Co. 54 Neb. 500, 74 N. W. 868.

The assets of a corporation are a trust fund for the payment of its debts, upon which creditors have an equitable lien, as against both stockholders and all transferees, except those purchasing in good faith and for value. Cole v. Millerton Iron Co. 133 N. Y. 164, 28 Am. St. Rep. 615, 30 N. E. 847.

Nothing is better settled than that the assets of an insolvent corporation are a fund for the payment of its debts. The holders of such property take it charged with a trust in favor of such creditors, which a court of equity will enforce. Shanokin Valley & P. R. Co. v. Malone, 85 Pa. 25.

The settled law of Tennessee is declared to be that the assets of an insolvent corporation become, from the date of its assured insolvency, a fixed trust fund for the equal *pro rata* distribution among its creditors, unless otherwise provided by law or fixed by a valid contract. Tradesman Pub. Co. v. Knoxville Car Wheel Co. 95 Tenn. 634, 31 L. R. A. 593, 49 Am. St. Rep. 943, 32 S. W. 1097.

When an insolvent corporation ceases to carry on its business, and by a conveyance of all its property incapacitates itself from continuing business, the law makes its assets a trust fund for the benefit of all its creditors without preference. Lyons-Thomas Hardware Co. v. Perry Stove Mfg. Co. 86 Tex. 143, 22 L. R. A. 502, 24 S. W. 16, 88 Tex. 468, 27 S. W. 100.

In equity the capital stock of a corporation is regarded as a trust fund for the payment of debts. The creditors have a lien upon it which is prior in point of right to any claim which the stockholders as such can have upon it; and courts will be astute to detect and defeat any scheme or device which is calculated to withdraw this fund, or in any way to place it beyond the reach of creditors. Crandall v. Lincoln, 52 Conn. 73, 94, 52 Am. Rep. 560.

This is the settled law. Buck v. Ross, 68 Conn. 29, 57 Am. St. Rep. 60, 35 Atl. 763.

The capital, unpaid subscriptions to the capital stock, and the liability of holders of paid-up stock to pay an additional amount equal to the par value of their stock, are all parts of a trust estate sacredly pledged for the security of

held that the liability of a corporation to deliver goods according to an executory contract ceases upon such corporation passing into the hands of a receiver, where the receivership was accompanied by the usual injunction against the further transaction of business by the insolvent corporation. This conclusion is arrived at on the theory that the failure to perform was due to the operation of law, and hence that no damages could be recovered for breach of the contract. The better rule, however, is that, even at common law, the obligations of a corporation do not cease by reason of its dissolution. The dissolution of a company does not put an end to its executory contract to employ a person, nor obligations which were created for a period longer than the

duration of the corporate charter. Where a corporation is dissolved before a lease taken by it runs out, the lessor may hold its assets liable for the breach of contract. Where a receiver is appointed, he generally finds a number of executory contracts in force,—contracts of employment, or for rental of premises, or for purchases of material, etc. He then must decide whether he wishes to adopt any of these contracts as his own. If he does not adopt a particular contract, then that contractor has no preferred claim against the receiver, as a part of the receiver's expenses or disbursements, but has merely a claim against the corporation and its general assets, and this claim may be for past sums due or for breach of contract, or both. On the other hand, if the

the creditors of a national banking association organized under the national banking acts. *Stuart v. Hayden*, 18 C. C. A. 618, 36 U. S. App. 462, 72 Fed. 402.

The law is that, when a corporation is insolvent, its capital is a trust fund for the payment of its debts. Hence, a director who is a creditor upon a pre-existing debt cannot take advantage of his superior information to secure his demand in preference to other creditors. *Hill v. Pioneer Lumber Co.* 113 N. C. 173, 21 L. R. A. 560, 37 Am. St. Rep. 621, 18 S. E. 107.

The capital stock and profits of a dissolved corporation should be regarded as a trust fund for the payment of its debts and liabilities, and the stockholders are only entitled to such surplus as remains after their payment. *Dudley v. Price*, 10 B. Mon. 84.

When a state becomes the sole stockholder in a corporation chartered by it for trading purposes, and such corporation becomes insolvent, the state, upon taking the corporate property, does so as stockholder, and not as sovereign, and takes such property charged with a trust in favor of the corporate creditors. *Curran v. Arkansas*, 15 How. 304, 14 L. ed. 705.

The obligations of its contracts survive the dissolution of a corporation, and its creditors may enforce their claims against any property belonging to the corporation which has not passed to bona fide purchasers, but is still held in trust for the company or its stockholders at the time of its dissolution, in any mode permitted by law. *Mumma v. Potomac Co.* 8 Pet. 286, 8 L. ed. 945.

Its debts survive the dissolution of a corporation, and creditors may enforce their claims against any property belonging to the corporation which has not passed into the hands of a bona fide purchaser; for such property will be held affected with a trust primarily for the creditors of the company. *Howe v. Robinson*, 20 Fla. 352.

By the old common law a dissolution of a corporation extinguished its debts; but in such cases courts of equity consider the property and effects a trust fund for the payment of creditors, and shareholders into whosoever hands they come subject to such a trust. *Powell v. North Missouri R. Co.* 42 Mo. 63.

But such statements require great modification.

The property of a corporation is only a trust
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fund for the payment of its debts in the sense that, when the corporation is lawfully dissolved, and all its business wound up, or when it is insolvent, all its creditors are entitled, in equity, to have their debts paid out of the corporate property before any distribution thereof among the stockholders. *Wabash, St. L. & P. R. Co. v. Ham*, 114 U. S. 587, 29 L. ed. 235, 5 Sup. Ct. Rep. 1081.

That the property of an insolvent corporation is a trust fund for the benefit of its creditors is true only in the sense that, after a court of equity has duly acquired, by virtue of some independent general equitable principle, jurisdiction to administer corporate assets, it will administer them for the benefit of all creditors equally. *O'Bear Jewelry Co. v. Volfer*, 106 Ala. 205, 28 L. R. A. 707, 54 Am. St. Rep. 31, 17 So. 525.

The cases of *Gibson v. Trowbridge Furniture Co.* 96 Ala. 357, 11 So. 365; *Goodyear Rubber Co. v. George D. Scott* 96 Ala. 439, 11 So. 370, and *Corey v. Wadsworth*, 99 Ala. 68, 23 L. R. A. 618, 42 Am. St. Rep. 29, 11 So. 350, in so far as they decided anything beyond the point that the transfer by the officers of a corporation of corporate assets to pay corporate debts upon which such officers were secondarily liable constituted, as respected other corporate creditors, a fraudulent preference, and was therefore, as to such creditors, void, were overruled by the decision in *O'Bear Jewelry Co. v. Volfer*, 106 Ala. 205, 28 L. R. A. 707, 54 Am. St. Rep. 31, 17 So. 525; and the proposition that the assets of a corporation become a trust fund for the benefit of creditors, and are beyond the power of disposition or control of the governing directors whenever and as soon as the corporation becomes insolvent; and that mere corporate insolvency gives a court of equity jurisdiction to administer the assets as trust property,—was there distinctly negated.

The general doctrine that the property of a corporation is a trust fund for the payment of its debts only means that the property must be first appropriated to the payment of corporate debts before any portion of it can be distributed to the stockholders. It does not mean that the property is so affected by the indebtedness that it cannot be sold, transferred, or mortgaged in good faith and for value, except subject to the liability of being appropriated to pay that indebtedness. *Fogg v. Blair*, 133 U. S. 534, 33 L. ed. 721, 10 Sup. Ct. Rep. 338.

receiver does adopt the contract, then, as to sums becoming due before such adoption, the contractor is a general creditor only, but, as to sums becoming due after such adoption, they are a part of the receiver's expenses or disbursements, and must be paid as such. The law is clear that a receiver may refuse to carry out an executory contract of the corporation. A receiver has no power, however, to cancel a lease, except as to his own liability."

Upon this question, the language of § 59 of chapter 53 of the Code of 1899 has important bearing. It says the property and assets of a dissolved corporation, whatever the cause or manner of its dissolution may be, shall be subject to the payment of the liabilities of the corporation. This language

is much broader than that of the New Jersey statute, which only directs the payment of the debts of the corporation out of its assets, and under which the courts of that state give damages on executory contracts rendered impossible of performance by reason of dissolution. As has been stated, the contract is not invalid, everything done under it is in part performance thereof, and the dissolution of the corporation cannot have the effect of rescission or rendering it void *ab initio*, and undoing anything that has been performed under it. Dissolution, even upon the theory adopted by those courts which adhere to the doctrine of *People v. Globe Mut. L. Ins. Co.* 91 N. Y. 174, is simply a contingency in view of which the contract was made, and which it was

The general principle is well settled that the property of a private corporation is not charged by law with any direct trust or specific lien in favor of general creditors, and such a corporation, so long as it is in the active exercise of its functions, may exercise as full dominion and control over its property as an individual. *McClaren v. Union Roller Mills & Elevator Co.* 95 Tenn. 606, 35 S. W. 88.

It is not strictly accurate to refer to the assets of an insolvent corporation as a trust fund, and to its officers as trustees; at most, under some circumstances, the assets are a quasi trust fund, and the directors quasi trustees. *Gottlieb v. Miller*, 154 Ill. 44, 39 N. E. 992.

In the absence of countervailing legislation, an insolvent corporation may prefer certain of its creditors subject to the same restrictions that apply to individual debtors, which it could not do if its property and assets were held in trust for all its creditors equally, as soon as insolvency supervened. *Ibid.*

There is an extended examination of the trust-fund doctrine, commonly called the American doctrine, in *Hospes v. Northwestern Mfg. & Car Co.* 48 Minn. 174, 15 L. R. A. 470, 31 Am. St. Rep. 637, 50 N. W. 1117, leading to the conclusion that there is no distinction between the absolute and unconditional control of his property and assets which belongs to an individual and that belonging to a corporation. The stockholders of a corporation cannot appropriate the corporate property without satisfying the creditors, not because it is held in trust for creditors, but because such appropriation is a fraud upon them. If equity is called upon to distribute corporate assets in the case of insolvency or dissolution, creditors will be treated equally, and preferred to shareholders, who will get what is left *pro rata* to their shares.

The American or trust-fund doctrine is thus explained by the United States Supreme Court: A corporation is a distinct entity. Its affairs necessarily are managed by officers and agents, but it is as distinct a being as an individual is, and is entitled to hold property as absolutely as an individual can. Its estate, its interest, its possession, are the same. When a corporation becomes insolvent it is so far civilly dead that its property may be administered as a trust fund for the benefit of its creditors and stockholders. A court of equity will then make those funds trust funds which in other circumstances

are as much the absolute property of the corporation as any man's property is his. *Graham v. La Crosse & M. R. Co.* 102 U. S. 148, 26 L. ed. 106.

That is to say that, when a court of equity takes into its possession the assets of an insolvent corporation, it will administer them on the theory that in equity they belong to the creditors and stockholders, rather than to the corporation itself. The idea underlies all the expressions in reference to "trust" in connection with corporate property, that the corporation is an entity distinct from its stockholders as from its creditors. Solvent it holds its property as any individual holds his, free from the touch of a creditor who has acquired no lien; free, also, from the touch of a stockholder, who, though equitably interested in, has no legal right to the property. Becoming insolvent, the equitable interest of the stockholders in the property, together with their conditional liability to the creditors, places the property in a condition of trust, first for the creditors, and then for the stockholders. Whatever of trust there is arises from the peculiar and diverse equitable rights of the stockholders as against the corporation in its property, and their conditional liability to its creditors. It is rather a trust in the administration of the assets after possession by a court of equity, then a trust attaching to the property as such for the direct benefit of either creditor or stockholder. *Hollins v. Brierfield Coal & I. Co.* 150 U. S. 371, 37 L. ed. 1113, 14 Sup. Ct. Rep. 127.

The question of trust when the legal right to the estate in lands of a dissolved corporation is claimed by the grantor in reversion under the common-law rule cannot be considered to prevent the legal results flowing from that rule in a court of law. A court of law is powerless to divest a legal estate in order to enforce an equity. In equity the rights of creditors and stockholders, if any there are, of a defunct corporation, will be enforced, whenever properly brought before a court administering equity. To enforce such rights equity will follow the legal estate in the hands of the grantor after he has recovered it at law. *St. Philip's Church v. Zion Presby. Church*, 23 S. C. 297.

IX. *The effects of corporate dissolution according to modern views.*

a. *Civil death.*

An act of the legislature declaring the char-

understood should, upon its happening, end the contract on a date earlier than that specified. Under that doctrine, full compensation is paid for so much of the contract as has been performed at the date of the dissolution, and profits which would have arisen from the performance of the part remaining unexecuted are denied and refused. It is difficult to conceive or express any reason why, upon the same principle, money expended in the performance of a contract which is not one of mere agency or service should not be recovered. It is laid out and expended upon the faith of the contract, at a time when that contract is recognized by the parties as valid and binding. If necessarily expended, as it must be if recoverable in any sense, it is of the

very essence of performance, an act of performance, a thing without which there could be no performance. Can the dissolution of the corporation have the effect of undoing that which was binding at the time it was done, and of releasing obligations fixed and unalterable by the parties themselves? It cannot be done upon any theory except that which was supposed once to have been a principle of the common law, under which the dissolution of a corporation canceled all its obligations, released it of its debts, vested the title to its personal assets in the king, and returned its real estate to the donors,—a doctrine which Cook well says has been declared by the English court never to have been a part of the common law, and which has never been adopted, approved,

ter of a domestic corporation vacated and annulled, and its powers and rights elsewhere vested, effects such corporation's legal death. *Mumma v. Potomac Co.* 8 Pet. 286, 8 L. ed. 947.

When the charter of a corporation is taken away or annulled by an act of the legislature the corporation is extinct. *Sturges v. Vanderbilt*, 73 N. Y. 384.

The dissolution of a corporation by act of the legislature deprives it of its corporate existence. *Merrill v. Suffolk Bank*, 31 Me. 57, 50 Am. Dec. 649.

b. Upon litigation.

Actions, suits, and other legal proceedings pending against a corporation abate by its dissolution. *Walters v. Western & A. R. Co.* 49 Fed. 679.

After the dissolution of a corporation, the power to proceed judicially against it in an action is wholly divested, except as specially authorized by statute. *Combes v. Keyes* (*Combes v. Milwaukee & M. R. Co.*) 89 Wis. 297, 27 L. R. A. 369, 46 Am. St. Rep. 839, 62 N. W. 89.

The dissolution of a corporation ends an action pending against it, and all subsequent proceedings therein are void, unless some statute providing for a continuance exists and is followed. *McCulloch v. Norwood*, 58 N. Y. 562; *Sturges v. Vanderbilt*, 73 N. Y. 384.

When a corporate charter is expressly subject to repeal by act of the legislature, and contains no provision for the prosecution of suits against the corporation in case of its dissolution, and no other statute provides for such prosecution, an action at law against such corporation abates upon the repeal of its charter. *Read v. Frankfort Bank*, 23 Me. 318.

When the charter of a company expires by limitation, its power to hold property as a corporation, and to prosecute and defend suits and actions, is gone; and, whether its property reverts to the donors, or the stockholders, or to the commonwealth as derelict, there is no doubt that it no longer remains in the corporation as such; hence suits pending against it abate at the instant its existence terminates. *Rider v. Nelson & A. Union Factory*, 7 Leigh, 154, 30 Am. Dec. 405.

To the same effect is *May v. State Bank*, 2 Rob. (Va.) 50, 40 Am. Dec. 726.

The extinction of a corporation is a substantial

tial impediment to the prosecution of a creditor's claim by legal remedies before ordinary tribunals, and warrants the interposition of a court of equity. *Shamokin Valley & P. R. Co. v. Maloue*, 85 Pa. 25.

No legal judgment can be rendered against a corporation which has been dissolved by an act of the legislature. *Merrill v. Suffolk Bank*, 31 Me. 57, 50 Am. Dec. 349.

A scire facias cannot be maintained, nor can a judgment be had thereon, against a dead corporation, any more than against a dead man. *Mumma v. Potomac Co.* 8 Pet. 286, 8 L. ed. 947.

It is neither to be denied, nor questioned, but that, by the common law, a corporation which has been dissolved absolutely for all purposes whatsoever stands upon the same footing as a dead person with respect of any power in the courts to enter a valid judgment against it. In the absence of any statute upon the subject, the manifest logic and reason of the thing are the same in both cases. *Life Asso. of America v. Fassett*, 102 Ill. 315.

The dissolution of a corporation abates all suits pending against it at the time such dissolution takes place, and thereafter no valid judgment in a pending action can be taken against the corporation. *Marion Phosphate Co. v. Perry*, 33 L. R. A. 252, 20 C. C. A. 490, 41 U. S. App. 14, 74 Fed. 425.

When, in an action by a foreign corporation upon a promissory note, besides proof of the note and incorporation, it is shown that, by order in chancery in the home state, a receiver of the corporate property has been appointed upon a petition alleging the insolvency of the company, and that it had suspended business for want of funds; and a statute of the foreign state providing for the appointment of a receiver when any corporation shall be dissolved is the only law proved, the inference is that the company no longer has a corporate existence, and the action must be dismissed. *Merchants' Loan & T. Co. v. Clair*, 107 N. Y. 663, 14 N. E. 414.

But statutes providing for the prosecution to judgment of pending suits, and action against dissolved corporations, affect only the domestic companies. Suits against foreign corporations abate by their dissolution notwithstanding such statutes. *Marion Phosphate Co. v. Perry*, 33 L. R. A. 252, 20 C. C. A. 490, 41 U. S. App. 14, 74 Fed. 425.

And the dissolution of a corporation after a

and recognized in America. There is certainly no room for any such principle under the statutes of this state creating, regulating, and providing for the dissolution of corporations and of the distribution of their assets.

Nor do the principles of law, constituting the other ground for discontinuing the performance of the contract, preclude recovery for outlay and expenses in part performance thereof. In its opinion, the court exonerates Thompson from any actual fraud in the procurement of his contract, although holding that his being a director of the corporation gave the stockholders the right to avoid it, and held that he is entitled to be compensated for labor and money necessarily expended by him in part performance

thereof. The rule on this subject is stated in 10 Cyc. Law & Proc. pp. 794, 795, as follows: "Directors are not disabled from entering into contracts with the corporation, provided there be enough directors on the other side of the contract to make a quorum, and provided the contract is open, fair, and honest. The rule under consideration prohibits a director from acquiring secret profits through contracts made with or for the corporation, but does not prohibit contracts with the corporation, where there has been a full and fair disclosure of his interest in the contract. For example, it has been held that the shareholders and directors of a manufacturing corporation, who, with their own money and on their own credit and risk, erect new works, may make

trial against it has been had in an action upon contract and the submission of the cause to the court for decision has been made does not abate the action, but judgment may be entered *nunc pro tunc*. *Shakman v. United States Credit System Co.* 92 Wis. 368, 32 L. R. A. 383, 53 Am. St. Rep. 920, 66 N. W. 528.

Often a state statute preserves for a longer or shorter period after its dissolution the right of a corporation to prosecute and defend suits. *Tuskaloosa Scientific & Art Asso. v. Green*, 48 Ala. 346; *Bowe v. Minnesota Milk Co.* 44 Minn. 460, 47 N. W. 151; *Blake v. Portsmouth & C. R. Co.* 39 N. H. 435.

c. Upon property and assets.

The ancient doctrine that, upon the repeal of a private corporation, its debts were extinguished, and its real property reverted to its grantors, and its personal property vested in the state, has been so far modified by modern adjudications that a court of equity will now lay hold of the property of a dissolved corporation and administer it for the benefit of its creditors and stockholders. *Broughton v. Pensacola*, 93 U. S. 266, 23 L. ed. 896.

The common-law doctrine respecting corporate property and assets upon dissolution has, so far as the modern business and commercial corporation is concerned, become practically obsolete. Its unjust operation upon the rights of creditors and stockholders has been generally prevented by statute. And in equity the assets of such a corporation, which represent, not the donations of a prince or its pious founder, but contributions of stockholders, are held, independent of statute, to constitute a trust fund, into whosoever hands they may come, for the benefit of creditors and stockholders. *Wallamet Falls Canal & Lock Co. v. Kittridge*, 5 Sawy. 44, Fed. Cas. No. 17,105.

The rights and interests of the creditors and stockholders of a corporation are neither extinguished nor seriously impaired by its dissolution. If the charters or statutes for winding up the business of a trading or moneyed corporation do not secure the rights and interests of its creditors and stockholders, equity regards its capital property and debts as trust funds pledged to pay the dues of creditors and stockholders, and has ample power to reach and apply them to the purposes of such trust. *Taylor v. Holmes*, 14 Fed. 498.

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A law distributing the property of an insolvent trading or banking corporation among its stockholders, or seizing it to the use of the state, would as clearly impair the obligation of its contracts as a law giving to the heirs the effects of a deceased natural person to the exclusion of his creditors would impair the obligation of his contracts. *Curran v. Arkansas*, 15 How. 304, 14 L. ed. 706.

The legislature, if the power to do so has been reserved, may repeal the charter of a corporation without thereby impairing the obligation of any contract into which the corporation has entered; but it cannot establish rules in regard to the management and disposition of the corporate assets so that the avails shall be diverted from, or divided unfairly and unequally among, the corporate creditors, thus impairing the obligations of contracts; nor so that that portion of the avails which belongs to the stockholders shall be sequestered and diverted from the owners, and thus injure vested rights. *Lothrop v. Stedman*, 13 Blatchf. 134, Fed. Cas. No. 8,519.

Upon the civil death of a manufacturing corporation by the expiration of its charter, real estate conveyed to it in fee for a money consideration does not revert to the grantors, but the title thereto vests in a receiver of its property and effects for the benefit of creditors and stockholders. *Owen v. Smith*, 31 Barb. 641.

The rule of the common law that real estate held by a corporation at the time of its dissolution reverts to the grantor does not, with respect of stock corporations, prevail in New York, a statute of which (1 Rev. Stat. 248; 1 Rev. Stat. 800, §§ 9, 10) provides that, upon the dissolution of a corporation, the directors or managers at the time become trustees of its property to pay its debts and divide its property among its stockholders, and the provisions apply as well to the real as to the personal property; consequently, where land is conveyed absolutely to a corporation having stockholders no reversion, or possibility of reversion, remains to the grantor. *Heath v. Barmore*, 50 N. Y. 302.

The modern doctrine now held in North Carolina in spite of earlier decisions to the contrary is that, upon the dissolution of a corporation, the title to real property does not revert to the original grantors or their heirs, and the personal estate does not escheat to the state; nor are the debts due to and from the corporation extin-

a profit thereon upon the sale to such corporation of such works, and are not accountable therefor, especially where the transaction is advantageous to the corporation, has been ratified by a unanimous vote at a shareholders' meeting, and an opportunity is given the shareholders to rescind, with full knowledge of all the facts, and where opportunity was also given to the corporation to erect such works before their construction was undertaken by the directors. Such contracts will be scrutinized in equity, and will be set aside if not made in the utmost fairness and good faith. So far from being void *ab initio*, such contracts are good as against third persons, who are not in a position to set up the rights of the corporation by way of defense against them.

guished. *Wilson v. Leary*, 120 N. C. 90, 38 L. R. A. 240, 58 Am. St. Rep. 778, 26 S. E. 630.

It seems to be otherwise with respect of the real estate of public-service corporations.

Although an act incorporating a turnpike company vests it, upon complying with prescribed conditions, with title to the land over which the road passes, nevertheless such title must be considered as vested solely for the purposes of a road, and when such road is abandoned the land reverts to the original owners. *Hooker v. Utica & M. Turnp. Road Co.* 12 Wend. 371.

A turnpike corporation loses title to its lands by reversion back to its grantor or his heirs upon its dissolution, when there is no provision in its charter, or some other statute, to avert such a consequence. *Bingham v. Welderwax*, 1 N. Y. 509.

Especially does this appear to be the case when lands have been taken by condemnation under the power of eminent domain.

See the cases in point, cited in the note on *The nature of a railroad, whether real or personal property*, appended to the case of *Webster Lumber Co. v. Keystone Lumber & Min. Co.* 66 L. R. A. 33.

But this class of cases constitutes an exception to the prevalent rule.

The common-law doctrine that, upon dissolution, the property of a corporation reverted to the Crown, has never been recognized in the United States. *Bolles v. Crescent Drug & Chemical Co.* 53 N. J. Eq. 614, 32 Atl. 1061.

The dissolution of a corporation by the forfeiture of its charter, while it disables the company from continuing its business, does not prevent it from closing out its affairs and disposing of its property in the interest of creditors and stockholders, independent of statute; and *a fortiori* is it authorized to liquidate thus when a statute of the state which created it so empowers. *Boyd v. Hankinson*, 34 C. C. A. 197, 63 U. S. App. 678, 92 Fed. 49.

Although contrary to the doctrine asserted in most elementary works, and in the case of *Bank of Vincennes v. State*, 1 Blackf. 267, 12 Am. Dec. 234, the doctrine that, on the dissolution of a once legal corporation, its personal and real property become assets for the payment of its debts and distribution among stockholders, is right. *State ex rel. Brown v. Bailey*, 16 Ind. 46, 79 Am. Dec. 405.

The assets of an insolvent banking corpora-

tion are a fund for the payment of its debts. *Curran v. Arkansas*, 15 How. 304, 14 L. ed. 705.

When an act of incorporation is repealed equity takes charge of all the property and effects which survive the dissolution, and administers them as a trust fund primarily for the benefit of the creditors. If anything is left it goes to the stockholders. *Shields v. Ohio*, 95 U. S. 819, 24 L. ed. 357.

When a corporation is virtually dead, although its term of existence limited by law has not expired, and it has property and assets which cannot be used in carrying out the purposes of the corporation, a court of equity has jurisdiction to distribute such property and assets among its members upon such basis as is just. *Stamm v. Northwestern Mut. Ben. Assn.* 65 Mich. 317, 32 N. W. 710.

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The dissolution of a corporation cannot deprive its creditors or stockholders of their rights in its property; and, if the common law affords them no adequate remedy, they may obtain relief in equity. *Folger v. Columbian Ins. Co.* 99 Mass. 267, 96 Am. Dec. 747.

The property of a dissolved corporation is liable only in equity for the claims of creditors. *Smith v. Huckabee*, 53 Ala. 195.

The property of a dissolved corporation is subject to a trust in favor of creditors. *Montgomery & W. P. R. Co. v. Branch*, 59 Ala. 153; *Nelson v. Hubbard*, 96 Ala. 244, 17 L. R. A. 377, 11 So. 430.

A court which never allows a trust to fail for want of a trustee will see to the execution of the trust charged upon the assets of an insolvent corporation for the payment of its creditors, although by the dissolution of the corporation the legal title to its property has been changed. *Shamokin Valley & P. R. Co. v. Malone*, 85 Pa. 25.

In equity a corporation is regarded as a trustee holding the corporate property for the benefit of its creditors and shareholders, which, upon its dissolution or civil death, a court of chancery will lay hold of as a trust fund and distribute for their benefit. *Life Assn. of America v. Fassett*, 102 Ill. 315.

When a corporation is declared insolvent it is incapacitated from doing any new business, but it still survives to discharge its liabilities, and, when that is accomplished, to make final distribution of its remaining assets. *Chemical Nat. Bank v. Hartford Deposit Co.* 161 U. S. 1, 40 L. ed. 593, 16 Sup. Ct. Rep. 439.

from it, or otherwise contracting or dealing with it, if for the purpose of the transaction he does not represent the corporation at all, but it is adequately represented by its other directors or officers, and the transaction is entirely free from fraud. And, by the weight of authority, a transaction between a director or other officer and the corporation, or a transaction in which a director or other officer is interested, is valid, if entirely free from fraud, even when he has acted as a member of the board in authorizing the same, if there were enough of disinterested votes in favor of the transaction to render his vote unnecessary."

Mr. Justice Miller, speaking for the court in *Turin-Lick Oil Co. v. Marbury*, 91 U. S. 567, 23 L. ed. 328, said: "So, when the

lender is a director, charged, with others, with the control and management of the affairs of the corporation, representing in this regard the aggregated interest of all the stockholders, his obligation, if he becomes a party to a contract with the company, to candor and fair dealing, is increased in the precise degree that his representative character has given him power and control derived from the confidence reposed in him by the stockholders who appointed him their agent. If he should be a sole director, or one of a smaller number vested with certain powers, this obligation would be still stronger, and his acts subject to more severe scrutiny, and their validity determined by more rigid principles of morality, and freedom from motives of selfishness. All this

And, although a judicial decree may, in terms, declare a corporation dissolved, yet, if it also authorizes suits to be brought and defended in the corporate name, and conveyance of its property and effects to be made, for the purpose of winding up its business, the corporation cannot be said to be absolutely extinguished for all purposes, but, on the contrary, to be expressly kept alive so far as necessary to collect and apply its assets to the payment of its debts. *Life Asso. of America v. Fassett*, 102 Ill. 315.

In the state of New York the rule of the common law in relation to the effect of the dissolution of a corporation upon its property and debts has never been applied to business corporations, and as early as 1811 an act was passed making the directors of such a corporation trustees to settle its affairs and divide the money among the stockholders after paying the debts owing at the time of dissolution. *Shayne v. Evening Post Pub. Co.* 168 N. Y. 70, 55 L. R. A. 777, 86 Am. St. Rep. 654, 61 N. E. 111.

When a corporation is dissolved by a repeal of its charter, says Black, J., of the Pennsylvania supreme court, the legislature may appoint, or authorize the appointment of, a person to take charge of its assets for the use of its creditors and stockholders, and this is no more confiscation than it is confiscation to appoint an administrator for a dead man. But money, goods, or land which are or were the private property of a defunct corporation cannot be arbitrarily seized for the use of the state without compensation paid or provided for. *Erie & N. E. R. Co. v. Casey*, 26 Pa. 287.

When the effects of a dissolution of a corporation are said to be the reversion of its lands to those who had granted them, and the extinguishment of the debts due either to or from the corporate body so that they are not a charge or a benefit to the members, the *dictum* is supported by the statutes and judgments following the suppression of the military and religious orders or the cases of dissolution of monasteries and other ecclesiastical foundations upon the death of all their members, or of donations to public bodies, such as municipal corporations. But such cases are not analogous to those of trading corporations. These hold their property in trust, first for their creditors, and next, when their debts are paid, for those who contributed in capital to the corporate enter-

prise. *Bacon v. Robertson*, 18 How. 480, 15 L. ed. 499.

d. Upon debts and credits.

There have been some decisions, notably in Delaware and Mississippi, upholding the common-law doctrine that dissolution extinguishes debts, whether owing to or due from the corporation; while elsewhere the existence of the rule has been admitted, but for one or another reason it has been found not to apply.

When, by the expiration of the period limited in its charter for its corporate existence, a bank is dissolved, the dissolution is absolute, and a debt owing to it at the time is extinguished. *Commercial Bank v. Lockwood*, 2 Harr. (Del.) 8.

The case of *Commercial Bank v. Lockwood*, 2 Harr. (Del.) 8, was examined, criticized, and disapproved in *Moultrie v. Smiley*, 16 Ga. 289.

The current of decisions has flowed in such a channel that it may be regarded as settled doctrine that, on the dissolution of a banking corporation, the debts due to and from it are extinguished, not by any implied condition in the contracts, but from necessity, because there is no person in whose favor, or against whom, they can be enforced. *Commercial Bank v. Chambers*, 8 Smedes & M. 9.

It is settled doctrine, upon common-law principles, independent of any statute declaring a different rule, that, upon the dissolution of a corporation, the debts due to and from it are extinguished. *Port Gibson v. Moore*, 13 Smedes & M. 157.

It is the doctrine of the common-law that upon the dissolution of a corporation the debts due to and from it are extinguished. *Hightower v. Thornton*, 8 Ga. 486, 52 Am. Dec. 412.

That the debts of a corporation either to or from it are extinguished by its dissolution is a proposition which nobody denies. *Thornton v. Lane*, 11 Ga. 459.

An act of the legislature renewing the corporate powers and franchises of a banking corporation after the expiration of its charter does not revive a debt owing to it when the original charter expired. *Commercial Bank v. Lockwood*, 2 Harr. (Del.) 8.

The granting of a new charter to a dissolved corporation does not revive a debt extinguished by the dissolution. *Port Gibson v. Moore*, 13 Smedes & M. 157.

falls far short, however, of holding that no such contract can be made which will be valid, and we entertain no doubt that the defendant in this case could make a loan of money to the company; and as we have already said that the evidence shows it to have been an honest transaction for the benefit of the corporation and its shareholders, both in the rate of interest and in the security taken, we think it was valid originally, whether liable to be avoided afterwards by the company or not."

In *Leavenworth County v. Chicago, R. I. & P. R. Co.* 134 U. S. 688, 33 L. ed. 1064, 10 Sup. Ct. Rep. 708, the court refused to set aside the foreclosure of a mortgage on a railroad and the sale of the road made under a decree, on the ground of its having

been procured by parties sustaining a trust relation to the property, where there was no proof of collusion or fraud in fact. In *Fit. Payne Rolling Mill v. Hill*, 174 Mass. 224, 54 N. E. 532, the court said of a contract made between a corporation and one of its directors: "It was not illegal or void because made with a director, the only person likely to be willing to make it. In this country it very generally has been deemed impracticable to adopt a rule which absolutely prohibits such contracts." The same doctrine is announced in the case of *Gay v. Fair*, 175 Mass. 521, 56 N. E. 708. In the late case of *United States Steel Corp. v. Hodge*, 64 N. J. Eq. 807, 60 L. R. A. 742, 54 Atl. 1, the law on this subject is stated by the court of last resort in New Jersey

The general current of authorities, especially the more recent ones, is altogether adverse to this doctrine.

A corporation never can dissolve itself so as to defeat any of the just rights of its creditors. *Brown v. Union Ins. Co.* 3 La. Ann. 177.

It is a well-settled rule that the dissolution of a corporation by liquidation or any other act of its stockholders, or by limitation, or in any mode save legislative repeal or judicial decree, does not affect the rights of creditors, and that, as to them and their right to enforce their claims or determine their validity by suit or otherwise, the corporation will be deemed to continue in existence. *National Pabuloque Bank v. First Nat. Bank*, 36 Conn. 325, 4 Am. Rep. 80.

The common-law doctrine that a dissolution of a corporation extinguishes its debts does not prevail in the United States. *Howe v. Robinson*, 20 Fla. 352.

The obligations of a corporation survive its dissolution, and are enforceable upon its assets. *Whiting v. Sheboygan & F. du L. R. Co.* 25 Wis. 207, 3 Am. Rep. 47.

After a banking corporation has been dissolved and its franchise forfeited debts owing to it still exist, and can be recovered by a trustee for distribution to creditors and stockholders. *Bacon v. Robertson*, 18 How. 480, 15 L. ed. 499; *Lum v. Robertson*, 6 Wall. 277, 18 L. ed. 743.

A delinquent debtor of a dissolved corporation, sued upon his obligation by a trustee of the corporate property, cannot plead the extinguishment of his debt by the forfeiture of the corporate franchise. *Lum v. Robertson*, 6 Wall. 277, 18 L. ed. 743.

There is no question but that debts due the creditors of a corporation, as well as claims for wrongs done by it, are not lost by its dissolution, but may be enforced by proper proceedings against the assets. *Walters v. Western & A. R. Co.* 69 Fed. 679.

The English doctrine that, in case of the dissolution of a corporation, its personal property vests in the King, and all its unsold real estate reverts to the grantor or his heirs, while debts due to and from it are extinct, is harsh and inequitable, and has not been adopted and acted upon as the rule in this country,—at least so far as the extinguishment of debts is concerned; and it certainly has not been favored 69 L. R. A.

by the courts or the legislatures. *Owen v. Smith*, 31 Barb. 641.

Sometimes a state provides by general statute that, upon the dissolution of a corporation, its debts may be thereafter collected, and its creditors discharged, and its assets divided among its shareholders. *McCoy v. Farmer*, 65 Mo. 244; *Bolles v. Crescent Drug & Chemical Co.* 53 N. J. Eq. 614, 32 Atl. 1061.

e. Upon contracts in general.

A corporation by the very terms of its political existence is subject to dissolution by a surrender of its corporate franchises and by a forfeiture of them for wilful misuser or non-user. Every creditor must be presumed to understand the nature and incidents of such a body politic, and to contract with reference to them. *Mumma v. Potomac Co.* 8 Pet. 281, 8 L. ed. 945; *Washington & B. Turnp. Road v. State*, 19 Md. 239.

Whoever contracts with a corporation exposes himself to losses which may arise from its dissolution, as he would with natural persons by their death. *Read v. Frankfort Bank*, 23 Me. 318.

A dissolution of a corporation by the sovereign power of the state puts an end to its contracts for the services of its agents by rendering performance impossible on either side; and such a result must be deemed within the contemplation of the contracting parties and an unexpressed condition of their contract inhering therein from the beginning. *People v. Globe Mut. L. Ins. Co.* 91 N. Y. 174.

Where a corporation surrenders its charter, ceases to exist by the efflux of time, or where its charter is decreed forfeited by a judicial tribunal of competent jurisdiction, it can neither sue nor be sued, although the obligations of its contracts survive, and may be enforced against any property which has not gone to bona fide purchasers. *City Ins. Co. v. Commercial Bank*, 68 Ill. 348.

The obligations of the contracts of a corporation survive its dissolution, and its creditors may enforce their claims against any property or estate belonging to the corporation which has not passed to bona fide purchasers. *Dudley v. Price*, 10 B. Mon. 84.

The obligation of contracts made whilst the corporation was in existence survives its dissolution; and the contracts may be enforced by

as follows: "The general doctrine is well established in this state that facts known, which are sufficient to put a party upon inquiry, are sufficient to charge him with all such knowledge as he would have acquired by a proper inquiry in the ordinary course of business. The rule that directors cannot lawfully enter into a contract in the benefit of which even one of their number participates without the knowledge and consent of the stockholders, is the settled law of this state. Such a contract is voidable at the option of the corporation, but is not void *per se*. When the facts are disclosed to the stockholders, it may be subsequently ratified by them."

As the contract was voidable, and not void *per se*, the principle of estoppel, according

to the great weight of authority, is applicable to cases of this kind, and must be given effect if the facts of this case warrant its application. The principal contract under which Thompson operated bears date June 18, 1890. Under it he began operations in the same month, and continued them until August, 1893, during which time he built a railroad, equipped it with locomotives and cars, built tramroads, rebuilt and repaired dams in the Blackwater river, and carried on the business of stocking the mill with timber under the contract upon an immense scale, using the railroad, cars, locomotives, tramroads, tools, appliances, and the booms and dams in the river for that purpose, and, as indicated by the record, practically supplied the mill with timber. In these opera-

a court of equity so far as to subject for their satisfaction any property possessed by the corporation at the time. *Broughton v. Pensacola*, 93 U. S. 266, 23 L. ed. 896.

The dissolution of a corporation no more impairs the obligation of its contracts than the death of a private person can be said to impair the obligation of his contracts. *Mumma v. Potomac Co.* 8 Pet. 286, 8 L. ed. 945.

The repeal or forfeiture of a corporate charter by an act of the legislature, although conditional upon the consent of the corporation, does not infringe the constitutional provision against impairing the obligation of contracts, notwithstanding it may deprive creditors of all opportunity to collect their debts. *Mobile & O. R. Co. v. State*, 29 Ala. 573.

While the obligation of the contract between a corporation and its creditor is not impaired by the repeal, by act of the legislature, of its charter, the method of obtaining indemnity for its breach is changed, and, after the enactment of the repealer, an action at law upon the contract can no longer be maintained or prosecuted, in the absence of any statute permitting it to be. *Read v. Frankfort Bank*, 23 Me. 318.

The liquidation of a corporation has the immediate effect of terminating all its purely personal obligations, and of relegating the beneficiaries thereunder to an action in damages in keeping with its covenants. *Schleider v. Dielman*, 44 La. Ann. 462, 10 So. 934.

Although a law authorizes the stockholders of a business corporation to dissolve it at will, and the laws of the state in this regard enter directly into its contracts, and all persons are deemed to have contracted in view of the existence and possible exercise of this power, it is nevertheless true that such a dissolution does not destroy the obligation of the corporation's contracts. The equitable rights of creditors survive the dissolution, and attach to the assets and property of the corporation in the hands of its liquidators. *Ibid*.

The dissolution of a solvent corporation by its own voluntary act will not relieve it from its contracts, but its assets will be liable for breaches thereof. *Griffith v. Blackwater Boom & Lumber Co.* 46 W. Va. 56, 33 S. E. 125.

"Even the executory contracts of a defunct corporation are not extinguished." *Shields v. Ohio*, 95 U. S. 319, 24 L. ed. 357.

Unless the dissolution is compulsory and involuntary. Then, even when partly performed, 69 L. R. A.

executory contracts perish when the corporation is dissolved. *Griffith v. Blackwater Boom & Lumber Co.* 46 W. Va. 56, 33 S. E. 125.

When a corporation, upon petition of its stockholders and by the decree of a court, is dissolved, and thereafter neither does, nor attempts to do, any business, it becomes as entirely extinct, except so far as the statute prescribes otherwise, as if it had never existed. It is thus wholly disabled from performing its contracts, and its breach of any such contract is a total one, which entitles the other party, immediately upon the dissolution, to his whole damages, present and prospective, for the loss of his contract. *Bowe v. Minnesota Milk Co.* 44 Minn. 480, 47 N. W. 151.

It is not the law that when a corporation is dissolved under a statute all contracts whereby third parties hold its property are annulled and avoided; hence, a writ of assistance will not be awarded to put a receiver in possession of property of such a corporation, where persons not parties to the dissolution proceedings assert in good faith a colorable right to hold it. *Musgrove v. Gray*, 123 Ala. 376, 82 Am. St. Rep. 124, 26 So. 643.

When the receiver of a dissolved corporation has paid all the undisputed debts, and has funds enough left to pay all the disputed ones, and still has a large surplus for distribution to stockholders, he is bound to pay rent accrued and accruing to the end of the term under a lease for years to the corporation. *People v. National Trust Co.* 82 N. Y. 283.

When, at the instance of the state, and by judicial decree or operation of law, a corporation is dissolved, and its corporate existence terminated, a contract between it and an individual for the latter's services, which is in progress and has been performed upon both sides according to its terms down to the time when the corporation and its agents and servants were prohibited from carrying on the corporate business, is at an end, and cannot upon either side longer be performed; but it cannot be considered as broken by the corporation, since nothing has occurred to constitute a breach of the contract upon either side, performance being simply prevented by *vis major*, and hence the individual has no claim for damages against the assets of the corporation. *People v. Globe Mut. L. Ins. Co.* 91 N. Y. 174.

A contract of a corporation with an individual for the latter's services for a term of

tions he expended nearly \$300,000, according to the report of the commissioner. He resigned his position as director in 1891. Can it be possible that the directors and the stockholders, who appear to have been few in number (only six, as indicated by the record), had no knowledge of the immense expenditure Thompson was making on the faith of this contract? Whether the making of the contract was in all respects duly formal or not, the books of the company were open to them, and upon them the terms of the contract were indicated by the entries. For a long time after Thompson ceased to be a director and to have any share or part in the management of the company, they allowed him to go on without objection or notice of the disapproval

of the contract. If, having such knowledge, they had the right to avoid the contract because he was a director at the time it was made, can they do it in such manner as to inflict upon him the loss of so much of this large expenditure as compliance with his contract, so far as he was permitted to perform it, necessitated? Having the right to deprive him of the profits which he could have made on the contract if permitted to complete it, have they also the right to punish him by depriving him of money expended under the honest belief that they, having full knowledge of all the facts, as they must be deemed to have had, and giving it to creditors, who advanced their money under the belief that the company had such financial strength as warranted

years at a stipulated salary is broken when, before the expiration of the term, the corporation is adjudged insolvent, and a receiver is appointed whose duty by statute is to collect and distribute the assets, under judicial direction, to the creditors and stockholders. *Spader v. Mural Decoration Mfg. Co.* 47 N. J. Eq. 18, 20 Atl. 378.

When a corporation contracts to sell and deliver upon a future day merchandise, and before the time of delivery arrives is enjoined from in anywise interfering with its property, and a receiver is appointed of all its assets, performance of its contract is rendered impossible by judicial action, and the buyer has no claim for damages. *Malcomson v. Wappoo Mills*, 88 Fed. 680.

The court cited and followed *People v. Globe Mut. L. Ins. Co.* 91 N. Y. 174, and rejected *Spader v. Mural Decoration Mfg. Co.* 47 N. J. Eq. 18, 20 Atl. 378, but the report does not show whether the appointment of the receiver was voluntary or involuntary, or whether or not the selling corporation (if such it was, for even its corporate entity is not stated) was dissolved.

Where, upon the suspension of business and the appointment of a receiver of a dissolved corporation, a contract with it is in process of performance, and is for a time afterwards continued under direction of the court having jurisdiction of the matter, it cannot be said that there was a breach of the contract, committed by the corporation. *Griffith v. Blackwater Boom & Lumber Co.* 46 W. Va. 56, 33 S. E. 125.

When the receiver of a dissolved corporation abandons the performance of one of its contracts by direction of the court which appointed him, after he had for a time, by the like direction, been performing it, and when at the time of his appointment the corporation was not in default thereon, the corporate assets are not liable for damages for a breach of such contract. *Ibid.*

While it is implied in every agreement, the performance of which depends upon the continued existence of a person or thing, that such existence will continue, and that the death of the person or destruction of the thing will terminate the obligation; and when a corporation is a party to such contract its dissolution or civil death ends it,—yet such is not the rule if such dissolution be voluntary, for it is equally an implied condition of all corporate contracts

that the corporation will not of its own volition try to escape the obligation of its contracts, and, if it does, equity will not recognize the dissolution or permit the dissipation of its assets until its contracts are satisfied. *Ibid.*

A contract between a dairyman and a corporation to run a year, whereby the company agrees to buy and furnish all the cans to carry all the milk produced by the former's kine to be delivered daily, is broken *in toto* by the voluntary dissolution of the corporation during the year, and the dairyman is entitled immediately to all his damages for the loss of the contract, present and prospective, for it is an entirety, and a single recovery is a bar to further actions. *Rowe v. Minnesota Milk Co.* 44 Minn. 460, 47 N. W. 151.

1. Upon employment contracts.

1. With officers.

The bringing of an action against a corporation, and alleging its insolvency and the appointment therein of a receiver, do not abrogate a contract for the employment of a salaried officer. *Kinsman v. Flisk*, 37 App. Div. 443, 56 N. Y. Supp. 33.

When a corporation makes a general assignment for creditors it is not thereby released from its express contract to pay a salary to its treasurer if he renders, or is ready to render, his services as such; and, on a reconveyance by the assignee after settlement with its creditors, he is entitled to recover his stipend. *Potts v. Rose Valley Mills*, 167 Pa. 310, 31 Atl. 655.

A secretary of a corporation which becomes insolvent and goes into the hands of a receiver is entitled to his salary for the balance of the year for which he was employed, less what he may earn in other employment. *Hassenfus v. Philadelphia Packing & Provision Co.* 15 Pa. Co. Ct. 650.

A managing director of a corporation, engaged upon a salary for a term of years, is entitled, upon the winding up of such corporation during the term, to prove up his claim for salary on the same footing as outside creditors, notwithstanding he was a shareholder in the company. His characters as stockholder and employee being quite distinct. *Re Dale*, L. R. 43 Ch. Div. 255, 59 L. J. Ch. N. S. 180, 62 L. T. N. S. 215.

Salary due the secretary of a corporation for services as such down to the winding up is a

their doing so without taking security for its repayment, just as Thompson laid out and expended these immense sums, under the like belief? The law does not demand the infliction of any such punishment, nor will its principles warrant the court in depriving him of compensation for his expenditures merely because of his fiduciary status at the time the contract was made, even if this court has correctly decided that he is not entitled to damages by way of compensation for the loss of anticipated profits, as to which it is now too late to enter upon any inquiry.

"The rule under consideration does not extend so far as to work an entire confiscation of the property of the unfaithful director, which he may have attempted to sell to his

corporation at an advance over its cost to him, so as to derive a secret profit therefrom; but in the accounting which takes place under the principle the director will be compelled to yield to the corporation the secret profit, but will be allowed a credit for the property sold to the corporation at its real value." 10 Cyc. Law & Proc. p. 795.

"In most jurisdictions, as we have seen, a contract or other transaction between a corporation and its directors or other officers, the corporation being represented by others, or a contract or other transaction between a corporation and a third party, from which a director or other officer derives a profit, or in which he is otherwise personally interested, is merely voidable at the option of the corporation, and not absolutely

provable demand, although he consented to take one half the amount until such time as it might be convenient for the company to pay the other half. *Cope's Case*, 20 L. J. Ch. N. S. 28, 1 Sim. N. S. 54.

The salaries of the officers of a corporation cease upon the appointment of a receiver empowered and directed to take control of all its property and to assume the entire management of all its affairs. *Lenoir v. Linville Improv. Co.* 126 N. C. 922, 51 L. R. A. 150, 36 S. E. 185.

The New Jersey rule, as exemplified in *Spader v. Mural Decoration Mfg. Co.* 47 N. J. Eq. 18, 20 Atl. 373, that claims for damages arising from breaches of contract for services occasioned by the insolvency of a corporation are entitled to be paid *pro rata* out of funds in the hands of the receiver, has much to commend it, says the North Carolina supreme court; but we think that the average ends of justice would be better and more generally subserved by following the New York rule as laid down in *People v. Globe Mut. L. Ins. Co.* 91 N. Y. 174, that such contracts are terminated by the dissolution of the corporation at the instance of the sovereign power, and not broken. 176d.

The dissolution of a corporation and annulment of its charter for the nonpayment of taxes preclude a manager, who was at the same time one of its stockholders and directors, from recovering from its assets in the hands of a receiver any salary on account of services rendered in continuing the business after dissolution of the corporation, as his contract terminated when the corporation was dissolved. *Louchheim v. Clewson Printing & Weighing Co.* 12 Pa. Super. Ct. 55.

2. With superintendents.

When, by the insolvency and winding up of a banking company, its manager is discharged by the official liquidator, and his contract has not expired, and he was by such contract entitled, in addition to a stated annual salary, to residence and offices upon the bank's premises free of rent and taxes, he is entitled to damages from the effects of the bank for the loss of his contract, computed upon the basis of the present value of an annuity equal to his annual salary and terminating at the end of his term of employment, with a proper rent for the bank premises for the unexpired term, deducting what is just for his being at liberty to obtain

a fresh appointment. *Yelland's Case*, L. R. 4 Eq. 350.

When it is part of the contract under which one is employed as manager for a corporation, that, if he is deprived of his employment for other than his gross misconduct, he shall be paid by the company a sum equal to three years' salary, he is entitled, upon the winding up of the corporation under the English companies act, to the sum stated without deduction as in *Yelland's Case*, because, had the corporation while a going concern discharged him without his misbehavior, it would be bound to pay him the three years' salary, and he might have entered at once upon a new employment. *Re London & S. Bank*, L. R. 9 Eq. 140, 18 Week. Rep. 273.

One who has a contract to serve a corporation as superintendent for a period of ten years at a stated annual salary and a percentage of profits, which is duly performed for nearly two years by both parties, when further performance is stopped by the adjudication of bankruptcy of the corporation, is entitled to prove against the assets in bankruptcy, and to share in the distribution thereof, damages for the breach of such contract as if he had been discharged without legal cause at the time the adjudication took place. *Ex parte Pollard*, 2 Low. Dec. 411, Fed. Cas. No. 11,252.

The reasoning of *Lowell, J.*, in the above case as to the provability and right of participation of a claim for damages against a bankrupt manufacturing corporation, of one employed as its superintendent under a written contract at a stated annual salary for ten years with a percentage of profits, and which was in course of performance by both parties, and had eight years and upwards to run when it was interrupted by an adjudication in bankruptcy following the voluntary petition of the corporation, is worth outlining, and in striking contrast to the reasoning of the New York case of *People v. Globe Mut. L. Ins. Co.* 91 N. Y. 174. Has there, he asks, been such a breach of the contract as will give the petitioner a right of proof for any damages which he may have suffered against the estate of the bankrupt corporation? That, he says, is a difficult question. It is easy to show the very great hardship of a negative answer. No corporation has been wound up in bankruptcy in this district, and ever been revived in such a form as to give its old creditors redress. In most cases, here or elsewhere, a

void. It follows that the transaction, if within the powers of the corporation, may be consented to, ratified, or acquiesced in, by the stockholders, or by the board of directors, if it could be authorized by them. If it is consented to or ratified with full knowledge of the facts, it is finally and absolutely binding, and neither the corporation nor individual stockholders can afterwards sue to set it aside, or otherwise attack its validity. And since the corporation may thus consent to the transaction and render it binding, if it acquiesces, strangers cannot object. This is true of contracts and other transactions between two corporations having directors or other officers in common. They are not absolutely void, but, at the most, merely voidable, and may be

rendered binding by ratification or acquiescence on the part of the stockholders. Ratification is to be implied if the corporation accepts or retains the benefit of the transaction (assuming, of course, that it can do otherwise), with knowledge of the facts; and it may be implied from acquiescence. Ordinarily, it is for the corporation—the stockholders collectively—to ratify or disaffirm the transaction, and individual stockholders cannot object. Of course, ratification or acquiescence by a majority of the stockholders cannot bind a dissenting stockholder where the transaction is a fraud upon his rights, or beyond the powers of the corporation, and cannot prevent the dissenting stockholder from suing in a proper case to set the transaction aside, and obtain re-

dividend is all that is left. And advertg to the English companies act (26 & 27 Vict. chap. 89, § 158) allowing proof of claims for damages, certain and uncertain, present and future, which, he says, is no more than common justice; and expressing regret that the attention of Congress was not attracted to this matter, and that the law as it stands is the same for corporations and individuals notwithstanding the difference in their situation,—he concludes that, as this claim could be proved against an individual bankrupt, it can be proved against a bankrupt corporation. He justifies this conclusion by saying that it is now well settled that where one party to a contract definitely refuses to perform it, even before the time for performance arrives, the other party has his immediate action, *a fortiori* when, after part performance, there is a refusal to complete, the only question in doubt being whether the injured party could have an immediate and complete remedy once for all without tender of performance on his part, and the decisions are that he may. It is plain, therefore, that if the corporation had discharged its superintendent the day before it began the bankruptcy proceedings, he would have had a claim for damages which he might prove. Does it make any difference that the company neglected to give the employee a formal dismissal?—he inquires. Not at all. It did an act which incapacitated it from fulfilling its contract, and it is unnecessary and false nicety to hold that, because this act was the very filing of a petition in bankruptcy, therefore there was no breach at the time of filing that petition. The contract was *ipso facto* dissolved by the filing of the petition in bankruptcy, which made its performance by the bankrupt impossible and by the employee illegal, for he had no right to employ a man or pay a dollar after that time; and the fact that the bankrupt corporation did not, five minutes or more before such filing, formally dismiss him from its service, is immaterial.

3. With agents.

In *People v. Globe Mut. L. Ins. Co.* 91 N. Y. 174, a general agent who had a running contract for a term of years with a life insurance company, and whose employment was terminated by the compulsory dissolution of his corporate employer, was denied any participation in the assets of the company upon his asserted

claim for damages for a breach of his contract of employment. There were more than one ground assigned for this conclusion, but the chief one was that there had been no breach of the contract on the part of the company, nor was it possible for the agent to perform, or tender performance, upon his part, so as to put the company in default, *a sine qua non*, to a recovery of such a claim. Both parties were in good faith, it was said, performing this contract, when the state, in the exercise of its sovereign power, interfered. It forbade by injunction both parties, alike, from going on with the contract, and rendered performance impossible, alike, by the company and the agent by the same sovereign act and at the same instant of time. Both parties contracted in view of the possibility of the dissolution of the corporation at any time by the act of the state.

It was necessary, to reach this judgment, for the court to distinguish two of its prior decisions. In *People v. Security L. Ins. Co.* 78 N. Y. 114, 34 Am. Rep. 522, and *People v. National Trust Co.* 82 N. Y. 283, the respective corporations defendant had been enjoined from continuing business, placed in the hands of a receiver, and dissolved absolutely. In the one case it was held that policy holders had contracts of value which were broken by the dissolution, and in the other case that a lease for years was not thereby terminated; so that in the first case the policy holders had valid claims upon the corporate assets for the value of their policies which were destroyed by the dissolution, and in the second case that the landlord had a valid claim for the future accruing rent to the end of the leased term.

It was said that the policy holder stood upon a breach of his contract, but that breach was not the dissolution of the company, but the failure upon its part, before the dissolution, to maintain the legal reserve which was the provoking cause of the state's intervention, and the promise to maintain, which was an implied part of its contract with every policy holder. The state, finding these contracts with the policy holders broken in this unexpressed condition, stepped in and wound up the recalcitrant corporation. The landlord's case, affected, it was said, property rights which survived the death of the corporation. He could perform upon his part, his ability to do so existed and was not restrained. The agent could not per-

dress for the benefit of the corporation, as has been explained in a former chapter. But where the transaction is of such a character that it might lawfully have been authorized by the majority, it may lawfully be ratified or acquiesced in by them, and their ratification or acquiescence will bar an action by a dissenting minority to set it aside. The board of directors may ratify a transaction if they could have authorized it, but not otherwise. When they do undertake to ratify, a majority must be disinterested. It is also well settled that the corporation and the stockholders may and will lose the right to have the contract or transaction set aside by laches in exercising their option to disaffirm it. Whether the delay in electing to set the transaction aside constitutes laches,

so as to bar the right to relief, will depend upon the circumstances, and not merely upon the length of time which has elapsed. It was said by Mr. Justice Miller in a leading case in the Supreme Court of the United States [*Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587, 23 L. ed. 328], in which a director had purchased property of a corporation at a sale under a deed of trust: 'The doctrine is well settled that the option to avoid such a sale must be exercised within a reasonable time. This has never been held to be any determined number of days or years, as applied to every case, like the statute of limitations, but must be decided in each case upon all the elements of it which affect that question. These are generally the presence or absence of the parties at the place of the

form because the state would not allow him to do so.

The court dismissed the English cases with the statement that in all of them the companies stopped payment before the law took them in hand, and they did so by open public notice, which was in legal effect a refusal to perform their contracts. The law did not break the contracts; they were already broken.

After disposing of the troublesome precedents in this wise, the court faced the contention that the agent's contract is to be regarded as only dissolved when destroyed by an outside, independent force, operating separately, and not set in motion directly or indirectly by the act of the party pleading it as an excuse. In other words, such party must be innocent and blameless respecting the *vis major* which dissolves the contract, and, if not so, cannot plead as an excuse what is practically his own act and fault. The argument was pressed upon the court that, unlike the corporations in all the precedent authorities, the Globe company at the bar was not only not blameless, but that its dissolution resulted from, and was directly caused by, its own acts and omissions.

The answer to this seems deplorably weak. The court said, the fact is not shown, nor necessarily to be inferred, from aught in the record, that the corporation was derelict, although at the same time it admitted that it should presume the legal reserve to have fallen below the safe level, since this was the statutory ground for state intervention. Moreover, this result, it added, may have been due to investments seemingly prudent when made, but which, contrary to all reasonable expectation and foresight, turned out bad. As, however, even this pointed to an indirect responsibility, the court retreated to the fellow-servant doctrine, that has done such yeoman service in preventing recoveries for personal injuries.

On the whole this decision is unsatisfying. Waiving the question as to why the court in one case implied a contract with the policy holder that the company should maintain the legal reserve, and not provoke corporate death at the hands of the state; and in the other refused to imply any contract with its agent to refrain from disabling itself from doing the business it was chartered to do,—there are difficulties with the court's theories. To say that the agent contracted with knowledge that the corporation must die whenever its creator so willed does not

help, since both policy holder and landlord did the same. It is also unsatisfactory to say that there was, by the failure to maintain the legal reserve, a breach of the contract with the policy holder before dissolution,—such breach being the cause and the dissolution the consequence. This alleged breach did not authorize any policy holder to refuse to carry out his contract until the state intervened. The policy holder was bound to pay his premiums down to the very moment of dissolution, or his policy would have lapsed and he have been barred from sharing in the corporate assets. Why, then, was not the company up to the instant of its dissolution as much performing its contracts with its policy holders as with its general agents? How could the policy holder, more than the agent, when dissolution occurred by the *vis major*, put the company in default?

In *Hepburn v. Montgomery*, 97 N. Y. 618, and in *Atty. Gen. v. Continental L. Ins. Co.* 93 N. Y. 630, the decision in *People v. Globe Mut. L. Ins. Co.* 91 N. Y. 174, was followed.

A question arose in a New Jersey litigation over the sufficiency of a plea in answer to a declaration by the general agent of a credit insurance company claiming damages for a breach of his contract to solicit insurance, which set up in defense, in substance, that the corporation became insolvent, and ceased to employ the agent because it was declared insolvent and enjoined from doing further business by the court of chancery, was put in the hands of a receiver, and its charter was declared to be forfeited and void, except for the purpose of collecting and distributing its assets. The supreme court held the plea good, and overruled the plaintiff's demurrer thereto, reasoning as follows: It is well settled that contracts for personal services are made upon the implied agreement that both contracting parties will continue alive, and are terminated when either dies. The distinction between such contracts and those with policy holders was applied in *People v. Globe Mut. L. Ins. Co.* 91 N. Y. 174, a case involving the question here, and where, as here, the life of the company was extinguished by the act of the state. The New York supreme court held, and its view was unanimously concurred in by the court of appeals, that a general agent whose compensation depended upon his success in procuring insurance for the company upon a percentage could not maintain an action for damages against the receiver because, be-

transaction, their knowledge or ignorance of the sale and of the facts which render it voidable, the permanent or fluctuating character of the subject-matter of the transaction as affecting its value, and the actual rise or fall of the property in value during the period within which this option might have been exercised.' Laches may bar the right of a corporation or its stockholders to maintain a suit to compel directors to account for secret profits. Individual stockholders may be estopped to attack a contract or other transaction on behalf of the corporation on the ground that directors or other officers were personally interested. If they participated or consented, or if they have ratified the transaction with knowledge of the facts, they are clearly estopped.

Stockholders will not be heard to complain of their own acts as directors. The right of individual stockholders to complain may also be barred by laches." Clark & M. Priv. Corp. § 764.

This text is supported by authorities too numerous to mention or examine, one of which is the leading case of *Foss v. Harbottle*, 2 Hare, 461, in which the vice chancellor, after laying down the rigid rules of law requiring the exercise of the utmost good faith on the part of promoters of corporations, treating them as acting in a fiduciary capacity, proceeds as follows: "If persons, on the other hand, intending to form a company, should purchase land with a view to the formation of it, and state at once that they were the owners of such land,

fore the expiration of the period for which he was engaged, he was prevented by the insolvency, receivership, and dissolution of the company from continuing his employment. The rule in that case will be accepted here. *Rosenbaum v. United States Credit System Co.* 60 N. J. L. 204, 37 Atl. 595.

But this judgment was reversed by the New Jersey court of errors and appeals, which, in doing so, said: In the case of *People v. Globe Mut. L. Ins. Co.* 91 N. Y. 174, upon which the supreme court relied, both parties to the contract, the company and the agent, were restrained by injunction, at the instance of the attorney general, from further prosecution of the business of the company and the exercise of any of its corporate franchises, followed by the appointment of a receiver and dissolution of the company: and it was held that, as the action of both contracting parties was paralyzed by injunction at the same time, so that neither could put the other in the wrong, there was no breach of the contract. But in the case at bar there was no such injunction. The contraction of debts and disposition of assets was forbidden, and afterwards there was an adjudication of insolvency and a receiver, but without continuing the injunction. The New Jersey statutes do not provide that a mere adjudication of insolvency and the appointment of a receiver take from a corporation its right to do business. The practical effect is to stop business, but the right to go on is not taken away. *Rosenbaum v. United States Credit System Co.* 61 N. J. L. 543, 40 Atl. 591.

Chancellor McGill, of New Jersey, in writing for the court of errors and appeals in *Rosenbaum v. United States Credit System Co.* 61 N. J. L. 543, 40 Atl. 591, which unanimously reversed the supreme court in the same case (60 N. J. L. 204, 37 Atl. 595), sharply criticises the reasoning of the New York court of appeals in *People v. Globe Mut. L. Ins. Co.* 91 N. Y. 174, upon which the court below had relied in coming to the conclusion about to be reversed. The learned chancellor had pointed out at the beginning a very material distinction between the case in hand and the New York case, which deprived the latter of authority as a precedent: but he did not rest there. He took up the broad question whether the forfeiture of the corporate charter would bar a general soliciting agent's claim for damages for a breach of his contract of employment for the term of the 69 L. R. A.

contract which had not expired at the date of that forfeiture. Following the reasoning of the New York court in the case mentioned, the court below, he said, looked upon the contract as one merely for skilled personal service, and treated the insolvency of the company and forfeiture of its charter as analogous to the death of the master of such a servant, which, by an implied condition, ended the contract. The court of appeals of New York carried the doctrine of implied condition in the contract still further, Finch, J., saying: What had happened was the dissolution of the contract by the sovereign power of the state, rendering performance on either side impossible. This result was within the contemplation of the parties, and must be deemed an unexpressed condition of their agreement. One party was a corporation. It drew its vitality from the grant of the state, and could only live by its permission. It existed within certain defined limitations, and must die whenever its creator so willed. The general agent who contracted with it did so with knowledge of the statutory conditions, and these must be deemed to have permeated the agreement and constituted elements of the obligation. The judge admits, says the chancellor, that the implication will not exist if it appears that the corporation was culpably responsible for state intervention. He then proceeds: It appears to us that both these implied conditions are forced, or at least forced in their application to cases in this state similar to the case now considered. It appears to us that the material fact that the corporation defendant is a stock company, and that its capital stands as a trust fund for the payment of its debts, is lost sight of. Such a company may become insolvent, and its charter may be forfeited when its assets may be more than sufficient to pay its debts. Everyone who deals with such a corporation does so in view of the trust fund its capital provides and the security that fund is intended to afford. The stockholders who provide the fund invite confidence because of it, and through such confidence their venture may be profitable to them. The mere statement of this situation makes conspicuous the injustice of any course of reasoning which will return to the stockholders their capital before satisfaction of all losses induced by faith in it should be made. The state creates corporations, and requires of them the provision of such a trust fund, and, when it destroys their corporate ex

and propose to sell it at a price fixed, for the purposes of the company to be formed, the transaction, so far as the public are concerned, commencing with that statement, might not fall within the principle of *Hickens v. Congreve*, 4 Russ. Ch. 562. A party may have a clear right to say: 'I begin the transaction at this time. I have purchased land, no matter how or from whom, or at what price. I am willing to sell it at a certain price for a given purpose.' Another is *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587, 23 L. ed. 328, heretofore quoted from. It holds: "The right of a corporation to avoid the sale of its property by reason of the fiduciary relations of the purchaser must be exercised within a reasonable time after the facts connected therewith are

made known, or can by due diligence be ascertained. As the courts have never prescribed any specific period as applicable to every case, like the statute of limitations, the determination as to what constitutes a reasonable time in any particular case must be arrived at by a consideration of all its elements which affect that question." In *Stewart v. Lehigh Valley R. Co.* 38 N. J. L. 505, Mr. Justice Dixon, delivering the opinion of the court, said: "After an examination of all the cases cited, and such others as I have found, and a careful consideration of the principle, and the results of regarding and disregarding it, I have come to the conviction that the true legal rule is that such a contract is not void, but voidable, to be avoided at the option of the

insistence, natural justice requires that it shall provide for distribution of the fund so that no part of it shall be returned to those who offer it as security for the action of others, until the latter shall have all the protection against loss in their undertaking that it is capable of affording.

The insolvency of a corporation and appointment of a receiver of its assets under the New Jersey laws do not rescind or terminate a contract with individuals to set up and operate a soda water fountain in the premises of the corporation, and pay, in lieu of rent, 15 per cent. of the gross receipts. *Bolles v. Crescent Drug & Chemical Co.* 53 N. J. Eq. 614, 32 Atl. 1061.

The ground of the decision in *People v. Globe Mut. L. Ins. Co.* 91 N. Y. 174, that the contract for service was annulled by the act of the state in dissolving the corporation, not by default of the corporation in performing it, "does not seem to be very perspicuous or satisfactory in any view; but the case certainly does not hold that contracts for personal services are rescinded by the insolvency of a corporation." *Ibid.*

An agent of a corporation, engaged for the term of five years, during which period the company goes into voluntary liquidation, and is wound up, and whose employment is continued by the official liquidators for a considerable length of time after the winding-up order, is entitled, under the rule in *Yelland's Case*, L. R. 4 Eq. 350, to his full salary to the end of the five years' term. *Re London & C. Co.* L. R. 7 Eq. 550, 38 L. J. Ch. N. S. 562, 20 L. T. N. S. 774.

An agent of an insurance company, employed for a term of years upon a stated annual salary and a commission of 10 per cent of the net profits of each year, when the company is wound up before the term of employment expires, is entitled to his stated salary, but not to damages for loss of his commission for the rest of the term of employment. The reason is, he cannot compel the company to do business, and, unless business is profitable, he earns no commissions. *Re English & S. Marine Ins. Co.* L. R. 5 Ch. 737, 39 L. J. Ch. N. S. 685, 23 L. T. N. S. 685, 18 Week. Rep. 1122.

If an agent is employed for a term of years to sell goods of a corporation upon a commission, and the company winds up before the term expires, he is entitled to his damages for the breach of his contract. *Re Patent Floor Cloth Co.* 41 L. J. Ch. N. S. 476, 26 L. T. N. S. 467.

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Bacon, V. C., distinguished *English & S. Marine Ins. Co.'s Case* by the circumstance that *Maclure* was to be paid a salary and a tithe of the net profits besides, while the claimants at bar were to be paid a commission on sales as sole compensation, and whether the sales were profitable or not. He did not venture to state any rule for computing the damages, or suggest any method of proving them.

The winding up of a corporation does not abrogate a contract made with a broker to place its shares and receive a stated fee for doing so, payable when all the shares have been allotted. *Inchbald v. Western Nellogherry Coffee, Tea & Cinchona Plantation Co.* 17 C. B. N. S. 733.

Notwithstanding the assignee of a corporation is enjoined by the courts from consummating a sale of the corporate property negotiated by a broker, the latter may recover his commissions, since these were earned as soon as he found a purchaser ready and able to buy. *Gibson v. Gray*, 17 Tex. Civ. App. 646, 43 S. W. 922.

This is the distinguishing feature that makes inapplicable *People v. Globe Mut. L. Ins. Co.* 91 N. Y. 174.

The salaried selling agent of a corporation, employed for a definite term, who is discharged before that term expires because the company is embarrassed and unable to continue business, and when, immediately after such discharge the corporation is dissolved by the decree of a competent court in regular proceedings voluntarily instituted, has a valid claim for damages against the property and assets of such corporation for a breach of his contract of employment, and the measure of such damages is the salary for the rest of the term less the net amount he has earned in the meantime. *Tiffin Glass Co. v. Stoeck*, 54 Ohio St. 157, 43 N. E. 279.

In *Tiffin Glass Co. v. Stoeck*, 54 Ohio St. 157, 43 N. E. 279, the supreme court of Ohio properly distinguished the case at bar from *People v. Globe Mut. L. Ins. Co.* 91 N. Y. 174, by pointing out that in the case before it the employee had been discharged from his employment before the company was dissolved, and, consequently, that a breach of his contract had been committed by the corporation before its dissolution, and that dissolution was the result of its own voluntary request. The fact that the damage could not be computed until long after the dissolution did not affect the case. Unlike

cestui que trust, exercised within a reasonable time. I can see no further safe modification or relaxation of the principle than this." In the late case of *United States Steel Corp. v. Hodge*, 64 N. J. Eq. 807, 60 L. R. A. 742, 54 Atl. 1, decided February 18, 1903, Van Syckel, J., said: "It is a settled rule of corporation law that the personal interest of directors renders a transaction voidable at the option of the stockholders, and not void *per se*. Under the declaration of this court in the case last cited the shareholders may, within a reasonable time after the disclosure to them of the interest of a director, elect to avoid the contract; but, if an unreasonable time is allowed to elapse without exercising such option, during which the position of directors becomes so

changed that it would be inequitable to vacate the engagement, equity would refuse to interpose."

On this question, it is useless to multiply authorities, for the principle is in perfect accord with both justice and common sense, and underlies the whole doctrine of compensation. It is the principle of estoppel that gives the right to recovery for outlay and expenses where performance of a contract has been wrongfully prevented. *United States v. Behan*, 110 U. S. 338, 28 L. ed. 168, 4 Sup. Ct. Rep. 81. It is on the basis of compensation, not punishment. Equity does not permit parties to play fast and loose with a contract, when they know money is being expended, labor performed, and obligations contracted on the faith of it. They

the case in New York, the Ohio corporation might lawfully have continued in business, and the agent was at liberty to go on and perform his services under his contract. The Ohio tribunal did not consider the effect of stopping performance of such a contract before either party had committed a breach, and of prohibiting *eo instanti* both parties from going on with it by the sovereign power of the state.

4. With ordinary employees.

When a corporation contracts with an individual for his services at a stated compensation, to be rendered until the corporation is dissolved, and otherwise to end only by the death of the employee or his refusal to further serve, it is not discharged by ceasing wholly to do business because it is unprofitable, followed by a vote of the stockholders to surrender the charter and wind up the business. *Revere v. Boston Copper Co.* 15 Pick. 351.

When a corporation ceases to do business, and breaks up its establishment, and its stockholders vote to dissolve and wind up its business; and it has a running contract for the services of an individual at a stipulated annual salary, and notifies him it has no further use for his services,—he is discharged from his obligation to serve them exclusively, and has a claim for damages, the measure of which is indemnity for the loss he has sustained by reason of not being longer employed and paid. *Ibid.*

When the contract of service of a salaried employee of a corporation is terminated before the end of the time limited for its continuance, by a judgment of insolvency against the corporation and appointment of a receiver to collect and distribute its assets according to law, such employee is a claimant for damages caused by the breach of his contract for service, and entitled, as such, to participate with other creditors in the distribution of the corporate assets. *Spader v. Mural Decoration Mfg. Co.* 47 N. J. Eq. 18, 20 Atl. 378.

The difficulty which led the English courts to disallow claims against bankrupt corporations for damages for breaches of contracts for personal services of employees occasioned by and accruing subsequent to the bankruptcy of the company, under the English bankrupt act before 1861 was the omission from that statute of all provisions for the ascertaining of such damages. *Ibid.*
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The decision in *People v. Globe Mut. L. Ins. Co.* 91 N. Y. 174, notwithstanding an intimation in the opinion that the insolvency of a corporation is equivalent to death in cases of contract for skilled personal services, was not rested upon that ground, but was based upon the proposition that the service was interrupted by the act of the state, and that it was not shown that dissolution was the result of any fault of the corporation. *Boiles v. Crescent Drug & Chemical Co.* 53 N. J. Eq. 614, 32 Atl. 1061.

One employed at a stated salary under a written contract by a corporation, which, becoming insolvent, made a general assignment for the benefit of its creditors, and who continued in the discharge of his duties until after the assignment, and until discharged by the assignee, is a claimant for damages for the breach of his contract, and when he diligently seeks other employment, and makes the most advantageous agreement open to him, is entitled to participate in the distribution of the assigned estate on the basis of his contracted salary after crediting the earnings of his subsequent new employment. *Parker v. Hull*, 46 Ill. App. 471.

Where a corporation ceases, in consequence of the destruction of its works by fire, to carry on its business, the fact is no defense to the claim of an employee hired unqualifiedly for a year for damages because of his discharge for that reason. *Eastman v. Eastman & M. Co.* 1 N. Y. Supp. 16.

The fact that a corporation has been sold out on execution does not justify an employee in treating as abrogated a contract with it for his services. *Nash v. H. R. Gladding Co.* 118 Mich. 529, 77 N. W. 7.

The insolvency of individuals, followed by an assignment for creditors, a discontinuance of business, dissolution of their partnership, and discharge of their employees, will not absolve them from their obligation to pay salary to an employee without fault whose term of employment has not expired, if he does not assent to the termination of his contract. *Vanuxem v. Bostwick*, 19 W. N. C. 74, 7 Atl. 598.

Insolvency of a corporate employer does not put an end to a contract to pay for services so as to deprive the employee of his salary after the insolvency. *Hassenfus v. Philadelphia Packing & Provision Co.* 15 Pa. Co. Ct. 650, Following *Vanuxem v. Bostwick*, 19 W. N. C. 74, 7 Atl. 598.

The appointment by a court of chancery, at

cannot take an equivocal position, waiting for time to reveal whether it will prove to be a good contract or a bad contract, and then accept it or reject it as may best subserve their own interest. Neither law nor equity permits any person intentionally to mislead another to his injury. Having, by their silence, led Thompson to believe that they would not disavow his contract, their objection to it, after he has acted upon it, comes too late to deprive him of compensation for his labor and outlay.

Having thus seen that no principle of *l.v.*, nor any decided case, withholds from the appellee compensation for his outlay, as the legal consequence of the termination of his contract before completion thereof on either of the two grounds on which it was

terminated, there is nothing in the former decision to deprive him of it. The language of both the opinion and syllabus is broad enough to carry it, and the principles declared do not inhibit it. So, according to both the letter and the spirit of the decision, he is entitled to it, unless precluded on some other ground.

Another objection urged against the allowance of Thompson's claim is the alleged purchase by him of the property of the Blackwater Boom & Lumber Company at the sale under the decree of June 23, 1893, and confirmed by the decree of August 4, 1893, as to which sale, and the terms and conditions thereof, see the opinion filed on the former appeal. 46 W. Va. 56, 59, 33 S. E. 125. The ostensible purchaser at this

the instance of debenture bondholders, of a manager and receiver of a corporation, is like the case of a mortgagee taking possession upon the default of the mortgagor, and is equivalent to a dismissal of the latter's servants, and that dismissal is so far wrongful as to afford the employees rights of action where they have running contracts protecting them from summary discharge. An employee, however, who may be discharged upon notice of a stated length of time, and who is continued in service of the manager and receiver for the period to be covered by such notice, has no cause of action, for he has not been damaged. *Reid v. Explosives Co.* L. R. 19 Q. B. Div. 264, 56 L. J. Q. B. N. S. 338, 57 L. T. N. S. 430, 35 Week. Rep. 509.

In England an order for winding up a corporation under the companies act of 1862 operates as a notice of discharge of clerks and servants from the employ of the corporation. *Re General Rolling Stock Co.* 35 Beav. 207, L. R. 1 Eq. 346, 12 Jur. N. S. 44.

When an English corporation becomes hopelessly and irretrievably insolvent, and there is really nothing for its clerks to do, a notice, a few days after the winding-up order under the companies act of 1862, that their services are not longer required, may be considered as dating back to the day of the order; but where there is a special contract, and the clerk continues in the employment, he is entitled to his salary. *Re English Joint Stock Bank*, L. R. 3 Eq. 341, 15 L. T. N. S. 528.

But in New York one employed by a corporation for a year at an annual salary, and discharged before it expires by a receiver appointed in an action by a judgment creditor to sequester and distribute the corporate property, and who has sustained damages in the amount of the balance of his stipulated salary to the end of the year less what he earns in the meantime, cannot participate in the receipt of dividends to creditors, since he was not, at the appointment of the receiver, a creditor of the corporation, there having up to that time been no breach of his contract. *Eddy v. Co-operative Dress Asso.* 3 N. Y. Civ. Proc. Rep. 442.

In reaching this conclusion, Cullen, J., relied upon and followed the case of *People v. Globe Mt. L. Ins. Co.*, at that time only decided by the New York supreme court (64 How. Pr. 249), but later affirmed by the court of appeals (91 N. Y. 174). He held that the final decree 69 L. R. A.

of sequestration worked a dissolution of the corporation and differentiated the case from those wherein only a temporary receiver *pendente lite* had been appointed and the corporate life continued. Then, said he, the assets of the company were subject to the claims of existing creditors at the time of the receiver's appointment, and until these were satisfied could not be used for any other purpose. At that time no liability had accrued to the employee, and might never accrue. He added that, if the corporation continues in existence, there may be a valid claim against it; but there is not a right to share in the fund to the detriment of other creditors.

X. Remedies.

a. Abstract.

Whatever technical difficulties exist in maintaining an action at law by or against a corporation after its charter has been repealed, in the apprehension of a court of equity there is no difficulty in a creditor following the property of a corporation into the hands of anyone not a bona fide creditor or purchaser, and asserting his lien thereon, and obtaining satisfaction of his debt out of that fund specifically set apart for its payment when the debt was contracted and charged with a trust for all the creditors when in the hands of the corporation; which trust the repeal of the charter does not destroy. *Curran v. Arkansas*, 15 How. 304, 14 L. ed. 705.

Although by dissolution debts due to or from a corporation are extinguished because there is no one in law to sue or be sued, yet the individuals who composed such corporation (and corporations aggregate are but associations of individuals) may, by contract or in law, nevertheless have incurred liabilities which will survive their charter, and be enforced at law or in equity according to the circumstances of the case. *Hightower v. Thornton*, 8 Ga. 486, 52 Am. Dec. 412.

I must think, said Lumpkin, J., of the supreme court of Georgia, that the legal world with great unanimity will hold that the science of jurisprudence is deplorably defective if the assets of a corporation, and among these the capital stock authorized to be invested and to which the public looks with confidence for security and indemnity, cannot be rescued "as

sale was W. H. Osterhout, but the Thompsons, the appellee and his son, F. E. Thompson, furnished him, on some sort of terms, part, if not all, of the money for the cash payment, and became his sureties on the notes for the deferred payments. After the sale a new mill was purchased and erected in the place of the one which had been burned down under the receivership, a new company was organized,—the Blackwater Lumber Company,—and the stocking, cutting, and marketing of the timber were resumed under the management of Frank E. Thompson, and so continued until the time of his death, by which event the appellee became the owner, by the statutes of descent and distribution, of all the estate of F. E. Thompson, including a large amount

of timber to be cut at the mill under contract. The appellee then resumed the management of the mill and property, paid part of the money due on the notes, and in 1898 purchased the interest of Osterhout, and is now substantially the owner of all the property. He claims to have sold to the new company his locomotives, cars, steel rails, splices, teams, camp outfits, tools, and appliances of all kinds. In addition to the circumstances indicating that the Thompsons were the real purchasers, a witness testifies that he had a conversation with them and Osterhout, in which they assured him that the mill and stocking business would go on after the sale as they had been run prior thereto. Thompson denies having made the purchase. Whether the charge is

planks from the wreck," and saved for depositors, bill holders, and other creditors; and that, although the corporation is dissolved, with or without legislative interference, a court of equity will devise a mode for the purposes of the remedy to hold the true parties to their just obligations. *Ibid.*

b. Concrete.

The doctrine is clearly established that courts of equity are without jurisdiction to decree the dissolution of a corporation and the forfeiture of its franchise, either at the suit of an individual or the state, unless such jurisdiction is conferred by statute. But, in virtue of its general jurisdiction over trusts, and to give relief where legal remedies are inadequate, a court of equity may, recognising the existence of a corporation, interpose to prevent dissipation and misapplication of its property and assets when it has ceased to do business, and make a just and equitable distribution thereof to whatever creditors and shareholders may be thereunto entitled. *Stamm v. Northwestern Mut. Ben. Asso.* 63 Mich. 317, 38 N. W. 710.

A suit in equity against the stockholders of an insolvent corporation may be maintained to collect unpaid subscriptions to be applied in payment of the corporate debts. *Robison v. Carey*, 8 Ga. 531.

A stockholder in an insolvent corporation is liable for his subscription as part of a trust fund for benefit of creditors. *Scott v. Latimer*, 33 C. C. A. 1, 60 U. S. App. 720, 89 Fed. 852.

When a statute affords a remedy against stockholders to creditors of an existing corporation, the remedy is open, although the corporation has ceased active operations, and has no persons in office as president, directors, etc., provided there has been no actual dissolution, expiration of charter, or forfeiture of the franchise. *Curry v. Woodward*, 53 Ala. 371.

Notwithstanding the annulment of the charter of a corporation by the judgment of a competent court in quo warranto proceedings instituted by the state, its creditors may compel the subscribers to its stock to pay up their subscriptions, although these were repudiated upon the ground the corporation had no legal existence. *Gaff v. Flesher*, 33 Ohio St. 107.

In sustaining the right of a judgment creditor of a dissolved and insolvent corporation to recover the debt against one of the stockholders. *L. R. A.*

ers, the New York commission of appeals, by Reynolds, C., said: With the nice distinction between law and equity, we are not troubled in this case, nor even as to the form of the action. The plaintiff is a creditor of the corporation upon a judgment duly obtained, and the company has no property in the state that can be taken on execution. The defendant is found in possession of corporate assets more than sufficient to pay the plaintiff's demand, and the law requires that he should pay it. It does not matter how he got it, whether by fair agreement with his associates, or wrongful act; it is enough that he had it, and that it should have been devoted to paying the corporate debts. His claim as a stockholder cannot prevail over a creditor's prior right. *Bartlett v. Drew*, 57 N. Y. 587, Followed in *Hastings v. Drew*, 76 N. Y. 9.

A transfer by a corporation of all its property and assets, which involves the destruction of the corporation and an abandonment of the purposes of its organization, is illegal as against creditors whose rights thereby are sacrificed and whose remedies thus are destroyed. *Cole v. Millerton Iron Co.* 133 N. Y. 164, 28 Am. St. Rep. 615, 30 N. E. 847.

The mere fact that the property of a corporation is a trust fund for the payment of creditors does not authorize the creditor to ask a court of equity to follow it into the hands of the stockholders and decree its payment to him, without alleging facts to show that his legal remedy would be unavailing and the interposition of a court of equity needful to enable him to obtain payment of his demand. *Dudley v. Price*, 10 B. Mon. 84.

The mere fact that a corporation is an insolvent debtor in the insolvent court of a state, and there has been appointed therein an assignee of its property, will not bar, even in equity, one of its contract creditors from proceeding to judgment against it in an action at law, when the insolvency proceedings cannot by statute eventuate in the discharge of the corporate debtor, and when, also, by statute, the creditor must obtain judgment against the corporation before he can pursue its stockholders. *Miller v. Waldborough Packing Co.* 88 Me. 605, 34 Atl. 527.

A creditor of a bank upon its circulating notes after the corporate charter has expired cannot maintain an action at law against one of its stockholders predicated upon the division of

true is not of controlling importance, for reasons now to be given.

Having erected its mill and obtained contracts of purchase of the timber standing on large tracts of land in the vicinity thereof, and commenced its operations, the Blackwater Boom & Lumber Company, on the 18th day of June, 1890, entered into a contract with S. W. Thompson and the appellee, Albert Thompson, for cutting and delivering said timber at the mill at certain specified prices per thousand feet. The lands mentioned in the contract from which the timber was to be so taken are those of the Marshall Coal & Lumber Company, containing 12,000 acres, lying on both sides of the Blackwater river, H. C. Davis & Bros., Wm. H. Harness, J. G. Harness, W. W. Harness,

H. C. Harness, H. J. Cooper, J. W. Parsons, C. S. Harness, I. H. Kuykendall, Jacob Van Meter, and Ann Van Meter. In all the contracts for the purchase of the timber on these lands by the Blackwater Boom & Lumber Company, there were certain covenants, and, among others, time limits for the removal of the timber; and the contract made with the Thompsons contain this clause: "All of said contracts are to be kept and observed as to detail by said Thompsons as binding upon them." Part of these lands lay along and near enough to the river to make it practicable to put the logs into it and drive them to the mill, while from others the timber had to be hauled. So the contract required the Thompsons to put the logs into the "mill

the capital among them on the dissolution without adequate provision to pay the note holders; the only remedy is by bill in chancery in behalf of all creditors, bringing in the stockholders and compelling restitution and *pro rata* distribution according to the justice of the case. *Vose v. Grant*, 15 Mass. 505.

There is no mode at common law whereby a single creditor of a banking corporation whose charter has expired by limitation can compel any one stockholder to pay him the amount of his stock. If any remedy to this effect exists it must be sought in a tribunal having power to act over the whole subject-matter equitably, and so as to adjust the varied claims and diverse liabilities, and make a final and just distribution to those entitled to the fund. *Spear v. Grant*, 16 Mass. 9.

XI. Construction and effect of statutes.

Admitting that, in the absence of any statute to the contrary, the common-law rule that the civil death of a corporation extinguishes all debts due to or from it still applies to actions at law, yet, as it is manifest that the modern business and commercial corporation is not within the reason of the rule, and that the rule itself has been generally superseded by legislation, the provisions of a statute in point ought to be so construed, if possible, as to keep the case out of the rule and accomplish the manifest purpose of the legislature, *viz.*, to allow a corporation to terminate its existence and collect and distribute its assets in its own name whenever and by any means deemed best by its stockholders. *Wallamet Falls Canal & Lock Co. v. Kittridge*, 5 Sawy. 44, Fed. Cas. No. 17,105.

Insolvency, as applied to corporations, and which brings into play the statute of New Jersey (P. L. 1896, pp. 277, 298) giving effect to the American trust-fund doctrine, denotes "a general inability to meet pecuniary liabilities as they mature by means of either available assets or an honest use of credit." *Empire State Trust Co. v. Wm. F. Fisher & Co.* (N. J.) 60 Atl. 940.

In Tennessee, although the liabilities of a corporation greatly exceed its assets, it is not insolvent, in such sense as to make its assets a trust fund for *pro rata* distribution to its creditors, if it continues a going concern conducting business in the ordinary way. *Tradesman Pub. Co. v. Knoxville Car Wheel Co.* 95 Tenn. 634, 31 L. R. A. 593, 49 Am. St. Rep. 69 L. R. A.

943, 32 S. W. 1097; *McClaren v. Union Roller Mills & Elevator Co.* 95 Tenn. 696, 35 S. W. 88.

Companies created in Delaware with banking powers are corporations unlike the English incorporated towns. They are mere creatures of the law deriving existence and all rights and powers, expressly or incidentally, from the law which created them. Perpetual succession is not one of their attributes. In their charter the days of their existence are numbered, and their period of dissolution fixed. If their charter be not extended, the moment that period arrives the corporation stands, not dormant, disabled, or incapable of action merely, but absolutely dissolved, civilly dead, without life or being, and altogether at an end. Their condition when their charters expire is not the same as that of an incorporated town which has failed to elect its officers and thus become inactive. Their life has gone out by their own constitution; they are not simply without active being through failure to do what they were entitled to do. They are dead, not dormant, and the principles of law applicable to a corporation thus dormant or disabled are not the same as those which apply to a corporation dissolved or civilly dead. An act of the legislature may awake and revive the one; it can only create a new corporation in the place of that which became defunct. *Commercial Bank v. Lockwood*, 2 Harr. (Del.) 8.

The legislature of New York, by its act of April 9th, 1811 (1 Rev. Stat. 248), re-enacted in the revision of 1830 (1 Rev. Stat. 600, §§ 9, 10), to the effect that, upon the dissolution of any corporation, its directors or others appointed by competent authority shall be trustees for its creditors and stockholders to settle its affairs, collect its outstandings, pay its debts, and divide among its stockholders what is left after paying necessary expenses, took means to remedy the gross injustice of the common law rule, and abolished it, establishing the equitable rule in its stead. *Owen v. Smith*, 31 Barb. 641.

In New York the dissolution of a corporation does not have the effect to terminate a lease for years and discharge a covenant to pay rent. Under the statutes of that state, upon the dissolution of a corporation its assets become a trust fund for the payment of its debts, and these include debts to mature as well as accrued indebtedness, and all engagements entered into by the corporation which have

pond at Davis in summer and to bullechain in winter." Owning the land on both sides of the Blackwater river, the Marshall Coal & Lumber Company, in its contract of sale of the timber to the Blackwater Boom & Lumber Company, granted to it the free and exclusive use of the river and its branches for floating, booming, and manufacturing its timber, with the right to erect dams and mills for such purpose, and also the right to construct on its lands, tramroads for hauling the timber.

In the light of these facts, the following clauses of the Thompson stocking contract are to be read and kept in mind, together with what Thompson did under the contract, in order to clearly understand his situation when the property and rights of the Blackwater Boom & Lumber Company were sold free and discharged from the obligations of his contract:

"9th. Said Thompsons agree to make all river improvements and repairs to river piers, dams, booms, etc., while said river improvements are used by them, excepting always dams, piers, booms, etc., at the mill; but said Thompsons agree to renew the boom and renew the piers, down to the water even at the mill pond, once during this contract when said boom and piers need said repairs; and said Blackwater Boom & Lumber Company agree to furnish the standing timber for said repairs to Davis boom and piers at mill.

"10. The Blackwater Boom & Lumber Company agree to sell, and S. W. and A. Thompson agree to purchase, all effects used

by said company in stocking and driving as follows, to wit, horses, harness, wagons, tools, supplies, and camp outfits; also company's blacksmith shop at Davis, with its tools and supplies in shop and ordered; all effects at a fair valuation, but if parties cannot agree at a fair valuation then the valuation of above property shall be decided by a board of arbitration, to be composed of parties agreeable to both parties hereto. It is mutually agreed that 'one have' the purchase price of above property be paid on 20th Aug. and one half be paid on 20th Sept., 1890.

"11th. It is mutually agreed by the parties hereto that in case any improvements not sold as above provided for be used by said Thompsons, such as camps, slides, etc., said Thompsons agree to pay for use of same, excepting camps along the river, for which no charge is to be made, for a consideration to be agreed upon.

"12th. The Blackwater Boom & Lumber Company agree to grant to said S. W. and A. Thompson all the rights and privileges held by them under the Marshall C. & S. Company contract and under other contracts to erect dams, booms, piers, and erect and build bridges and tramroads, but only for the purpose of carrying out this contract; and the said Blackwater Boom & Lumber Company agree to proceed under their contract for the purpose of condemning rights of way, etc., provided said Thompsons pay all costs, judgments, and damages under said condemnation proceedings, always provided

not been fully satisfied or canceled. *People v. National Trust Co.* 82 N. Y. 283.

A lessor, therefore, is entitled to recover subsequently accruing rent to the end of the lease from the receiver of such a dissolved corporation, and, in case the premises have been vacated, and he relets them to a new tenant, he is entitled to the difference between the new rent received and that reserved in the lease. *People v. St. Nicholas Bank*, 151 N. Y. 592, 45 N. E. 1129.

A statute for the winding up, through a receiver of corporations adjudged insolvent, whereby the corporate assets including rights of action, damages, and demands of every nature existing at the time of the insolvency, or accruing subsequently thereto, are to be collected by the receiver, and their proceeds distributed by him among the creditors of the corporation in proportion to the amounts of their debts, does not use the terms "creditors" and "debts" in any narrow, restrictive, or technical sense, but as covering all just liabilities, including claims for damages for breaches of contract for personal service. *Spader v. Mural Decoration Mfg. Co.* 47 N. J. Eq. 18, 20 Atl. 378.

Whether, upon general principles, the dissolution of a corporation by the voluntary act of its stockholders has the same effect upon the status of its property and the rights of creditors as does its extinction by expiration of its 69 L. R. A.

charter, or a decree of forfeiture by a competent judicial tribunal, in Iowa, by statute (Rev. Stat. 1865, § 1171), such a dissolution does not take away the power to act in winding up its affairs, or the right of a creditor (in equity, at least) to relief from the inequitable consequences of such a dissolution. *Muscatine Turn Verein v. Funck*, 18 Iowa, 469.

Under the provisions of a statute for placing the property of insolvent banks and trust companies in the custody of the law, to be converted into money and divided among their creditors, upon the appointment of an assignee the corporation is practically dissolved. The insolvency proceedings do not revoke corporate contracts, nor excuse the corporation from performing them. They disable it from performing the executory parts of such contracts, and entitle the other parties to them to an allowance of reasonable damages for the breaches of contract thus occasioned. *Bank Comrs. v. New Hampshire Trust Co.* 69 N. H. 621, 44 Atl. 130.

The common-law rule respecting the effect of dissolution upon the property and assets of a corporation does not, under the statutes of Texas, apply to stock corporations. On the dissolution of a stock corporation in that state its assets become a trust fund for the discharge of its liabilities, and the surplus belongs to the shareholders. Equity will always find means to

said Thompsons require said proceedings to carry out this contract."

Thompson shows that under this contract he expended \$1,700 on the dams in the river, and constructed 2½ miles of tramroad, called the "Harness tramroad," at a cost, exclusive of rails, splices, spikes, and switches, of \$3,200, and 11 210/320 miles of standard gauge tramroad at a cost, as aforesaid, of \$19,582.25, besides two bridges across the Blackwater river at a cost of \$1,200. In addition to this, he built engine houses, a repair shop, sand house, and necessary switches, put the steel on the roads, and equipped them with three locomotives and cars, making a total outlay of \$53,258.60, according to a statement filed as an exhibit with his petition. As tested by the items credited in the commissioner's report to the railroad and the tramroad accounts, this estimate appears to be under, rather than above, the actual cost. A large portion of this expense, it will be observed, was on account of the dams, bridges, and cutting and grading of roads, which, by clause 12 of the contract, could be used by Thompson for no other purpose than that of the performance of his contract. By selling the Blackwater Boom & Lumber Company's property discharged from his contract, the purchaser obtained the benefit of these improvements. Though the rolling stock and the materials of the railroad might have been taken away and held by Thompson, the benefit of his expenditures upon the dams and bridges and in the opening and grading of roads would have gone to the purchaser.

At the time of the sale there were several millions of feet of timber lying in the woods and streams on which work had been done to the amount of \$12,399.63, payment of which could not be demanded by Thompson under the contract until after actual delivery, which was prevented by the court. The purchaser took this timber discharged of Thompson's claim for the labor done on it. Having completed and equipped his tramroads at great cost, he was in a position to earn profits in the performance of the unexecuted part of his contract, and by purchasing the property himself, if he did so, he thereby paid into the hands of the court the supposed value of his work on the dams, bridges, roads, etc., and said sum of \$12,399.63 due to himself for work done on timber not delivered. His bid may not have provided for any profits, as by becoming the purchaser he secured to himself the right to continue and complete the logging of the timber. Had he purchased subject to his contract, the sale would not have deprived him of the benefit of his permanent improvements, and he would have been compelled to pay, in addition to the purchase money, said sum of \$12,399.63 due to himself, as well as profits thereafter accruing by the completion of the logging contract. If Osterhout was a bona fide purchaser of the property discharged of the Thompson contract, it is perfectly clear that he obtained and paid for said permanent improvements, and the timber on which Thompson had done work for which he had not been paid. What he paid for these went into the hands of the

collect the corporate debts after dissolution for the benefit of either creditors or stockholders. Sulphur Springs & M. P. R. Co. v. St. Louis, A. & T. R. Co. 2 Tex. Civ. App. 650, 22 S. W. 107, 23 S. W. 1012.

The forfeiture of the franchise of a railway company in respect of the unfinished part of its road under the Texas statute, which is self-executing, does not affect its corporate existence or property rights in the completed part of its line. *Ibid.*

Under the statutes of Texas the forfeiture of the charter of a railway corporation does not devest without compensation the stockholders of their property right in the roadbed, acquired by their means. This proposition is in harmony with the decision in *People v. O'Brien*, 111 N. Y. 1, 2 L. R. A. 255, 7 Am. St. Rep. 634, 18 N. E. 692, construing statutes of New York similar in terms to those of Texas. The decision in *Erie & N. E. R. Co. v. Casey*, 26 Pa. 287, to the contrary effect can only be sustained in the absence of statutes in those jurisdictions where the strict rule of the common law is in force respecting the property of dissolved corporations. *Ibid.* Stephens, J., however, dissented on this point.

XII. Conclusion.

The general trend of the decisions, notwithstanding much disagreement and many back-

ward glances at the early doctrine of the common law, makes it reasonably safe to conclude that, upon the civil death by dissolution of a corporation, especially if its demise be suicidal, the obligations of its contracts with those engaged to render it service will survive in all cases where they would survive the death of a natural employer; and that claims arising upon such contracts stand in the same relation to the property and assets of the dissolved corporation as do other unliquidated claims arising upon other contracts. The rule deducible from the New York cases in respect of the effect of compulsory dissolution upon running contracts not otherwise broken, and claims for damages on account of their loss, has met with only partial acceptance, and its general recognition lies in the future, and cannot be confidently predicted. It may be suggested that, under its operation, cases may arise where, in the course of administering the estate of a dead corporation, all its creditors would be paid in full and something be left for its stockholders. The gross injustice of excluding from any share in the property and assets of claims for damages for abruptly canceled employment contracts is so obvious that the rule appears unsound. Should such a case arise it is probable the grounds upon which it rests would be critically re-examined before the rule would be allowed to stand.

J. B. G.

court, and Thompson is equitably entitled to it. If, on the other hand, Thompson was, in fact, the purchaser, he purchased on the same basis, and paid his own money into court, to be returned to him to the extent of the value of said improvements and the amount due for work done on timber. Assuming that Thompson put in both bids,—\$72,500 subject to his contract, and \$110,000 discharged from his contract,—the latter having been confirmed, the difference of \$37,500 indicates that a large amount was paid by him for the privilege of retaining the benefit of his expenditures. It also indicates that the bidders, parties to the suit, and the court, in ordering and confirming the sale, understood that on one basis the purchaser should allow Thompson to continue his contract and pay him all demands thereafter accruing under it, and that on the other he should not be liable to Thompson for anything, and that Thompson should look to the purchase money in the hands of the court for the satisfaction of any claims he might have.

In cases of breach of contract, money paid out and expended by the plaintiff to prevent or lessen the resulting damages is recoverable. A man is not precluded from recovering because it is in his power, by the expenditure of his own money, to save himself from the injury inflicted by the other party. Sutherland on Damages, in treating of the elements of damages, says, at § 88, 3d ed.: "Fifth, such losses may consist of labor done and expenses incurred to prevent or lessen damages which would otherwise result from the defendant's default or misconduct. The law imposes upon a party injured by another's breach of contract or tort the active duty of using all ordinary care and making all reasonable exertions to render the injury as light as possible. If by his negligence or wilfulness he allows the damages to be unnecessarily enhanced, the increased loss—that which was avoidable by the performance of his duty—falls upon him. This is a practical obligation under a great variety of circumstances, and, as the damages which are suffered by a failure to perform it are not recoverable, it is of much importance. Where it exists, the labor or expense which its performance involves is chargeable to the party liable for the injury thus mitigated; in other words, the reasonable cost of the measures which the injured party is bound to take to lessen the damages, whether adopted or not, will measure the compensation the party injured can recover for the injury, or the part of it that such measures have or would have prevented. This is on the principle that, if the efforts made are successful, the defendant will have the benefit of them; if they

prove abortive, it is but just that the expense attending them shall be borne by him." The latter part of the same section demonstrates the duty to make the loss as light as possible in case of notice of rescission given by one party to the owner, but it also appears that money expended in doing so is recoverable. This equitable and common-sense principle must be applied here, and therefore, if Thompson was the actual purchaser, the circumstance does not preclude the allowance of his claim.

In support of the view here taken, the following is quoted from the decree of confirmation of the sale: "The said special receiver is directed to execute and deliver to the said William H. Osterhout, the purchaser, a deed conveying to him all the property, real and personal, and also all the corporate rights, powers, privileges, and franchises, of the said Blackwater Boom & Lumber Company, together with all the improvements made in said Blackwater river and its tributaries, including dams, piers, and booms, and all standing timber belonging to said company, and all the rights, powers, and privileges conferred upon said company under and by virtue of the contracts set forth in the decree of sale, other than the logging contracts with S. W. and A. Thompson; and in said deed said receiver shall reserve a lien for unpaid purchase money upon the real estate conveyed, and upon the leasehold property held under leases from H. G. Davis and others, and upon all improvements thereon; and the said receiver, Fairfax S. Landstreet, is directed forthwith to turn over and deliver to the said purchaser, William H. Osterhout, the possession of all said property, real and personal, and all the original timber contracts aforesaid."

If the price paid was inadequate, it is too late to suggest that the inadequacy is the result of manipulation on the part of Thompson, or of collusion between him and Osterhout. That would have been ground for resisting confirmation of the sale, but it can have no bearing on the question of Thompson's right to compensation or the amount thereof. The sale was widely advertised, and was public and open to the world, and the confirmation without objection on the part of creditors or stockholders estops them from denying the fairness of the sale or adequacy of the price. At any rate, it has no connection whatever with the matter now under consideration.

The foregoing principles and conclusions settle the most important question in the case, but do not cover the exceptions touching specific items entering into the account, the mode of statement, and the evidence upon which the balance struck depends. Un-

der exceptions 1, 2, 3, 6, 12, and 13, it is insisted that Thompson's contract was divisible, that the executed part of it could not be considered in ascertaining his compensation, and that the sums expended in getting out the timber which had been paid for, and the amounts received on account of it, should not have been charged and credited in the statement, for the reason that if, in any instance, Thompson had lost money on any particular lot of timber, the loss was, by such method of statement, wrongfully charged to the company, since it ought to be borne by Thompson, and if, in any instance, a profit had resulted, it was wrongfully given to the company, as it belonged to Thompson. If, on the last-stated hypothesis, any error has been committed, it is not prejudicial, but beneficial, to the appellants, and they cannot complain of it. If, on the former, any error was committed, it is prejudicial, but the burden is upon the appellants to show that such losses sustained were carried into the general balance against the company. This they have failed to do. They point out no instance of such charge, and have introduced no evidence showing it. Moreover, it is a question of fact on which the commissioner and the court below have passed, and their finding cannot be disturbed by this court unless plainly wrong. How is it possible to determine the amount of compensation on the basis of charging all expenditures and the value of work and labor, and crediting all sums received, without including those relating to the executed part of the contract? The lengthy argument of the brief on this point not only fails to point out any wrong done, but also to show how it is possible to arrive at the amount necessary to reimburse for outlay in any other way with any degree of certainty.

Exceptions 9, 10, 11, 14, 15, and 17 present the contention that the expenditures for permanent improvements and preparations for the execution of the contract should be apportioned between the executed and unexecuted parts of the contract, on the theory that if, when interrupted, his contract was three-fifths performed, he should be allowed only two fifths of such expenditures. The authorities cited for this do not support it. The first is *Watts v. Camors*, 115 U. S. 353, 29 L. ed. 406, 6 Sup. Ct. Rep. 91, holding that a clause in a charter party whereby the parties bind themselves, etc., "in the penal sum of estimated amount of freight," to the performance of the agreements contained in the contract, is not a stipulation for liquidated damages, and is discharged by payment of the actual damages sustained by breach of the agreement. Another is *Dalbeattie S. S. Co. v. Card*, 59 60 L. R. A.

Fed. 159, holding as follows: "In awarding damages against a charterer for refusing a vessel, the net freight earned by obtaining another—less valuable—cargo is to be deducted from the sum which would have been earned under the charter." Another is *Baker Transfer Co. v. Merchants' Refrigerator & Ice Mfg. Co.* 12 App. Div. 260, 42 N. Y. Supp. 76, applying the principle of the last-named case in determining the measure of damages for breach of an agreement to take and deliver the output of an ice-manufacturing plant. Another is *Ewing v. Codding*, 5 Blackf. 433, an action by a landlord against the tenant for breach of an agreement to deliver one third of the crops as rent, in which it was held that in assessing the damages the defendant might prove in mitigation thereof that after the making of the lease the plaintiff, with defendant's consent, had leased a part of the premises to a third person, from whom he had received rent for that part. The last one is *Jebsen v. East & West India Dook Co.* L. R. 10 C. P. 300, relating to reduction of damages resulting from a breach of a contract concerning one ship by applying profits earned with another ship. These authorities, except the Indiana case, all relate to damages by prevention of anticipated profits, and not to compensation for outlay and expenses, and are so obviously inapplicable to the proposition contended for that it would be a waste of time to comment on them. Nor has the *Ewing v. Codding Case* the remotest bearing on the question. By consent of parties, part of the land, and consequently part of the rent, were eliminated from the contract. The proposition is not only unsupported by any authority, but is also at variance with the law of compensation and reimbursement as laid down by the courts. It is an element in every case of damages for prevention of the performance of a contract, and is ascertained upon the following basis: "When one party enters upon the performance of a contract, and incurs expense therein, and, being willing to perform it, is, without fault of his own, prevented by the other party from performing, his loss will consist of two distinct items of damage: First, his outlay and expenses; second, the profits he might have realized by performance, which profits are related to the outlays, and include them and something more. The first item he may recover in all cases, unless the other party can show the contrary." *United States v. Behan*, 110 U. S. 338, 28 L. ed. 168, 4 Sup. Ct. Rep. 81. Here there is no question of profits. It is one of outlay, time, labor, and expenses, and is governed by so much of the foregoing rule as relates to reimbursement for outlay. The idea of apportionment here contended for is

nowhere to be found in it; nor do its terms leave any room for it. "But, as Towne saw fit to say that the special contract was not binding upon him, it cannot be set up by his executor as binding upon the plaintiff. *King v. Welcome*, 5 Gray, 41. It cannot be treated as a nullity for one purpose, and as a contract for another. It required two years for its completion, and both parties understood that there was to be no profit or advantage to the plaintiff except from the operations of both years taken together. A large part of the labor and expense incurred in the first year had no reference whatever to the operations and results of that year, taken by itself, but were a preparation of the land for increased productiveness in the second year. The plaintiff must be considered as having in that way paid in advance, in part at least, for the privilege of using the land the second year in the manner agreed upon. By the repudiation of the contract he has lost the privilege which he had so paid for. The consideration upon which he made that payment has failed by the wilful act of the other party to the contract, and he is therefore entitled to recover back what he has so paid." *Williams v. Bemis*, 108 Mass. 91, 11 Am. Rep. 318.

To apportion the expense for permanent improvements between the executed and unexecuted portions of the contract, on the theory that Thompson has had three fifths of the benefit of them, would be inconsistent with the rule of compensation adopted, and contrary to the fact as regards the alleged reception of the three fifths of the benefit of them. Everything received by him goes in reduction of his bill for services and outlay. Every dollar paid by him, profits on the work, executed work included, is charged against his bill. How can it be said, then, that he has had the benefit of these improvements so far as the contract has been executed? The rule of compensation as laid down by the court deprives Thompson of all his profits, past and future, directs that he be made whole, nothing more, nothing less, and excludes any inquiry as to allowances of, or deductions for, profits, benefits, and losses.

In this connection, it is contended that Thompson should not be allowed the money expended in the construction of the railroad because he hauled over it more of F. E. Thompson's timber than of the company's timber. In order to reach the Van Meter tract of timber owned by the company, and which Thompson was bound to log under a short-time limit, it was necessary to build the road through the C. E. Harness tract, the timber on which belonged to F. E. Thompson, or to the company, and was to be logged by said F. E. Thompson. *Albert* 69 L. R. A.

Thompson, having built his road though said tract, hauled timber from it for F. E. Thompson, and has credited, in his statement against his expenditures, the hauling of said timber at 50 cents per thousand, and testifies that there was a profit in it to him, and therefore to the company. But it is said he hauled more timber on this road for his son than he hauled for the company, and that therefore he did not build it for use under his contract with the company. This position is untenable. He was bound to take the timber from the Van Meter tract, No. 8, the W. H. Harness tract, No. 11, and the J. W. Parsons tract, No. 12, under time limits, all lying beyond the C. E. Harness tract, from which he incidentally hauled timber for F. E. Thompson. The situation of these lands necessitated the hauling of the timber by a railroad or in some other way. He may have hauled more of his son's timber than of the company's timber, too, but the question is not what was actually hauled. It is the purpose for which the road was built, and that is very apparent from the facts stated. Had he been permitted to complete his contract, the relative amounts actually hauled for the company and for F. E. Thompson would in the end have been in a proportion very different from what they are now. It is further objected, in this connection, that Thompson hauled some bark and pulpwood of his own over this road, and, for hauling bark, purchased some bark cars. These were used, not only in hauling bark, but also in hauling supplies to the camps along the road, the log cars being unsuitable for that. He has credited what he deems a fair price for the hauling of the bark, and the cars are credited at a little more than what they cost. All this seems to be purely incidental, and does not prove the road to have been built for a purpose other than the carrying out of the logging contract.

Again, it is urged that compensation cannot be had because the work under the contract was prosecuted in the name of a corporation organized by Thompson, called the Forest City Lumber & Improvement Company. No authority is cited in support of the contention, and the argument in its favor is far from convincing. If a contractor can employ individuals to aid in carrying on his contract, why can he not, on the same principle, procure the work to be done by a corporation? Must he do all the work with his own hands, or keep the business all in his own name? If he chooses to operate through a corporation, so as to limit his liability on claims for damages as to third persons, or to keep one branch of his business separate from others, is that a matter which in any way prejudices or com-

cerns the other party to the contract, even if it be in some sense immoral, or even contrary to public policy, as charged in the argument? Whether it is immoral or otherwise wrong, we have no occasion to say.

Exception No. 22 comprises six different items. The first is \$4,750, charged by Thompson for his personal services. The objection seems to be that he charged this as a salary at \$1,500 per year as president of the Forest City Lumber & Improvement Company, a mere instrumentality in his hands for the execution of the work under his contract. As already indicated, there is nothing in this objection. The second is to the allowance of three items of \$1,500, \$300, and \$878.35, paid by Thompson to three subcontractors, Talbord, Bartlett, and Whitcomb. These were paid to discharge liabilities thrown upon him by the interruption of his work under the main contract, and he was bound to pay them. They were necessary expenditures, but it is said they were disallowed by this court on the former appeal. No reference to them is found in the opinion, and there is no more reason for saying they were disallowed than for holding many thousands of dollars of other expenditures to have been so cut out. The third objection is to the allowance of \$65 expended by Thompson in hunting a locomotive, because he is allowed \$1,500 a year for personal services. Are his expenses to come out of his small allowance for services? The fourth relates to the bark cars, which has been disposed of. The fifth is of the same nature, and relates to an item of \$400 for lumber cars, which Thompson used in hauling his own lumber, as well as for purposes of his contract. They were sold, and the proceeds credited, as well as their earnings in hauling his lumber. The sixth is to all items in the account, because they were paid by the Forest City Lumber & Improvement Company, and not by Thompson. Nothing further need be said on that subject.

Exceptions Nos. 5, 16, 18, and 19 relate to questions of competency, relevancy, and sufficiency of the evidence upon which the report is based. It is shown that many of the items charged were not found on the books of the Forest City Lumber & Improvement Company, or the Blackwater Boom & Lumber Company, but were taken from Thompson's private memoranda or inserted upon his verbal representations. The commissioner has made a complete list of all the items not taken from the books. Those in Thompson's favor are principally items of rent, wages of S. W. Thompson, superintendent, services of Albert Thompson, amounts paid Talbord, Bartlett, and Whitcomb, an item of \$230 paid the Blackwater Boom & Lumber Company for loss of timber

on the Van Meter land not removed within the limit of time specified in the contract, and an item of \$450 paid for a team of horses and harness. These charges amount to \$14,271.94, and, with the exception of three or four small items, were all fully explained by Thompson in his testimony, and shown by him to be proper charges, under the principles of law hereinbefore announced. The items on the other side of the account, not taken from the books, amount to \$26,357.97, composed of credits for stocking and hauling for F. E. Thompson, and the proceeds of the locomotives, cars, rails, horses, harness, wagons, etc., sold to the Blackwater Boom & Lumber Company. It is not perceived that any wrong has been done the appellants in respect to any of these items. But it is said the accounts concerning work done for F. E. Thompson and for the Blackwater Boom & Lumber Company have been so mingled as to render it improper to allow any of the items to enter into a statement for the purpose of ascertaining the amount expended by Thompson under his contract. No instance is specified in which money paid out on work for F. E. Thompson is charged in favor of Albert Thompson, without a corresponding credit for the stocking and hauling of his timber at fair prices—the same, or about the same, prices as those paid Albert Thompson under his contract. All the timber logged for F. E. Thompson went to the Blackwater Boom & Lumber Company. Its books, as well as Thompson's, must have shown the amount of it so far as delivered. Is Thompson to be deprived of all compensation because he is unable to separate these accounts, when it is evident that the balance found by charging and crediting as aforesaid is substantially the true balance? As his work progressed, there was nothing in the situation to apprise him, or the other interested parties, that it would ever become necessary for him to produce the evidence now demanded, and it is as clear, full, and fair as could be expected under such circumstances. The books of the two companies were open to the commissioner and counsel on both sides, and were thoroughly and critically examined by the former, and from them and the testimony taken he has arrived at a conclusion which the circuit court has confirmed. The evidence on which it rests is neither incompetent nor irrelevant, and there is nothing to pass upon but its sufficiency. How can this court disturb the finding, if the appellants are unable, as apparently they are, to show wherein or how they have suffered from an erroneous finding upon the evidence? They fail to show or indicate that any money was lost on the work done for F. E. Thompson; nor

do they put a witness on the stand who denies Thompson's claim that there was a profit in it. If it was profitable, how are they injured? If so, how can it be otherwise than that they are benefited?

Does the amount of this decree, as compared with the former one, indicate injustice? It is suggested that Thompson now has a decree for outlay, services, and expenses about equal to his former decree for these and profits added. But the record does not verify the charge. Under the former decree, he had, on account of the claims included in the present decree, principal sums decreed to him amounting to \$94,433.50, and under the present decree on the same accounts, after his claim for profits has been eliminated, about \$48,000, making a difference against him of about \$46,433. From the \$48,000 now allowed, deduct the item of \$12,399.63, representing uncompleted work on timber actually felled, and the remainder is \$35,600.37, the amount decreed for money expended, not directly upon the timber, but in making betterments and improvements and other preparations for carrying on the work. In view of what has been shown, respecting the character and magnitude of this work, the court cannot say the amount is unreasonable and unsustained by the evidence. It is suggested in this connection, however, that there is inconsistency, condemning and rendering worthless Thompson's testimony and all his evidence, in this: That in obtaining his former decree he swore his contract was a profitable one, and now shows it to have been a losing one. The bases of the former and present estimates are entirely different. When Mr. Thompson, on the former inquiry, testified that \$10,000 had been sunk in the first year, and almost made up by the profits of the second year, he spoke of profits, not outlay and expenses. Just how he estimated them does not appear. The present inquiry is upon an entirely different basis, and, even if there be inconsistency, and the logic of facts shows the present result to be reasonable and just, is it to be cast aside and justice withheld because of such inconsistency? The great bulk of the expenditures and receipts by Thompson is shown by items taken from books, the correctness and accuracy of which have not been impaired or overthrown. There is a substantial check upon them found in the books of the Blackwater Boom & Lumber Company. All of them—both sets—have been open to the commissioner and counsel. Who has pointed out any omissions, any padding, any false or fraudulent entries? There is not an intimation of such a thing anywhere in the record or the argument. There is no suggestion of fraud in connection with the omissions from the

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books of certain credits and charges reported by the commissioner as not having been found on the books.

This disposes of all important exceptions and assignments of error respecting the principles on which the account is stated and the items thereof. But two errors, not made the subjects of exceptions nor mentioned in the assignments of error, have been discovered. The receiver paid Thompson in August, 1893, interest amounting to \$330.68, which has not been credited in the account against him, though charged in his favor. He is credited as of October, 1894, with \$15,955, proceeds of property sold, and as of December, 1895, with \$2,000 on account of property sold. These sums should have been credited as of August, 1893, for Thompson used them from that date until they were sold, and he ought, therefore, to pay, as compensation for their use, at least the interest on the sums for which he sold them. Making these corrections, and deducting \$34.50 interest on small items disallowed by the circuit court, the sum found to be due him as of the 12th day of June, 1901, is \$80,288.90, of which \$47,873.62 is principal and \$32,415.34 is interest.

The last contention is that the court erred in decreeing the amount due the appellee to be a lien upon the assets of the company. As this question was adjudicated on the former appeal, the court below could not, nor can this court now, disturb that conclusion and determination. Point 4 of the syllabus declares that Thompson's "compensation is entitled to a preference of payment out of the corporate assets in the hands of the receiver in equal priority with the other obligations of the receivership." That decision may be wrong, though we do not say it is; but it is, and must remain, the law of this case, however erroneous it may be. *Camden v. Werninger*, 7 W. Va. 528; *Horn v. Perry*, 11 W. Va. 694; *Henry v. Davis*, 13 W. Va. 230; *North Western Bank v. Hays*, 37 W. Va. 475, 16 S. E. 561.

As there is no error in the decree except in respect to the omission of said sum of \$330.68 from the credit side of the account, and the failure to charge Thompson with the use of the property from the date of the decree of confirmation until disposed of, as hereinbefore stated, it will be corrected and modified in these respects, and, *as so modified, affirmed*, and the cause remanded for further proceedings; but, as this reduces the amount of the decree by the sum of \$4,505.95, the costs in this court will be decreed to the appellants.

Dent, J., dissenting:

I cannot concur in the opinion in this case, for the reason that it is a misconstruc-

tion of, and in violation, to some extent, of the former opinion herein. The facts and circumstances clearly show that Albert Thompson was the real purchaser of the property of the defendant company in the name of Osterhout, who was only nominally used to cover the transaction; that Thompson suffered no loss so far as his outlay and expenses were concerned, but had really made a profit, according to his own testimony, at the time the sale of the property was decreed, and that the larger bid was made by him on the theory that he would be able to cover the difference between the two bids by his account for profits not earned; and that, having failed in this, his present account as to damages for outlay and expenses is an unconscionable demand to cover the difference between the two bids incurred by him under a misapprehension of the law as to his right to recover such unearned profits.

In becoming a purchaser of the property, it was Thompson's duty to take into consideration that the law imposed upon him, as the company's contractor, the obligation to use all ordinary means to save the company harmless from the expenditures incurred by him in carrying out his contract. 1 Sutherland, Damages, p. 184, § 88; Id. p. 188, § 90. This is a condition the law imposed upon him as a purchaser, and which it must be assumed he fully understood at the time of his purchase, and that he made the same with this understanding. Hence he could not have made the purchase with any legal expectancy of a recovery of his outlay and expenses from the company, owing to his knowledge that it was his legal duty to save the company harmless. Nor did he, in making his bid, take into consideration his outlay and expenses, for the sale was made entirely free from his stocking contract, which necessarily excluded all improvements made by him for the purpose of carrying them out, and gave the purchaser no right to such improvements without the consent of Thompson. This gave him such control over the property that no one else dare bid against him; for a purchaser subject to the stocking contracts would be entirely in his power, and a purchaser free from the contracts would be none the less so, for the improvements made by him were essential to the enjoyment of the purchase, and concerning which a stranger, in purchasing, would have to deal with Thompson. The property was thus so encumbered that Thompson had it in his power to make his own terms with regard thereto. He made two bids,—the lower one subject to his contract; the higher bid was made with the expectancy of the recovery of the unearned profits on his contracts by reason of the abrogation thereof.

The court held in its former opinion that he could not recover these profits. Hence he made a legal mistake in bidding on the property with such expectation. To avoid such mistake, he comes back with an alleged claim for expenditures for improvements made by him in the expectancy of being permitted to carry out his contracts. The law answers this demand by saying that it was your duty to save your contractee harmless, and you got the full enjoyment of these improvements when you purchased the property, and you can recover nothing unless you can show that you have suffered a loss by reason thereof. This, Thompson could not possibly do, for he had the full enjoyment of all the improvements under his purchase, without paying anything additional therefor, such as a stranger purchasing would have had to do to him. The improvements were no loss to him, but they not only deterred others from bidding on the property, but enhanced its value greatly without his having to pay anything for such enhancement. It is plainly apparent to the most simple minded that Thompson suffered no loss except the unearned profits denied to him by the former opinion, and that he was led into a legal mistake in making his higher bid in contemplation of the recovery of such profits. This is such a mistake that equity has no power to relieve against, it being in no sense mutual, or occasioned by the act or conduct of the opposite party. Yet the court relieves him therefrom by allowing his unconscientious demand for improvements and expenditures, concerning which he suffered no loss, but enjoyed the full benefit thereof, to the great enhancement of his property. In doing so the court in effect overrules its former opinion, and allows Thompson the greater portion of the profits then denied him. For this there can be no other justification or excuse than the legal mistake made by Thompson in making his higher bid. While this may appear equitable, yet it is in violation of the established rules and principles of courts of equity. Hence my dissent.

A petition for rehearing having been filed, **Poffenbarger**, P., on August 13, 1904, handed down the following additional opinion:

A petition for rehearing sets up one new contention, namely, that while the statement of the commissioner shows over 13,000,000 feet of timber was hauled for F. E. Thompson, for which credit is given, only 6,205,000 feet—less than half as much—is credited as having been stocked for F. E. Thompson. This discrepancy, if credited at \$4.50 per thousand feet, would amount to over \$30,000, and it is urged that the allowance to

Thompson should be cut down by about that much. It is rather strange that such an amount should have been overlooked until this late hour, especially so in view of the strenuousness with which this contest has been waged on both sides; but, if the claim has any foundation in the record, it is made in time. Only the amounts paid by F. E. Thompson for stocking his timber are proper credits. If the 7,000,000 feet and over, stocked for him and not so credited, was paid for by the Blackwater Boom & Lumber Company upon the order of F. E. Thompson, and is therefore included in the cash credited in the statement, it is not only accounted for, but to credit it up as timber stocked for F. E. Thompson would give a double credit. Credit for \$17,000 as cash, notes, and drafts, exclusive of commissions paid Thompson on sales of lumber, is given in the statement. At an average price of \$4 per thousand, this represents 42,374,000 feet; at \$4.50 per thousand it represents 37,777,000 feet; and at \$5, covering both stocking and hauling, it represents 33,901,000 feet. Thompson gives the total amount of spruce timber scaled under his own contract as having been 25,643,710 feet. Add to this 13,000,000 feet as having been stocked for F. E. Thompson, and the result is 38,643,710 feet. Add to 33,901,000 feet, represented by the cash credited by Thompson, the 6,205,000 credited as having been stocked for F. E. Thompson, and the result is 40,101,000, but little more than the total found by the other method. But there was some hemlock timber put in by Thompson under his own contract, not included in the 25,643,710 feet. The amount, however, is comparatively small. Of the 6,205,000 feet shown by the statement to have been stocked for F. E. Thompson, only 313,297 feet was hemlock. Albert Thompson cut but little hemlock under his own contract. R. W. Eastham testified that, in saying all the timber of easy access on the 12,000-acre Marshall tract had been cut, he meant the spruce, and that no hemlock on that tract above the dam had been cut. Meyer, secretary of the Marshall Company, filed a statement from which it appears that Thompson logged from the Marshall tract, under his contract, 19,210,065 feet, of which only 1,712,369 feet were hemlock. Making an allowance of 2,000,000 feet of hemlock as having been cut by Albert Thompson under his own contract in addition to the 25,643,710 feet of spruce, and then adding 13,000,000 as having been cut for F. E. Thompson, the result is 40,643,710 feet. Take another test: From the statement exhibited with the deposition of H. A. Meyer, it appears that Thompson logged from the Marshall tract 19,210,065 feet. Most of this went in by the river. As the railroad runs through

a corner of the tract, some of this timber may have been hauled in. Thompson says he hauled in about 10,000,000 feet for the company and about 13,000,000 feet for F. E. Thompson. Adding these three amounts, we have 42,210,065 feet, for some of which Thompson has not been paid. For unpaid work on it he had in the present decree \$12,399.63. Besides, the report of the receiver shows 16,735,682 feet to have been "in stream and skidded in bush," much of which was, no doubt, from the Marshall tract. From this it is manifest that there can be no such discrepancy as is claimed, and that there is probably none at all. The commissioner and counsel on both sides all had access to the books, knew the basis on which the account was being made up, and had the witnesses before them, and there is a presumption of correctness as to the finding which cannot be overcome by a mere suspicion or surmise which the evidence in the record strongly tends to contradict. Though it may not appear from the record that payments for stocking F. E. Thompson's timber were made directly to Albert Thompson by the Blackwater Boom & Lumber Company, the books of the two companies almost certainly show how these payments were made, and they were at hand when this account was made up by the commissioner. And it does appear here that Albert Thompson has been paid by the Blackwater Boom & Lumber Company for more timber than he stocked for it under his own contract with it,—in fact, about the amount he stocked under his own contract and F. E. Thompson's contract, less the 6,205,000 credited as timber stocked for F. E. Thompson,—and all the money so received is credited in the account stated by the commissioner.

This petition renews, in slightly different form, the contention that Thompson is precluded from claiming the money expended by him because the expenditures were made in the name of the Forest City Lumber Company. It says he paid \$25,000 for the stock of that company, which he still holds, wherefore said sum should be deducted from the amount allowed him. That corporation was organized for the sole purpose of carrying out Thompson's contract, and all the money paid into its treasury as capital stock or otherwise was Thompson's money. It never had any assets except the money expended through it by Thompson in the execution of his contract, and the money derived by Thompson from his contract through it as an agency used in the execution thereof. All these sums are carried into this account as charges and credits. The Forest City company is defunct, and its stock is but waste paper in Thompson's hands. The corpora-

tion had no substantial existence, nor its stock any value, save as an instrumentality in the execution of the contract. To make such deduction, therefore, would be to substitute a mere shadow for substance, and subordinate equity and justice to a barren technicality.

It is further insisted in the petition that the former adjudication by this court gave no lien for the amount now found to be due to Thompson, because the present claim was not then before the court. All the items in the account as now stated were not then in the record. Some of them were, but not stated in the present form. The claim that formed the basis of the former decree was for damages for breach of contract, composed of two items, outlay and gains prevented, as formerly explained. This court said the latter could not be allowed, but that, upon the ascertainment of the former, a decree therefor should be entered, giving a lien for it upon the assets of the company, and for that purpose the cause was remanded to the circuit court. Was not every question except that of the amount of compensation thereby adjudicated? The present demand was before the court as a part of the original claim. Thompson's original petition sets forth as an item of damages the cost of constructing his tramroads, repairs of dams, and building of bridges, amounting to \$53,258.60, and his amended petition sets up the claim for \$12,399.63, making in all more than \$67,500. But this court said all sums received by him must be deducted. This necessitated a restatement of the account and the addition of many items both of debit and credit, resulting in a decree for about \$48,000 instead of \$67,500. It is ar-

gued that the language of the last clause of point 4 of the syllabus of the case, as reported in 46 W. Va. 56, 33 S. E. 125, saying, "which compensation is entitled to a preference of payment out of the corporate assets in the hands of the receiver in equal priority with the other obligations of the receivership," amounts to a construction of all the language used by the court on the subject of lien, and negatives the allowance of anything but the \$12,399.63 item, because it says the amount shall have priority with the "other obligations of the receivership;" in other words, the whole amount must be an obligation of the receivership to make it a lien on the assets. But does not the court declare and decide that "a just compensation for the actual expenditure of labor and money in fulfilment of his contract, subject to a deduction of all sums paid him," shall be allowed priority with the other obligations of the receivership? It must be one of such obligations to satisfy the sense of the words "other obligations" of the like kind. The question is, What did the court decide? not whether it decided correctly. Properly or improperly, it has plainly declared the demand to be an obligation of the receivership and entitled to priority, and remanded the cause for a decree in accordance with the adjudicated principle governing the cause. It was binding upon the court below (*Butler v. Thompson*, 52 W. Va. 311, 43 S. E. 174), because it was an adjudication. What is *res judicata* as to one court is *res judicata* as to all others, and there is no escape from it except where an appeal exists. An appeal to this court from its own decision rendered years ago does not lie.

INDIANA SUPREME COURT.

John DILL, *Appt.*,
v.
Daniel W. MARMON.

(.....Ind.....)

1. A master is not liable to a servant for injuries caused by negligence of a fore-

man in directing work where the master has otherwise performed his duty.

2. A direction by a foreman to an employee assisting in shifting cars to be loaded at a mill, to push a car put in motion by the impact of another before it has lost its momentum, is not such a change in his work, although he has never done that

NOTE.—As to servant's right of action for injuries received in obeying direct command, see also, in this series, *Dallemand v. Saalfeldt*, 48 L. R. A. 753, and *note*; and the later cases of *Finn v. Cassidy*, 53 L. R. A. 877, and *Long v. Illinois C. R. Co.* 58 L. R. A. 237.

As to vice principalship considered with reference to the superior rank of a negligent servant, see *Stevens v. Chamberlin*, 51 L. R. A. 513, and *note*; *Norton Bros. v. Nadebok*, 54 L. R. A. 442; *Southern P. Co. v. Schoer*, 57 L. R. A. 707; *Canney v. Walkeine*, 58 L. R. A. 33; and 59 L. R. A.

Illinois Southern R. Co. v. Marshall, 66 L. R. A. 297.

As to vice principalship determined with respect to the character of the act which caused the injury, see *Lafayette Bridge Co. v. Olsen*, 54 L. R. A. 33, and *note*; *Wellston Coal Co. v. Smith*, 55 L. R. A. 99; *Swift & Co. v. Blaise*, 57 L. R. A. 147; *Kelly v. New Haven S. B. Co.* 57 L. R. A. 494; *Sroufe v. Moran Bros. Co.* 58 L. R. A. 313; *Knutter v. New York & N. J. Teleph. Co.* 58 L. R. A. 808; *Sams v. St. Louis & M. River R. Co.* 61 L. R. A. 475, and *Southern Indiana R. Co. v. Harrell*, 63 L. R. A. 461.

particular act before, as to authorize him to proceed at the master's risk.

3. The mere fact that a place where a servant is working is rendered temporarily unsafe in the execution of the details of the service does not, alone, make it the duty of the master to be present in person, or by representative, to protect the servant from harm.
4. A servant engaged in assisting in shifting cars to be loaded at a mill assumes the risk of the foreman giving a negligent command relative to the handling of the cars.
5. A servant employed to assist in shifting cars to be loaded at a mill cannot hold the master liable for an injury caused by the negligence of the foreman in charge of the two or three men engaged in such work, but who is not at the head of a department of the work, in directing him to push a car after it has been set in motion by the momentum of another car, or in failing to stop the latter after the servant, in attempting to obey the order, has slipped and fallen in such a way that he will be injured in case it is not stopped.
6. It is error to direct a verdict for defendant in an action by a servant against his master to recover damages for personal injuries, where there is some evidence tending to show that the injury was caused by defective machinery.

(January 25, 1905.)

APPPEAL by plaintiff from a judgment of the Superior Court for Marion County in favor of defendant in an action brought to recover damages for personal injuries for which defendant was alleged to be responsible. *Reversed.*

The facts are stated in the opinion.

Messrs. Frank E. Gavin, Theodore P. Davis, and James L. Gavin, for appellant:

It is the duty of the master to exercise reasonable care to provide a safe working place and safe appliances for the servant.

Island Coal Co. v. Swaggerty, 159 Ind. 664, 62 N. E. 1103, 65 N. E. 1026; *Indiana Car Co. v. Parker*, 100 Ind. 181.

If the master authorizes an agent to perform such duty, the agent, whatever his rank, stands in the place of the master.

Taylor v. Evansville & T. H. R. Co. 121 Ind. 126, 6 L. R. A. 584, 16 Am. St. Rep. 372, 22 N. E. 876; *Louisville, N. A. & C. R. Co. v. Graham*, 124 Ind. 89, 24 N. E. 668; *Nall v. Louisville, N. A. & C. R. Co.* 129 Ind. 260, 28 N. E. 183, 611; *Louisville, E. & St. L. Consol. R. Co. v. Hanning*, 131 Ind. 528, 31 Am. St. Rep. 443, 31 N. E. 187; *Evansville & T. H. R. Co. v. Holcomb*, 9 Ind. App. 198, 36 N. E. 39; *G. H. Hammond Co. v. Mason*, 12 Ind. App. 469, 40 N. E. 642; *Lebanon v. McCoy*, 12 Ind. App. 500, 40 N. E. 700; *Southern Indiana R. Co. v. Harrell* (Ind. App.) 66 N. E. 1016.

59 L. R. A.

The duty of the master is a continuing one, not only to make, but to keep, the servant's working place safe.

Taylor v. Evansville & T. H. R. Co. 121 Ind. 126, 6 L. R. A. 584, 16 Am. St. Rep. 372, 22 N. E. 876; *Louisville, N. A. & C. R. Co. v. Graham*, 124 Ind. 89, 24 N. E. 668; *Nall v. Louisville, N. A. & C. R. Co.* 129 Ind. 260, 28 N. E. 183, 611; *Louisville, E. & St. L. Consol. R. Co. v. Hanning*, 131 Ind. 528, 31 Am. St. Rep. 443, 31 N. E. 187; *Evansville & T. H. R. Co. v. Holcomb*, 9 Ind. App. 198, 36 N. E. 39; *G. H. Hammond Co. v. Mason*, 12 Ind. App. 469, 40 N. E. 642; *Lebanon v. McCoy*, 12 Ind. App. 500, 40 N. E. 700; *Southern Indiana R. Co. v. Harrell* (Ind. App.) 66 N. E. 1016.

Until the agent selected by the master acts up to the limit of the duty of the master to act, the master's duty is not done.

Island Coal Co. v. Swaggerty, 159 Ind. 664, 62 N. E. 1103, 65 N. E. 1026; *McElligott v. Randolph*, 61 Conn. 157, 29 Am. St. Rep. 181, 22 Atl. 1094; *Gerrish v. New Haven Ice Co.* 63 Conn. 9, 27 Atl. 236.

The master must respond, not only for the misfeasance, but also for the nonfeasance, of him to whom he has intrusted his duty.

Island Coal Co. v. Swaggerty, 159 Ind. 664, 62 N. E. 1103, 65 N. E. 1026; *Louisville, N. A. & C. R. Co. v. Graham*, 124 Ind. 89, 24 N. E. 668; *Chicago, I. & L. R. Co. v. Martin*, 31 Ind. App. 308, 65 N. E. 591; *Louisville, E. & St. L. Consol. R. Co. v. Hanning*, 131 Ind. 528, 31 Am. St. Rep. 443, 31 N. E. 187; *Evansville & T. H. R. Co. v. Holcomb*, 9 Ind. App. 198, 36 N. E. 39; *Michael v. Roanoke Mach. Works*, 90 Va. 492, 44 Am. St. Rep. 927, 19 S. E. 261.

The master must respond for his representative's failure to give the signal to stop the loaded car when the men stepped in behind the empty car to push.

Island Coal Co. v. Swaggerty, 159 Ind. 664, 62 N. E. 1103, 65 N. E. 1026; *Indiana Car Co. v. Parker*, 100 Ind. 181; *Taylor v. Evansville & T. H. R. Co.* 121 Ind. 126, 6 L. R. A. 584, 16 Am. St. Rep. 372, 22 N. E. 876; *Louisville, N. A. & C. R. Co. v. Graham*, 124 Ind. 89, 24 N. E. 668; *Nall v. Louisville, N. A. & C. R. Co.* 129 Ind. 260, 28 N. E. 183, 611; *Louisville, E. & St. L. Consol. R. Co. v. Hanning*, 131 Ind. 528, 31 Am. St. Rep. 443, 31 N. E. 187; *Evansville & T. H. R. Co. v. Holcomb*, 9 Ind. App. 198, 36 N. E. 39; *G. H. Hammond Co. v. Mason*, 12 Ind. App. 469, 40 N. E. 642; *Lebanon v. McCoy*, 12 Ind. App. 500, 40 N. E. 700; *Southern Indiana R. Co. v. Harrell* (Ind. App.) 66 N. E. 1016; *McElligott v. Randolph*, 61 Conn. 157, 29 Am. St. Rep. 181, 22 Atl. 1094; *Gerrish v. New Haven Ice Co.* 63 Conn. 9, 27 Atl. 236; *Chicago, I.*

& *L. R. Co. v. Martin*, 31 Ind. App. 308, 65 N. E. 591; *Michael v. Roanoke Mach. Works*, 90 Va. 492, 44 Am. St. Rep. 927, 19 S. E. 261.

The master must respond herein because he absolutely failed to take any precaution whatever to keep the plaintiff's working place safe after he had specifically ordered him to do this particular work at this particular place.

Taylor v. Evansville & T. H. R. Co. 121 Ind. 124, 6 L. R. A. 584, 16 Am. St. Rep. 372, 22 N. E. 876; *Nall v. Louisville, N. A. & C. R. Co.* 129 Ind. 260, 28 N. E. 183, 611.

In ordering the appellant to work at this particular place, Haines was performing the master's duty.

Lebanon v. McCoy, 12 Ind. App. 500, 40 N. E. 700; *Noblesville Foundry & Mach. Co. v. Yeaman*, 3 Ind. App. 521, 30 N. E. 10; *Taylor v. Evansville & T. H. R. Co.* 121 Ind. 124, 6 L. R. A. 584, 16 Am. St. Rep. 372, 22 N. E. 876; *McMahon v. Ida Min. Co.* 95 Wis. 308, 60 Am. St. Rep. 117, 70 N. W. 478; *Miller v. Missouri P. R. Co.* 109 Mo. 350, 32 Am. St. Rep. 673, 19 S. W. 58; *Schrader v. Chicago & A. R. Co.* 108 Mo. 322, 18 L. R. A. 827, 18 S. W. 1094; *Carlson v. Northwestern Teleph. Exch. Co.* 63 Minn. 423, 65 N. W. 915; *Shearm. & Redf.* Neg. last ed. §§ 204-233.

Having ordered plaintiff to do this particular work at this particular place, defendant had no right, by his negligence, to make the place unsafe and dangerous for the work, and the hazard of his master's negligence, of which he was ignorant, cannot be imposed upon plaintiff.

Taylor v. Evansville & T. H. R. Co. 121 Ind. 124, 6 L. R. A. 584, 16 Am. St. Rep. 372, 22 N. E. 876; *Louisville, N. A. & C. R. Co. v. Graham*, 124 Ind. 89, 24 N. E. 668; *Nall v. Louisville, N. A. & C. R. Co.* 129 Ind. 260, 28 N. E. 183, 611; *Louisville, E. & St. L. Consol. R. Co. v. Hanning*, 131 Ind. 528, 31 Am. St. Rep. 443, 31 N. E. 187; *Evansville & T. H. R. Co. v. Holcomb*, 9 Ind. App. 198, 36 N. E. 39; *G. H. Hammond Co. v. Mason*, 12 Ind. App. 469, 40 N. E. 642; *Noblesville Foundry & Mach. Co. v. Yeaman*, 3 Ind. App. 521, 30 N. E. 10; *Lebanon v. McCoy*, 12 Ind. App. 500, 40 N. E. 700; *Island Coal Co. v. Swaggerty*, 159 Ind. 664, 62 N. E. 1103, 65 N. E. 1026; *Gould Steel Co. v. Richards*, 30 Ind. App. 348, 66 N. E. 68; *Southern Indiana R. Co. v. Harrell* (Ind. App.) 66 N. E. 1016; *Herdler v. Buck's Stove & Range Co.* 136 Mo. 3, 37 S. W. 115; *Michael v. Roanoke Mach. Works*, 90 Va. 492, 44 Am. St. Rep. 927, 19 S. E. 261; *McMahon v. Ida Min. Co.* 95 Wis. 308, 60 Am. St. Rep. 117, 70 N. W. 478; *Miller v. Missouri P. R. Co.* 109 Mo. 350, 32 Am. St. Rep. 673, 19 S. W. 58; 69 L. R. A.

Gerrish v. New Haven Ice Co. 63 Conn. 9, 27 Atl. 235; *Schrader v. Chicago & A. R. Co.* 108 Mo. 322, 18 L. R. A. 827, 18 S. W. 1094; *Carlson v. Northwestern Teleph. Exch. Co.* 63 Minn. 428, 65 N. W. 914; *Rahman v. Minnesota & N. W. R. Co.* 43 Minn. 42, 44 N. W. 522; *Hannibal & St. J. R. Co. v. Fox*, 31 Kan. 586, 3 Pac. 320.

A servant who was obeying a specific order of his superior in charge "had the right to assume, in the absence of warning or notice to the contrary, that in conforming to the order he would not be subjected to injury."

Republic Iron & Steel Co. v. Berkes, 162 Ind. 517, 70 N. E. 815.

Messrs. Elmer E. Stevenson and Edward H. Knight, for appellee:

The appellant and E. A. Haines, the foreman whose negligence is complained of, are shown by the evidence to have been engaged in the performance of a common service for the master at the time of the accident to appellant, and they were therefore fellow servants.

Smallwood v. Bedford Quarries Co. 28 Ind. App. 692, 63 N. E. 869; *Standard Cement Co. v. Minor*, 27 Ind. App. 479, 61 N. E. 684; *Salem Stone & Lime Co. v. Chastain*, 9 Ind. App. 453, 36 N. E. 910; *Peirce v. Oliver*, 18 Ind. App. 87, 47 N. E. 485; *American Teleph. & Teleg. Co. v. Bower*, 20 Ind. App. 32, 49 N. E. 182; *Kerner v. Baltimore & O. S. W. R. Co.* 149 Ind. 21, 48 N. E. 364; *Ross v. Union Cement & Lime Co.* 25 Ind. App. 463, 58 N. E. 500; *Southern Indiana R. Co. v. Martin*, 160 Ind. 280, 66 N. E. 886; *Brazil & O. Coal Co. v. Cain*, 98 Ind. 282; *Louisville, N. A. & C. R. Co. v. Ison*, 10 Ind. App. 691, 38 N. E. 423; *Indianapolis & St. L. R. Co. v. Johnson*, 102 Ind. 352, 26 N. E. 200; *Capper v. Louisville, E. & St. L. R. Co.* 103 Ind. 305, 2 N. E. 749; *Conley v. Portland*, 78 Me. 217, 3 Atl. 658; *Reese v. Biddle*, 112 Pa. 72, 3 Atl. 813; *McLaughlin v. Camden Iron Works*, 60 N. J. L. 557, 38 Atl. 677; *Morgridge v. Providence Teleph. Co.* 20 R. I. 386, 78 Am. St. Rep. 879, 39 Atl. 328; *Kelly v. Hogan*, 37 Misc. 761, 76 N. Y. Supp. 913; *New Pittsburgh Coal & Coke Co. v. Peterson*, 14 Ind. App. 634, 43 N. E. 270, 136 Ind. 398, 43 Am. St. Rep. 327, 35 N. E. 7; *Elliott, Railroads*, § 222; *Brothers v. Carter*, 52 Mo. 373, 14 Am. Rep. 424; *McDermott v. Boston*, 133 Mass. 349; *Perigo v. Indianapolis Brewing Co.* 21 Ind. App. 338, 52 N. E. 462; *Cincinnati, H. & D. R. Co. v. Voght*, 28 Ind. App. 665, 60 N. E. 797; *Maher v. Thropp*, 59 N. J. L. 186, 35 Atl. 1057; *Fraker v. St. Paul, M. & M. R. Co.* 32 Minn. 54, 19 N. W. 349; *Justice v. Pennsylvania Co.* 130 Ind. 321, 30 N. E. 303; *Houser v. Chicago, R. I. & P. R. Co.*

60 Iowa, 230, 46 Am. Rep. 65, 14 N. W. 778; *Taylor v. Evansville & T. H. R. Co.* 121 Ind. 124, 6 L. R. A. 584, 16 Am. St. Rep. 372, 22 N. E. 876; *Northern P. R. Co. v. Peterson*, 162 U. S. 346, 40 L. ed. 994, 16 Sup. Ct. Rep. 843.

A foreman is a fellow servant of those working with him; and for the foreman's negligence in the discharge of those duties owing by him to the master, resulting in injury to a servant working with such foreman, the master is not liable.

Indiana Car Co. v. Parker, 100 Ind. 181; *New Pittsburgh Coal & Coke Co. v. Peterson*, 136 Ind. 398, 43 Am. St. Rep. 327, 35 N. E. 7; *Salem Stone & Lime Co. v. Chastain*, 9 Ind. App. 453, 36 N. E. 910; *Southern Indiana R. Co. v. Martin*, 160 Ind. 280, 66 N. E. 886; *Brazil & C. Coal Co. v. Cain*, 98 Ind. 282; *Crispin v. Babbitt*, 81 N. Y. 516, 37 Am. Rep. 521.

The test to determine whether an employee is a vice principal or a fellow servant is not his title or rank, or power to employ or discharge, but the nature of the service that is being performed at the time of the accident.

Peirce v. Oliver, 18 Ind. App. 87, 47 N. E. 485; *Robertson v. Chicago & E. R. Co.* 146 Ind. 486, 45 N. E. 655; *Justice v. Pennsylvania Co.* 130 Ind. 321, 30 N. E. 303; *Ross v. Union Cement & Lime Co.* 25 Ind. App. 463, 58 N. E. 500; *Perigo v. Indianapolis Brewing Co.* 21 Ind. App. 338, 52 N. E. 462.

If there was any negligence on the part of Haines in failing to warn the appellant, it was the negligence of a fellow servant.

New Pittsburgh Coal & Coke Co. v. Peterson, 14 Ind. App. 634, 43 N. E. 270; *Cole Bros. v. Wood*, 11 Ind. App. 37, 36 N. E. 1074; *Kerner v. Baltimore & O. S. W. R. Co.* 149 Ind. 21, 48 N. E. 364; *Klochinski v. Shores Lumber Co.* 93 Wis. 417, 67 N. W. 934.

When the master has furnished appliances reasonably safe and fitted for the purposes intended, and exercised reasonable care to so keep them, he is not liable to a servant injured by reason of the negligent, unskilful, or improper use thereof by other servants, even if the latter be superior in rank to the injured servant. The proper use of such implements is a duty owing to the master from all his servants.

12 Am. & Eng. Enc. Law, 2d ed. pp. 953, 954; *Kerner v. Baltimore & O. S. W. R. Co.* 149 Ind. 21, 48 N. E. 364; *Hoosier Stone Co. v. McCain*, 133 Ind. 231, 31 N. E. 956; *Drinkout v. Eagle Mach. Works*. 90 Ind. 423; *McKinnon v. Norcross*, 148 Mass. 533, 3 L. R. A. 320, 20 N. E. 183; *McDermott v. Boston*, 133 Mass. 349; *O'Brien v. American Dredging Co.* 53 N. J. L. 291, 21 69 L. R. A.

Atl. 324; *McGinty v. Athol Reservoir Co.* 155 Mass. 183, 29 N. E. 510; *Lothrop v. Fitchburg R. Co.* 150 Mass. 423, 23 N. E. 227; *Howard v. Hood*, 155 Mass. 391, 29 N. E. 630; *Johnson v. Boston Tow-Boat Co.* 135 Mass. 209, 46 Am. Rep. 458; *O'Keefe v. Brownell*, 156 Mass. 131, 30 N. E. 479; *Columbus & I. C. R. Co. v. Arnold*, 31 Ind. 174, 99 Am. Dec. 615; *Neutz v. Jackson Hill Coal & Coke Co.* 139 Ind. 411, 38 N. E. 324, 39 N. E. 147; *Robertson v. Chicago & E. R. Co.* 146 Ind. 486, 45 N. E. 655; *Southern Indiana R. Co. v. Martin*, 160 Ind. 280, 66 N. E. 886; *Ross v. Union Cement & Lime Co.* 25 Ind. App. 463, 58 N. E. 500; *Meehan v. Speirs Mfg. Co.* 172 Mass. 375, 52 N. E. 518; *Peirce v. Oliver*, 18 Ind. App. 87, 47 N. E. 485; *Chicago, B. & Q. R. Co. v. Abend*, 7 Ill. App. 130.

A master is not chargeable with negligence on account of a place for work made dangerous alone by the carelessness and neglect of fellow servants, or for the negligent manner in which they use the tools or materials furnished to them for their work.

Hussey v. Coger, 112 N. Y. 614, 3 L. R. A. 559, 8 Am. St. Rep. 787, 20 N. E. 556; 12 Am. & Eng. Enc. Law, 2d ed. pp. 953, 954; *Kerner v. Baltimore & O. S. W. R. Co.* 149 Ind. 21, 48 N. E. 364; *Robertson v. Chicago & E. R. Co.* 146 Ind. 486, 45 N. E. 655; *Meehan v. Speirs Mfg. Co.* 172 Mass. 375, 52 N. E. 518; *Hermann v. Port Blakely Mill Co.* 71 Fed. 853.

A master is not required to be present at all times superintending the work, but the details of the work and the manner of its execution must usually be intrusted to workmen, for whose negligence in the performance of such details of the work the master is not liable to other servants.

Kerner v. Baltimore & O. S. W. R. Co. 149 Ind. 21, 48 N. E. 364; *Southern Indiana R. Co. v. Martin*, 160 Ind. 280, 66 N. E. 886; *Hussey v. Coger*, 112 N. Y. 614, 3 L. R. A. 559, 8 Am. St. Rep. 787, 20 N. E. 556; *O'Brien v. American Dredging Co.* 53 N. J. L. 291, 21 Atl. 324; *Cullen v. Norton*, 126 N. Y. 1, 26 N. E. 905; *Central R. Co. v. Keegan*, 160 U. S. 259, 40 L. ed. 418, 16 Sup. Ct. Rep. 269; *Potter v. New York C. & H. R. Co.* 136 N. Y. 77, 32 N. E. 603.

Where one servant is injured by the negligence of his fellow servant, the duties of both being such as to bring them into habitual association, as in this case, so that they may exercise a mutual influence upon each other, promotive of proper caution, and the master is not guilty of any negligence in employing the servant causing the injury, the master is not liable.

Bier v. Jeffersonville, M. & I. R. Co. 132 Ind. 78, 31 N. E. 471; *Chicago & E. I. R. Co. v. Kneirim*, 152 Ill. 458, 43 Am. St.

Rep. 259, 39 N. E. 324; *Chicago & N. W. R. Co. v. Moranda*, 93 Ill. 302, 34 Am. Rep. 168; *Chicago & A. R. Co. v. O'Bryan*, 15 Ill. App. 134; *Indiana Car Co. v. Parker*, 100 Ind. 181.

An employee assumes, not only the ordinary dangers of his employment which are known to him, but also such as, by the exercise of ordinary diligence, could have been known to him.

Bailey, Master's Liability for Injuries to Servant, pp. 162 *et seq.*; *Pennsylvania Co. v. Ebaugh*, 152 Ind. 531, 53 N. E. 763; *Chicago & E. R. Co. v. Wagner*, 17 Ind. App. 22, 45 N. E. 76, 1121; *Russell v. Tiltonson*, 140 Mass. 201, 4 N. E. 231; *Corning Steel Co. v. Pohlplatz*, 29 Ind. App. 250, 64 N. E. 476; *Romona Oolitic Stone Co. v. Tate*, 12 Ind. App. 57, 37 N. E. 1065, 39 N. E. 529; *Diamond Plate Glass Co. v. De Hority*, 143 Ind. 381, 40 N. E. 681; *Chicago, I. & L. R. Co. v. Glover*, 154 Ind. 584, 57 N. E. 244; *Kentucky & I. Bridge Co. v. Eastman*, 7 Ind. App. 514, 34 N. E. 835; *Linton Coal & Min. Co. v. Persons*, 15 Ind. App. 69, 43 N. E. 651; *Day v. Cleveland, C. C. & St. L. R. Co.* 137 Ind. 206, 36 N. E. 854; *Stuart v. New Albany Mfg. Co.* 15 Ind. App. 184, 43 N. E. 961.

If a servant with knowledge of existing conditions, or the means of obtaining such knowledge, without objection adopts the more dangerous method of doing the work, because it is convenient, the risk is his own.

Wabash Paper Co. v. Webb, 146 Ind. 303, 45 N. E. 474; *St. Louis Bolt & Iron Co. v. Brennan*, 20 Ill. App. 555; *St. Louis Bolt & Iron Co. v. Burke*, 12 Ill. App. 369; Bailey, Personal Injuries Relating to Master & Servant, §§ 1121-1150; Beach, Contrib. Neg. 3d ed. § 299, note, p. 242; Elliott, Railroads, § 1313; *Consolidated Stone Co. v. Redmon*, 23 Ind. App. 319, 55 N. E. 454; *Erskine v. Chino Valley Beet-Sugar Co.* 71 Fed. 270.

When a servant knows facts from which he can, as well as the master, determine the probability of danger, he assumes the risk, even though he may not know of the actual danger.

McFahan v. Indianapolis Natural Gas Co. 140 Ind. 335, 29 L. R. A. 355, 49 Am. St. Rep. 199, 37 N. E. 601; *Hines v. Willcox*, 96 Tenn. 148, 34 L. R. A. 824, 54 Am. St. Rep. 823, 33 S. W. 914; *Mitchell v. Stewart*, 187 Pa. 217, 40 Atl. 799; *Kibele v. Philadelphia*, 105 Pa. 41.

The master is not bound to furnish implements of the best or most approved pattern, or of any particular design.

Jacobson v. Cornelius, 52 Hun, 377, 5 N. Y. Supp. 306; *Harley v. Buffalo Car Mfg. Co.* 142 N. Y. 31, 36 N. E. 813; *Lake Shore & M. S. R. Co. v. McCormick*, 74 Ind. 440, 69 L. R. A.

Where an accident is unusual, and could not have been reasonably anticipated by a master in the light of long experience, there can be no culpable negligence upon his part, and a verdict for the plaintiff cannot stand.

Wabash, St. L. & P. R. Co. v. Locke, 112 Ind. 404, 2 Am. St. Rep. 193, 14 N. E. 391; *Standard Oil Co. v. Helmick*, 148 Ind. 457, 47 N. E. 14; *Consolidated Stone Co. v. Redmon*, 23 Ind. App. 319, 55 N. E. 454; *Craven v. Mayers*, 165 Mass. 271, 42 N. E. 1131; *Kitteringham v. Sioux City & P. R. Co.* 62 Iowa, 285, 17 N. W. 585; *Evansville & T. H. R. Co. v. Krapp*, 143 Ind. 647, 36 N. E. 901; *Gassaway v. Georgia Southern R. Co.* 69 Ga. 347; *Sjogren v. Hall*, 53 Mich. 274, 18 N. W. 812; *Loftus v. Union Ferry Co.* 84 N. Y. 455, 38 Am. Rep. 533; *McGrell v. Buffalo Office Bldg. Co.* 153 N. Y. 265, 47 N. E. 305; *Del Sejnore v. Hallinan*, 153 N. Y. 274, 47 N. E. 308; *Ayers v. Rochester R. Co.* 156 N. Y. 104, 50 N. E. 960; *Baxter v. Chicago & N. W. R. Co.* 104 Wis. 307, 80 N. W. 644; *Deisenrieter v. Kraus-Merkel Malting Co.* 97 Wis. 279, 72 N. W. 735; *Wilber v. Follansbee*, 97 Wis. 577, 72 N. W. 741, 73 N. W. 559.

Gillett, J., delivered the opinion of the court:

Appellant instituted this action to recover for an injury to his person alleged to have been caused by the negligence of appellee. It is unnecessary to make any particular statement of the issues. Upon the close of the evidence introduced on behalf of the defense, the court instructed the jury to return a verdict in favor of appellee. The record presents the question as to the propriety of this action upon the part of the court.

There is a question in the case as to whether a certain appliance was defective, but, laying this matter aside for the present, it may be said that, after giving appellant the benefit of all disputed questions upon the evidence, the following facts are shown by the bill of exceptions: On July 4, 1900, appellee was, and for some time prior thereto had been, operating a flour mill, and an elevator in connection therewith, at Noblesville, Indiana. Appellee did not give the business his personal attention. One Anderson was the general manager thereof, and the evidence shows that he occasionally gave directions to the workmen. Under him was one Haines, who had charge of the loading, weighing, and handling of cars used by appellee, as well as of the exchange business in connection with the mill. So far as shown, he had but three or four men under him. Appellant was employed by Anderson about the middle of May, 1900. He was told that he would be subject to the instructions

of Haines. Appellant worked under Haines in loading cars, and in moving them on a siding used in connection with the plant; but, when there was no work of that kind to do he was given general, or, as he describes it, "roustabout," work upon the premises. The mill was about 150 feet north of the elevator. The siding was on the east side of the mill and of the elevator, and when cars were loaded at the mill they were pulled down to or just beyond a track scale which was in front of the latter building. From one to three cars were handled per day. The men would sometimes push an empty car between the two points, but the method of taking a loaded car from the mill to the elevator was by means of an appliance in the elevator known as a "car puller." The power was transmitted from this appliance to the car by means of a rope. The car puller would draw the car at the rate of 45 feet per minute. The rope passed out of the elevator through a window which was so situated that, by attaching the rope to the rear truck of the car, it could be pulled until the rear end of it was just south of the scale. Anderson had explained to appellant at different times that it was necessary for a man to stand in the window to signal the man in charge of the car puller when to shut off the power. Haines ordinarily did this, but he frequently designated some one of the men to do it. On quite a number of occasions appellant had done this. A short distance south of the scales two tracks came into the siding,—one from the Lake Erie & Western Railroad, and the other from the Chicago & Southeastern Railroad. Appellant had helped to push cars between the mill and the elevator, and had assisted in pulling cars onto the intersecting tracks to the south. Haines ordinarily worked with his men. He possessed no power to hire or discharge them. Appellant was forty-two years old, and had had a reasonable amount of general experience about machinery. He admits that he was thoroughly familiar with the surroundings outside the mill and elevator. During the night of July 3, 1900, two cars were pushed into the siding by the Lake Erie & Western for appellee's use. The next morning the north car was loaded at the mill. The other car stood partially on the scale, but the greater part of it was to the south thereof. It was necessary to pull the loaded car down to the scale to weigh it, and then to get the empty car to the north. Haines, appellant, and another man started to do this work. The rope was fastened to the rear truck of the loaded car, and Haines stood at the window to stop the car when it stood upon the scale. It seems to have been appellant's expectation, since it was the practice, that a

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chock would be put under one of the wheels when the car reached the proper position. Haines said to the two men, as the car was approaching: "When that loaded car comes down and bumps that empty car, you keep it going down the switch." Appellant testified that his understanding of the order was that when the two cars got far enough apart so that they could get in between them, and before the empty car had lost its momentum, they were to get in and push. The two men undertook to do so, and, as appellant was pushing, he slipped, and one of his feet was caught by the flange of a wheel of the loaded car. Both appellant and his associate cried out. Their cries were heard by a man inside, but the car continued to move for a minute or a minute and a half, during which time appellant's foot slipped along the rail for a little distance, but the outcome of it was that his foot was crushed. Appellant did not look back after stepping between the cars. He supposed that the loaded car would be stopped. He had never been called on before to help push a car that had been started by a car behind it.

Assuming that Haines was guilty of negligence in giving the order, and in failing to signal to stop the car puller the moment that he was apprised that appellant's foot was caught, it is to be determined whether Haines occupied such a relation to the work that appellee should be held responsible for the consequences which ensued. If there is any liability in this case, it must be placed on a common-law ground, since appellee is an individual.

The extreme doctrine concerning who are fellow servants, which was declared in *Columbus & I. C. R. Co. v. Arnold*, 31 Ind. 174, 99 Am. Dec. 615, is no longer the law of this state. There have been innovations upon the doctrine as declared in that case, in the direction of a more liberal rule in favor of injured employees, but not to the extent of permitting a recovery on the grounds suggested. Appellant's counsel cite upon this branch of the case the following authorities: *Indiana Car Co. v. Parker*, 100 Ind. 181; *Taylor v. Evansville & T. H. R. Co.*, 121 Ind. 124, 6 L. R. A. 584, 16 Am. St. Rep. 372, 22 N. E. 876; *Nall v. Louisville, N. A. & C. R. Co.*, 129 Ind. 260, 28 N. E. 183, 611; *Louisville, E. & St. L. Consol. R. Co. v. Hanning*, 131 Ind. 528, 31 Am. St. Rep. 443, 31 N. E. 187; *Hoosier Stone Co. v. McCain*, 133 Ind. 231, 31 N. E. 956; *Island Coal Co. v. Swaggerty*, 159 Ind. 684, 62 N. E. 1103, 65 N. E. 1026. *Indiana Car Co. v. Parker*, 100 Ind. 181, was a case where a duty of the master was neglected, in failing to furnish a safe place to work. It is therein very clearly pointed out that, as respects those duties which the master

owes to the servant, they cannot be delegated, and that therefore the omission of the servant to whom their performance is intrusted is necessarily the omission of the master. The case, however, gives no recognition to the view that rank or superiority in service upon the part of a commanding servant is a controlling factor in the solution of the question as to liability. On the contrary, it was said: "The rules which these decisions so firmly establish as the law of this state may be thus stated: First. The master is not liable to a servant for injuries resulting from the negligence of a fellow servant engaged in the same general line of duty, where the negligent act is performed in the capacity of a servant. Second. Servants engaged in the same general line of duty are fellow servants, although one may be a superior, and the others may be subordinate servants, under his immediate direction and control." In *Taylor v. Evansville & T. H. R. Co.* 121 Ind. 124, 6 L. R. A. 584, 16 Am. St. Rep. 372, 22 N. E. 876, it was held that the company was liable to a servant who was injured, while acting under a special order of the master mechanic, owing to a negligent act done by the latter. The case does not rest upon the theory that the master mechanic occupied a position analogous to that of a foreman, but on the proposition that, in view of the full authority which he had over the men, machinery, and work, he stood for the master in the particular circumstances. The following extract from the opinion will sufficiently show the effect of the decision: "We do not affirm that an employee with authority to command may not be a fellow servant. On the contrary, we hold that one having authority to command may still be a fellow servant; but we hold also, that, where the position is such as to invest the employee with sole charge of a branch or department of the employer's business, the employee, as to that branch or department, may be deemed a vice principal while engaged in giving orders or directing their execution." In *Nall v. Louisville, N. A. & C. R. Co.* 129 Ind. 260, 28 N. E. 183, 611, a servant was called out, with a large force of men, to save a bridge which a freshet threatened with destruction. While laboring in the waters, as he was directed to do by an employee who had solely been intrusted with the work of endeavoring to save the bridge, the servant was killed by reason of a negligent order given by the man in charge of the work as to the movement of a locomotive. It was held that the master was liable. In the opinion of the petition for a rehearing, it was said: "One who is placed in charge of a force of men engaged in any of those occupations, whose duties

are limited to carrying on the work or directing it, whether actively assisting therein or not, and who is invested with no authority, or charged with no duty, in furnishing places or appliances for the work, or in the employment or retention of employees, is himself usually a mere coemployee. His duties require him to use, or superintend and direct the using of, places and appliances, and to control employees furnished by the master. If, however, he is given additional authority, and is charged with the duty of furnishing places to work, and appliances for the work, and is authorized to employ and discharge operatives, he is, as to such things, not a coemployee, but speaks and acts as the master. One who is placed in unrestricted control of a given department by his master, and is clothed with the power to command the services of the other employees, not simply to see that they faithfully discharge the duties ordinarily pertaining to their employment, and in the usual places, with the usual appliances provided therefor, but has authority to require of them the performance of other duties in other places and with other appliances,—who has the authority to call the sectionmen, the bridge builders, the freight handlers, and the laborers from the gravel pit and gravel train, and require of all that they unite in averting the threatened destruction of a bridge,—is certainly in such matters more than a mere fellow servant with those thus subject to his control." In *Louisville, E. & St. L. Consol. R. Co. v. Hanning.* 131 Ind. 528, 31 Am. St. Rep. 443, 31 N. E. 187, it was held that the railroad company was liable where a servant was killed while engaged in the repair of a car on a track used for switching; it appearing that the servant was called from his regular work, and had engaged in the repair of the car at the special command of the general foreman of the company's repair shops, and that such foreman had neglected to put out flags, as it was alleged that it was his duty to do, and as decedent supposed had been done. In *Hoosier Stone Co. v. McCain.* 133 Ind. 231, 31 N. E. 956, the facts were that, while two cars were being loaded with stone they started, and, running down a grade, caused the death of a servant who was unloading coal from a car which was standing further down the track. The superintendent was present, and had directed the loading of the cars above, and the jury found that there was nothing to prevent him from seeing that the cars were not sufficiently stationed. In deciding the case, this court said: "It sufficiently appears, upon a fair and reasonable construction of the facts stated, that the superintendent represented the corporation of

which appellee's intestate was an employee. He was placed in charge of the quarry and the connected business, and, in conducting and controlling the quarry and the connected business, he was, in law and in fact, occupying the position of a master, and not that of a mere fellow servant. If he represented the master, his negligence, if he was guilty of negligence, was that of the employer."

Although it is not cited by counsel for appellant, we call attention, in passing, to the case of *Louisville, N. A. & C. R. Co. v. Heck*, 151 Ind. 292, 50 N. E. 988. It was there held that the railroad company was liable for the negligence of a train despatcher in sending an improper order; it appearing that he was authorized to send orders in the name of the division superintendent, and had done so in the instance in question. The ruling was based on the ground that the despatcher was authorized to act for one who was a vice principal, and on the further ground that the master's business was of such a character that superintendence upon its part was necessary in the operation of its trains.

The case of *Island Coal Co. v. Swaggerty*, 159 Ind. 664, 62 N. E. 1103, 65 N. E. 1026, may be said, in a general way, to belong to that class of cases to which *Taylor v. Evansville & T. H. R. Co.* 121 Ind. 124, 6 L. R. A. 584, 16 Am. St. Rep. 372, 22 N. E. 876; *Nall v. Louisville, N. A. & C. R. Co.* 129 Ind. 260, 28 N. E. 183, 611; *Louisville, E. & St. L. Consol. R. Co. v. Hanning*, 131 Ind. 528, 31 Am. St. Rep. 443, 31 N. E. 187, and *Hoosier Stone Co. v. McCain*, 133 Ind. 231, 31 N. E. 956, belong. It was a case where a servant was injured who had gone into a dangerous place pursuant to the special command of the master's sole representative below ground, and where the latter had been guilty of negligence in failing to stop the descent of an elevator.

Notwithstanding the view which this court has sanctioned as to the liability of the master to a servant for the negligence of an employee who is over the whole service, or over a large department of it, yet it has never given any recognition to what is termed the "superior servant doctrine." On the contrary, it has always maintained that the master was not liable for the act of a mere foreman in giving directions concerning the work to a servant working under him, where the place and appliances furnished by the master were proper. *Indiana Car Co. v. Parker*, 100 Ind. 181, and cases cited; *Indianapolis & St. L. R. Co. v. Johnson*, 102 Ind. 352, 26 N. E. 200; *Pittsburgh C. & St. L. R. Co. v. Adams*, 105 Ind. 151, 5 N. E. 187; *Justice v. Pennsylvania Co.* 130 69 L. R. A.

Ind. 321, 30 N. E. 303; *New Pittsburgh Coal & Coke Co. v. Peterson*, 136 Ind. 398, 43 Am. St. Rep. 327, 35 N. E. 7; *Bedford Belt R. Co. v. Brown*, 142 Ind. 659, 42 N. E. 359; *Robertson v. Chicago & E. R. Co.* 146 Ind. 486, 45 N. E. 655; *Kerner v. Baltimore & O. S. W. R. Co.* 149 Ind. 21, 48 N. E. 364; *Hodges v. Standard Wheel Co.* 152 Ind. 680, 52 N. E. 391, 54 N. E. 383; *Island Coal Co. v. Swaggerty*, 159 Ind. 664, 62 N. E. 1103, 65 N. E. 1026; *Southern Indiana R. Co. v. Martin*, 160 Ind. 280, 66 N. E. 886; *Southern Indiana R. Co. v. Harrell*, 161 Ind. 689, 63 L. R. A. 460, 68 N. E. 262. In the case last cited it was pointed out that the master's duty relative to furnishing a safe place to work does not require, in undertakings which may properly be intrusted to a foreman and the men under him, that the master shall guard the men against those transient dangers which from time to time occur in the progress of the work. In *Southern Indiana R. Co. v. Martin*, 160 Ind. 280, 66 N. E. 886, it was said: "The train and every appliance that the appellant had furnished may be presumed to have been proper, and it may be presumed that it had no notice that Mathieu was not a proper man to intrust with the duty of acting as foreman in the performance of the particular work. The whole matter was one of detail, that the foreman and the men might properly be permitted to attend to in their own way." While it may be that a different rule applies where the master or—what amounts to the same thing—his personal representative is present and is guilty of negligence: and, while we admit that a master's business may be so complicated and dangerous that the very carrying on of some department of it may require the master's superintendence, in addition to his ordinary duties,—yet, as applied to those classes of work which may properly be left to the direction of a foreman, we cannot, in view of principles, and of the constant iteration and reiteration in our cases that superiority in rank or authority to direct does not *per se* make a servant a vice principal, consent to the proposition that the master is liable for the negligence of the foreman in directing the work, where the master has otherwise performed his duty.

In the course of an article written by Judge Cooley in 2 Southern Law Rev. N. S. 114, 124, it was stated: "It has been seen that the superior position of the negligent servant, as that of a foreman, conductor, etc., is not regarded as affecting the case. But a foreman is not necessarily or usually, perhaps, intrusted with any large share of the master's discretionary authority. Neither is the conductor of a train of cars, except as to the particular duty of taking it

safely to its destination. His duty may be, and probably is, less responsible than that of the telegraph operator who directs his movements and those of others in charge of trains on the line; and, if the conductor is to be regarded as principal for some purposes, so should the operator be for others. But this would suggest questions and distinctions that could only be confusing, and would preclude the possibility of any settled rule whatsoever. It would seem that the law could go no further than to hold the corporation liable for the acts and neglects of the officer exercising the powers and authority of general superintendent; but that for these it ought to respond to its servants as for its own acts or neglects. But this in no way affects the general rule which requires of any employer, whether corporate or not, to employ suitable servants, and to make use of safe tools, machinery, etc., or at least to take care that there is no negligence in procuring them."

The opinion of the Supreme Court of the United States concerning the superior servant doctrine, at least in recent years, is shown by the following quotation from the opinion in *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368, 389, 37 L. ed. 772, 782, 13 Sup. Ct. Rep. 914, 922: "It may be safely said that this court has never recognized the proposition that the mere control of one servant over another in doing a particular piece of work destroys the relation of fellow servants, and puts an end to the master's liability [sic]. On the contrary, all the cases proceed on the ground of some breach of positive duty resting upon the master, or upon the idea of superintendence or control of a department. It has ever been affirmed that the employee assumes the ordinary risks incident to the service; and, as we have seen, it is as obvious that there is risk from the negligence of one in immediate control as from one simply a coworker." In *Northern P. R. Co. v. Hambly*, 154 U. S. 349, 38 L. ed. 1009, 14 Sup. Ct. Rep. 983, it was said: "To hold the principal liable whenever there are gradations of rank between the persons receiving and the persons causing the injury, or whenever they are employed in different departments of the same general service, would result in frittering away the whole doctrine of fellow service. . . . In a large majority of cases there is some distinction either in respect to grade of service, or in the nature of their employments. Courts, however, have been reluctant to recognize these distinctions unless the superiority of the person causing the injury was such as to put him rather in the category of principal than of agent,—as, for example, the superintendent of a factory or railway,—and the employments were so far different that, 69 L. R. A.

although paid by the same master, the two servants were brought no farther in contact with each other than as if they had been employed by different principals."

An illustrative case upon the subject in hand is *Northern P. R. Co. v. Peterson*, 162 U. S. 346, 40 L. ed. 994, 16 Sup. Ct. Rep. 843, where it was said: "This boss of a small gang of ten or fifteen men, engaged in making repairs upon the road wherever they might be necessary, over a distance of three sections, aiding and assisting the regular gang of workmen upon each section as occasion demanded, was not such a superintendent of a separate department, nor was he in control of such a distinct branch of the work of the master, as would be necessary to render the master liable to a coemployee for his neglect. He was in fact, as well as in law, a fellow workman. He went with the gang to the place of work in the morning, stayed with them during the day, superintended their work, giving directions in regard to it, and returned home with them in the evening; acting as a part of the crew of the hand car upon which they rode. The mere fact, if it be a fact, that he did not actually handle a shovel or a pick, is an unimportant matter. When more than one man is engaged in doing any particular work, it becomes almost a necessity that one should be boss, and the other subordinate, but both are nevertheless fellow workmen."

In *Howard v. Denver & R. G. R. Co.* 26 Fed. 837, it was stated by Mr. Justice Brewer: "To make one, as the controller of a department, properly the representative of the master, his duties should be principally those of direction and control. He should have something more than the mere management of machinery. He should have subordinates over whose various actions he has supervision and control, and not a mere assistant to him in his working of machinery. He should have control over an entire department of service, and not simply of a single machine in that service. He should be so lifted up in the grade and extent of his duties as to be fairly regarded as the *alter ego*—the other self—of the master."

For a general discussion of the question as to who is a vice principal, see note to *Stevens v. Chamberlin*, 51 L. R. A. 513; note to *Mast v. Kern*, 75 Am. St. Rep. 580. See, further, on the question in hand, *Labbatt, Mast. & S. cc. 28, 29, 31, 32.*

Where groups or gangs of men are employed in the performance of work, it is, in the nature of things, impossible to bend their energies to the accomplishment of the ultimate purpose without intelligent direction upon the part of one mind. To secure this end, and in many circumstances to protect the men themselves, they must work

under a foreman. His work, although it consists in giving directions, is not only essential, but, as his commands set in motion the forces which may lead to the injury or death of those under him, there is an especial reason why the employees should consider the intelligence and prudence of the man in control. If there is any philosophy in the general rule, its purpose must be clearest in the case of a coservice of this character, since the workmen have ordinarily a better opportunity than the master to determine how much of discretion the foreman possesses. These considerations, and especially the want of opportunity upon the part of the master to supervise every command, should prompt the courts to exculpate him where there has been no negligence in the performance of a master's duty, as in negligently hiring or retaining an unfit foreman. In *Ross v. Walker*, 139 Pa. 42, 23 Am. St. Rep. 160, 21 Atl. 157, 159, it was said: "No employer could bear the burden of legal responsibility for every blunder or neglect on the part of each and all of his employees. The fact that one employee is more skillful than another, or has had greater experience, and so is deferred to by others, does not change his relation to his employer or to his fellows. Nor does a difference in rank or grade of service change the rule. When the character of the business requires it, the master is as much bound to provide his workmen with a reasonably competent foreman as to provide them with tools, but in either case his liability ceases when he has made a suitable selection." As was observed by Mr. Justice Holmes in *Kalleck v. Deering*, 161 Mass. 469, 42 Am. St. Rep. 421, 37 N. E. 450: "A command is a transitory act which the employer has no chance to supervise. It is not like a permanent condition of land or machinery, or the abiding incompetence of an employee. See *Flynn v. Campbell*, 160 Mass. 128, 35 N. E. 453. If the defendants have been guilty of no personal negligence, and the plaintiff does take the risk of the negligence of some persons with whom his work will bring him into contact, the question whether the negligence of one of those persons is within or outside the risks assumed is not a matter of names or dignities. That is too well settled to need the citation of cases. *Moody v. Hamilton Mfg. Co.* 159 Mass. 70, 38 Am. St. Rep. 396, 34 N. E. 185. The question is what he must be taken to have contemplated when he went into the employment. The chances of negligence on the part of a superior employed in the common business are as obvious as in the case of one of a lower grade, and therefore, when the duty is not personal to the employer, the same rule applies, whatever

the degree."

Giving command as to the proper manner of performing the work is not ordinarily one of those absolute, personal functions which the master alone can exercise. *Doughty v. Penobscot Log Driving Co.* 76 Me. 143; *Hofnagle v. New York C. & H. R. Co.* 55 N. Y. 608. A vice principal is one who represents the master in the discharge of those duties which the master owes to his servants. *Thacker v. Chicago, I. & L. R. Co.* 159 Ind. 82, 85, 59 L. R. A. 792, 64 N. E. 605; *Indiana Car Co. v. Parker*, 100 Ind. 181; *New Pittsburgh Coal & Coke Co. v. Peterson*, 136 Ind. 398, 43 Am. St. Rep. 327, 35 N. E. 7; *Robertson v. Chicago & E. R. Co.* 146 Ind. 486, 45 N. E. 655; *Southern Indiana R. Co. v. Martin*, 160 Ind. 280, 66 N. E. 886; *Southern Indiana R. Co. v. Harrell*, 161 Ind. 689, 63 L. R. A. 460, 68 N. E. 262.

In this case appellant was engaged in the business of loading and moving cars, and in general, or, as he termed it, "roustabout," work. His duties made him familiar with the operation of moving cars by means of the car puller, and of pushing them by hand, and he was familiarly associated with the foreman whom he charges with negligence. While it is true that appellant claims that he had never before been called on to perform a precisely similar task, yet it is clear that pushing the empty car to the south was comprehended within his general employment. The direction from the foreman to push the car before it lost the momentum which it had acquired was not such a change in his business as to authorize him to proceed at the master's risk. *Stuart v. New Albany Mfg. Co.* 15 Ind. App. 184, 43 N. E. 961. If every new situation in matter of detail were to be held to constitute a new service, the general rule would be frittered away, for an accident ordinarily grows out of a new combination of circumstances. The case, so far as the matter of discretion is concerned, is one where the place was rendered unsafe in the execution of the details of the service; and, since every place where an accident happens is at least momentarily unsafe, it cannot be said that that fact alone made it the duty of the master to be present in person or by representative to protect the servant. *Southern Indiana R. Co. v. Harrell*, 161 Ind. 689, 63 L. R. A. 460, 68 N. E. 262. Appellant, in our opinion, assumed the risk that the foreman might give a negligent command relative to the handling of cars upon the siding. But even if we were to concede that the command of Haines related to a matter so essentially new that the appellant might fairly contend that he is not debarred of a recovery under the rule. *Volenti non fit injuria*, yet it does not follow that, because he may not have assumed

the risk, he proceeded at the master's risk. A case like this is to be broadly distinguished from one where the command comes from the master or his special representative, or where the condition is of such a permanent character as to place or appliances that the master is in default in failing to warn the servant. In such cases the latter has a right to assume, at least ordinarily, that in following a special direction he will not be carried into an extraordinary and unapprehended peril. But it is nevertheless a rule of law that a servant cannot recover compensation of a master unless he can show that his injury was occasioned by the negligence of the master or of his representative. *Quincy Min. Co. v. Kitts*, 42 Mich. 34, 3 N. W. 240; *Ross v. Walker*, 139 Pa. 42, 23 Am. St. Rep. 160, 21 Atl. 157, 159, 4 Thomp. Neg. § 3758. Of course, the master may be thrown into default, notwithstanding all the care that he may have taken to perform his duties, as respects those obligations which are personal to himself; but, as applied to an employment not essentially dangerous, it does not admit of doubt that, having taken due care to furnish and maintain a proper place, sufficient appliances, and proper servants, he may intrust the carrying out of the details of the work to those servants. The very denial of the superior servant doctrine, which this court has steadily frowned on, involves the proposition that the master is not always required to be present while the ordinary duties of the employment are being carried on. In such a case it is not the master's voice which directs the servant to perform the particular act, and the employee knows that, in the nature of things, there has been no opportunity upon the part of the master to examine and consider whether the act is dangerous, so there is no basis for the assumption that the servant has undertaken the peril at the master's risk. As applied to the question in hand, we may well adopt the following language used by the supreme court of Massachusetts in *Flynn v. Campbell*, 160 Mass. 128, 35 N. E. 453: "The actual danger of the moment was due to a transitory act. Under the circumstances, the rule as to instructing inexperienced hands about the hidden dangers of their employment does not apply." It were idle to declare the rule of law to be that a master who has fully discharged every duty which belongs to him may intrust the details of the execution of a part of the business to a foreman, if we also held that whenever an accident happens from a negligent order given by the foreman the master is to be charged with a default because he did not protect the servant from the transitory peril. If it be the law that the ordinary work of an employment

not essentially dangerous may be carried on by means of a foreman who directs the servants in their work, the proposition becomes a practical matter to employers, and this assurance should not be nullified by converting the foreman into a vice principal whenever an accident happens.

We have before us a case of a foreman who worked with his men; who was not, in the sense of the law, at the head of a department, but was simply over two or three men; who was intrusted with no function which belonged to the master, but was superintending and assisting in the loading, weighing, and handling of cars; and who had a man over him. We deem it clear that the master was not liable for any negligence upon the part of his foreman, either in giving the order, or in failing to stop the car afterwards.

It remains to consider another branch of the case. It appeared without dispute that the car puller principally consisted of two drums: that, in pulling a car, the load was on the lower drum; and that the other drum was used to take up the slack. Appellant offered evidence tending to show that a finger clutch was used to throw the appliance out of gear; that it was very difficult to operate the clutch when the load was heavy, thereby occasioning serious delay in stopping cars. One witness testified that he had been compelled to pound with a heavy timber on shutting off the power, that he had complained to the general manager about the clutch a year and a half before, that it had not been changed, and that the appliance would have operated promptly if a friction clutch had been substituted. Another witness testified that he had on a number of occasions given signals at the window to the man in charge of the appliance, that it would take from half a minute to a minute to stop, and that in some instances the car would pull over the chock. Appellant testified that he did not know that there was anything wrong with the machinery. Appellee offered evidence which tended to show that the clutch was in order, and also that by raising a lever the slack could be loosened on the upper drum, with the result that the rope would no longer wind about the lower drum. He also offered evidence tending to show that Haines gave the signal to stop as soon as he heard the outcry, and that the man in charge of the appliance threw it out of gear and raised his slack lever, throwing off the power instantly. In rebuttal, appellant introduced evidence of a declaration of the man who was in charge of the power, made after the accident, to the effect that there was something wrong with the machinery, and that he was not able to stop it. The evidence in

roduced by appellant on his case in chief, while not wholly conclusive that the appliance could only be stopped by the finger clutch, tended to show, when taken in connection with the evidence offered as to the delays in stopping, that the appliance was defective. In attempting to meet this, appellee altogether relied upon the testimony of his own witnesses, all of whom were in his employ. In addition to this, it was pertinent for the jury to consider why the car did not stop for a minute or a minute and a half after the outcry was heard by a man who was in the elevator. Of course, this is giving appellant the benefit of disputed

questions, but it is our duty to do this in considering whether the trial court invaded the province of the jury in giving a peremptory instruction to find for appellee. We think that there was at least some evidence tending to show a defective condition of the machinery, and that it was error to take that theory of the case from the jury. *Diezi v. G. H. Hammond Co.* 156 Ind. 583, 60 N. E. 353.

Judgment reversed, with an instruction to grant a new trial.

Petition for rehearing denied April 18, 1905.

IOWA SUPREME COURT.

Melvina SMITH, *Appt.*,
v.

SUPREME TENT KNIGHTS OF MACCA-
BEES OF THE WORLD
and

Daniel BANTZ, Intervener, *Appellee*.

(.....Iowa.....)

1. A niece of a former wife of a man is not a relative of his child by a subsequent one, within the meaning of a statute permitting certificates of mutual benefit societies to be taken in favor of relatives.
2. Naming a person as beneficiary in a mutual benefit certificate does not make her a legatee, within the meaning of a statute permitting such certificates to be issued in favor of legatees.

(March 11, 1905.)

A PPEAL by plaintiff from a judgment of the District Court for Black Hawk County in favor of intervener in an action brought to recover the amount alleged to be due on a mutual benefit certificate. *Affirmed*.

The facts are stated in the opinion.

Messrs. Mullan & Pickett, for appellant:

The word "relative," as used in Code, § 1824, should be given a liberal construction, and include any one of those popularly called relatives.

Bennett v. Van Riper, 47 N. J. Eq. 563, 14 L. R. A. 342, 24 Am. St. Rep. 416, 22 Atl. 1055; *People's Bank v. Aetna Ins. Co.* 20 C. C. A. 630, 42 U. S. App. 81, 74 Fed. 507;

NOTE.—For a case in this series holding that a stepfather is a relative, and may be made the beneficiary in a benefit certificate, see *Simcoke v. Grand Lodge*, A. O. U. W. 15 L. R. A. 114.

As to who are relatives or relations generally, see note to *Bennett v. Van Riper*, 14 L. R. A. 342.

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Simcoke v. Grand Lodge, A. O. U. W. 84 Iowa, 383, 15 L. R. A. 114, 51 N. W. 8; *Snow v. Durgin*, 70 N. H. 121, 47 Atl. 89.

The legislature having enlarged the category of those capable of being selected as beneficiaries so as to include all persons whom the member may see fit to select as his legatees, there is no substantial rule of public policy which would be violated by the adoption of a different mode of selection of beneficiaries.

Martin v. Stubbings, 126 Ill. 387, 9 Am. St. Rep. 620, 18 N. E. 657; *Lamont v. Grand Lodge I. L. of H.* 31 Fed. 177.

A designation as beneficiary is of precisely the same effect as being named as legatee.

Lamont v. Grand Lodge I. L. of H. 31 Fed. 177.

If a member under the law can give or devise the benefits of his certificate to a stranger, he can, in the first instance, take out a policy payable to such stranger, and naming such stranger as beneficiary.

Bloomington Mut. Ben. Asso. v. Blue, 120 Ill. 121, 60 Am. Rep. 558, 11 N. E. 331; *Mitchell v. Grand Lodge I. K. H.* 70 Iowa, 360, 30 N. W. 865; *White v. Brotherhood of American Yeomen*, 124 Iowa, 293, 66 L. R. A. 164, 99 N. W. 1071.

The defendant, by paying the money into court, waived the right to question the designation of the plaintiff as beneficiary, and the intervener cannot be heard to do so.

Martin v. Stubbings, 126 Ill. 387, 9 Am. St. Rep. 620, 18 N. E. 657; *Titsworth v. Titsworth*, 40 Kan. 571, 20 Pac. 213; *Brown v. Mansur*, 64 N. H. 39, 5 Atl. 768; *Johnson v. Knights of Honor*, 53 Kan. 255, 8 L. R. A. 732, 13 S. W. 794; *Supreme Conclave, Royal Adelpia v. Cappella*, 41 Fed. 1; *Ledebuhr v. Wisconsin Trust Co.* 112 Wis. 657, 88 N. W. 607.

Messrs. Springer & Smith, for appellee:

The laws of the order and the statutes of the state enter into and become a part of the contract of insurance.

Wendt v. Iowa L. of H. 72 Iowa, 682, 34 N. W. 470.

A member has no power to designate by will one outside of the class named in the certificate.

McClure v. Johnson, 56 Iowa, 620, 10 N. W. 217.

The plaintiff herein was not related by affinity to the insured.

See title *Affinity*, in 1 Am. & Eng. Enc. Law, 2d ed. p. 911, also title *Relative*, 24 Am. & Eng. Enc. Law, 2d ed. p. 278; *Chinn v. Ohio*, 11 L. R. A. 630, note, 47 Ohio St. 575, 26 N. E. 986; *Waterhouse v. Martin*, Peck (Tenn.) 390; *Köhler v. Centennial Mut. L. Ins. Co.* 66 Iowa, 325, 23 N. W. 687.

If a beneficiary is designated who does not belong to the class of persons enumerated by statute and the laws of the order, the insurance becomes payable to those who would have been entitled to it in the absence of any designation.

Schmidt v. Northern Life Asso. 112 Iowa, 41, 51 L. R. A. 141, 84 Am. St. Rep. 323, 83 N. W. 800; *Byram v. Sovereign Camp, W.* 108 Iowa, 440, 75 Am. St. Rep. 265, 79 N. W. 144; 3 Am. & Eng. Enc. Law, 2d ed. p. 960; *Norwegian Old People's Home Soc. v. Wilson*, 176 Ill. 94, 52 N. E. 41; *Alexander v. Parker*, 144 Ill. 355, 19 L. R. A. 187, 33 N. E. 183; *Palmer v. Welch*, 132 Ill. 141, 23 N. E. 412; *Rindge v. New England Mut. Aid Soc.* 146 Mass. 286, 15 N. E. 628; *Newman v. Covenant Mut. Ins. Asso.* 76 Iowa, 56, 1 L. R. A. 659, 14 Am. St. Rep. 196, 40 N. W. 87; *Britton v. Supreme Council, R. A.* 46 N. J. Eq. 102, 19 Am. St. Rep. 376, 18 Atl. 675; *Niblack*, Ben. Soc. 2d ed. §§ 13, 136, 158, 177; Article entitled *Rights of beneficiaries erroneously or falsely described in benefit society certificates*, 57 Cent. L. J. 383.

McClain, J., delivered the opinion of the court:

The certificate was taken by one Daniel J. Bantz, benefit payable to plaintiff. On the death of the member, plaintiff brought action against defendant, and intervener, father of the deceased member, as administrator of his estate, and also as assignee of the mother of deceased, who, under the provisions of the by-laws of the association, would be entitled to the proceeds in preference to the father, made claim to such proceeds as against the plaintiff. The defendant does not resist payment of the sum named in the certificate, and the only question for decision in the lower court was as to which of the two claimants was entitled to the proceeds.

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In Code, § 1824, it is provided that "no fraternal association . . . shall issue any certificate of membership, . . . unless the beneficiary under said certificate shall be the husband, wife, relative, legal representative, heir, or legatee of such member." The plaintiff was the niece of the first wife of the father of the deceased member, deceased being the issue of the second wife; and the contention of appellant is that therefore plaintiff was a "relative" of the deceased, under the statutory language. Conceding that the term "relative" is to be extended to cover relatives by marriage as well as by blood, we are still unable to reach the conclusion that the plaintiff was a relative of deceased. During the life of the first wife, the father of deceased was the uncle by marriage of the plaintiff, and, perhaps, after the death of the first wife, the father of deceased was still her uncle by affinity. *Simcoke v. Grand Lodge, A. O. U.* W. 84 Iowa, 383, 387, 15 L. R. A. 114, 51 N. W. 8. But there was no relationship by either blood or affinity between the plaintiff and the deceased, the son of her uncle by marriage by his second wife. The general proposition seems to be this: That relationship by affinity is not created between the blood relatives on either side of the parties to the marriage relation. *Chinn v. State*, 47 Ohio St. 575, 11 L. R. A. 630, 26 N. E. 986; *Waterhouse v. Martin*, Peck (Tenn.) 374, 389; *Winchester v. Hinsdale*, 12 Conn. 88, 94; 1 Bouvier, Law Dict. *Affinity*. It appears, then, that in no legal sense was the plaintiff a relative of the deceased member. They might, perhaps, be said to be connections by marriage, but they were not relatives by marriage.

The argument of counsel for appellant is, however, that, although no recognized legal relationship existed between them, the statute should be broadly construed as including all persons who by common understanding are recognized as relatives. But we cannot properly give to the words used in the statute any other meaning than their true legal meaning. It must be presumed that the legislature intended to use the terms employed in the statute with accuracy and definiteness, and not with indefiniteness and uncertainty. Furthermore, there is nothing in the record, or within our judicial knowledge, to justify us in saying that, according to common use or understanding, the plaintiff and deceased were related.

Counsel also urge that the use of the word "legatee" indicates a purpose on the part of the legislature to permit certificates to be made to any beneficiary whom the member shall see fit to name, because, as anyone may be made a legatee, the member might, by making a will in favor of one not a relative.

support a certificate naming such person as beneficiary. But the statute is explicit in limiting the authority of such associations as to the persons who may be entitled to the benefits of certificates issued, and we have no power to enlarge the statute to cover persons not thus designated. If the deceased member had made a will in favor of the plaintiff, then the plaintiff might have been the beneficiary in the certificate; but he did not do so, and it seems to us this is an end to the argument.

Plaintiff, then, not being one of the persons who by statute may be made beneficiaries in such a certificate, it follows that she was not entitled to the proceeds of the certificate. As the association does not resist

payment of the claim, we have no occasion to elaborate the question as to whether the intervener is entitled to the proceeds. But it seems to be well settled that, where the beneficiary named is incapable of taking the proceeds under the law, the administrator of the deceased person can recover the proceeds, just as he might if no beneficiary had been named. *Schmidt v. Northern Life Assn.* 112 Iowa, 41, 51 L. R. A. 141, 84 Am. St. Rep. 323, 83 N. W. 800, and cases therein cited.

The decree that plaintiff is not entitled to the fund, on the grounds that she is not related by consanguinity or affinity, and that the intervener is the beneficiary entitled to the fund, is *affirmed*.

KANSAS SUPREME COURT.

STATE of Kansas, *Appt.*,

v.

Charles M. BOWLES.

(.....Kan.....)

- *1. Whenever required by the governor to appear and prosecute criminal proceedings in any county, the attorney general becomes prosecuting attorney of that county in those proceedings, and as such may sign indictments presented by the grand jury.
2. The district court of any county is obliged to take judicial notice of an executive order upon the attorney general to appear and prosecute criminal proceedings there, and such authority need not be expressed on the face of an indictment which he signs.
3. The solicitation of a bribe does not constitute an attempt to accept or receive a bribe.
4. The solicitation of a bribe is not punishable as a crime by the laws of this state.

(February 11, 1905.)

APPPEAL by the State from an order of the District Court for Wyandotte County quashing an indictment charging defendant with offering to accept a bribe. *Affirmed*.

The facts are stated in the opinion.

Messrs. C. C. Coleman, Attorney General, and Jay F. Close, for appellant:

The attorney general has authority to sign

*Headnotes by BURCH, J.

NOTE.—As to criminality of solicitation to crime which is not consummated, including solicitation of bribe, see also note to *State v. Butler*, 25 L. R. A. 434.
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indictments found by a grand jury. The powers belonging to the office of attorney general at common law are retained, in addition to those conferred by statute.

3 Am. & Eng. Enc. Law, 2d ed. p. 479; *People v. Miner*, 2 Lans. 396; *Hunt v. Chicago & D. R. Co.* 20 Ill. App. 282; *Craft v. Jackson County*, 5 Kan. 521; *Atchison, T. & S. F. R. Co. v. State*, 22 Kan. 1; *Barber County v. Smith*, 48 Kan. 331, 29 Pac. 565.

Under his general authority as attorney general, he may, in his discretion, institute prosecutions in any court he may choose.

The proceedings before a grand jury are as much a part of a prosecution as the proceedings in the trial court.

23 Am. & Eng. Enc. Law, 2d ed. p. 268; *Choen v. State*, 85 Ind. 210; *Territory v. Harding*, 6 Mont. 327, 12 Pac. 750; *Territory v. Layne*, 7 Mont. 225, 14 Pac. 705; *State ex rel. Nolan v. District Court*, 22 Mont. 25, 55 Pac. 916.

When power is placed in the hands of an officer, all incidental powers necessary for the due and efficient exercise of the power expressly granted are conferred by implication.

Throop, Pub. Off. § 543.

Where acts are of an official nature, or require the concurrence of official persons, a presumption arises in favor of their due execution.

Broom, Legal Maxims, 5th ed. 637; 22 Am. & Eng. Enc. Law, 2d ed. p. 1267; *Mechem*, Pub. Off. § 525; *Throop*, Pub. Off. § 558; *State v. Farrar*, 41 N. H. 53; *San Luis Obispo County v. Hendricks*, 71 Cal. 242, 11 Pac. 682; *Wolfe v. State*, 79 Ala. 201, 58 Am. Rep. 590; *Lowell v. Flint*, 20 Me. 404;

Miller v. Lewis, 4 N. Y. 555; *Choon v. State*, 85 Ind. 210; *State v. Thompson*, 64 Tex. 690; *Tierney v. Cornell*, 3 Neb. 267; *Ward v. Barrows*, 2 Ohio St. 241; *Coombs v. Lane*, 4 Ohio St. 112; *Valley Twp. v. King Iron Bridge & Mfg. Co.* 4 Kan. App. 622, 45 Pac. 660; *State v. Nield*, 4 Kan. App. 626, 45 Pac. 623; *Smith v. Payton*, 13 Kan. 384; *Rex v. Verelst*, 3 Campb. 432; *M'Gahey v. Alston*, 2 Mees. & W. 206; *Faulkner v. Johnson*, 11 Mees. & W. 581; *M'Mahon v. Lennard*, 6 H. L. Cas. 970; *Nofire v. United States*, 164 U. S. 657, 41 L. ed. 588, 17 Sup. Ct. Rep. 212.

When all is done toward the commission of a crime that the nature thereof will admit of, except its actual perpetration, an attempt to commit a crime has been made.

2 Wharton, Crim. Law, § 1857; *State v. Ellis*, 33 N. J. L. 102, 97 Am. Dec. 707; 1 Bishop, New Crim. Law, chap. 51.

An offer by a public officer to receive a bribe is a punishable offense at common law.

2 Wharton, Crim. Law, § 1858.

Messrs. Hale & Maher, for appellee:

There is a marked difference between an intent to commit a crime and an attempt to commit one.

No one can be convicted in Kansas except for such crimes as are defined by statute, there being no common-law offense.

State v. Young, 55 Kan. 349, 40 Pac. 659.

In order to constitute an attempt to commit an indictable offense, some physical act must be done towards its commission, and mere solicitation, no matter how urgent or long persisted in, is not sufficient.

State v. Frazier, 53 Kan. 87, 42 Am. St. Rep. 274, 36 Pac. 58; *Thompson v. People*, 96 Ill. 161; 2 Bishop, Crim. Proc. ¶¶ 86-92; *Re Lloyd*, 51 Kan. 501, 33 Pac. 307; *State v. Russell*, 64 Kan. 798, 68 Pac. 615; *Hicks v. Com.* 86 Va. 223, 19 Am. St. Rep. 891, 9 S. E. 1024; *Com. v. Clark*, 6 Gratt. 675; 1 Wharton, Crim. Law, 9th ed. ¶ 192.

An attempt to commit a crime is compounded of two elements: (1) The intent to commit it; and (2) a direct ineffectual act done towards its commission.

Code, § 3888; 2 Bishop, Crim. Proc. 71; *Uhl v. Com.* 6 Gratt. 706; *Mc Dade v. People*, 29 Mich. 50; *Bouvier*, Law Dict. *Attempt*; *People v. Murray*, 14 Cal. 180; *United States v. Savaloff*, 3 Sawy. 311, Fed. Cas. No. 16, 226; *United States v. Stephens*, 8 Sawy. 116, 12 Fed. 52; *Cornwell v. Fraternal Acci. Asso.* 6 N. D. 201, 40 L. R. A. 437, 66 Am. St. Rep. 601, 69 N. W. 191; *Mulligan v. People*, 5 Park. Crim. Rep. 105; *State v. Clarissa*, 11 Ala. 57; *Hicks v. Com.* 86 Va. 223, 19 Am. St. Rep. 891, 9 S. E. 1024; *Stabler v. Com.* 95 Pa. 318, 40 Am. Rep. 653; *State v. Butler*, 8 Wash. 194, 25 L. R. A. 434, 40 Am. St. Rep. 900, 35 Pac. 69 L. R. A.

1093; 1 Bishop, Crim. Law, ¶¶ 760, 762, 764; *Reg. v. Taylor*, 1 Fost. & F. 511; *Smith v. Com.* 54 Pa. 209, 93 Am. Dec. 686; *Com. v. Willard*, 22 Pick. 476.

Where the solicitation is not in itself a substantive offense, or where there has been no progress made towards the consummation of the independent offense attempted, the question whether the solicitation is by itself the subject of penal prosecution must be answered in the negative.

1 Wharton, Crim. Law, 9th ed. 179; *People v. Gardner*, 73 Hun. 66, 25 N. Y. Supp. 1072; *Stabler v. Com.* 95 Pa. 318, 40 Am. Rep. 653.

Merely soliciting one to do an act is not an attempt to do that act.

Rex v. Butler, 6 Car. & P. 368; *Smith v. Com.* 54 Pa. 209, 93 Am. Dec. 686; *Kelly v. Com.* 1 Grant Cas. 484; *Reg. v. Williams*, 1 Car. & K. 589; *Reg. v. Lewis*, 9 Car. & P. 523; *Reg. v. St. George*, 9 Car. & P. 483.

The provision of the statute (¶ 5540, Gen. Stat. 1901), requiring that each indictment must be signed by the prosecuting attorney, is mandatory, as much so as the provision requiring that it shall be indorsed, "A true bill," with the name of the foreman signed thereto; and a failure on the part of the foreman to so indorse and sign an indictment is a fatal omission.

State v. Joiner, 19 Mo. 224; *Teas v. State*, 7 Humph. 174; *Hite v. State*, 9 Yerg. 198; *State v. Soragan*, 40 Vt. 450; *Oliver v. Com.* 95 Ky. 372, 25 S. W. 600; *Strange v. State*, 110 Ind. 354, 11 N. E. 357; *State v. Cooper*, 2 Blackf. 226; *State v. Bowman*, 103 Ind. 69, 2 N. E. 289; *Bird v. State*, 103 Tenn. 343, 52 S. W. 1076; *United States v. Helriggle*, 3 Cranch, C. C. 179, Fed. Cas. No. 15,344.

An indictment must be signed by the prosecuting attorney.

Jackson v. State, 4 Kan. 150; *State v. Brown*, 63 Kan. 262, 65 Pac. 213; *Teas v. State*, 7 Humph. 174; *Hite v. State*, 9 Yerg. 198; *State v. Soragan*, 40 Vt. 450; *State v. Tannahill*, 4 Kan. 117; *State v. Beddo*, 22 Utah, 432, 63 Pac. 96; *Shattuck v. Chandler*, 40 Kan. 516, 10 Am. St. Rep. 227, 20 Pac. 225; *Sutherland*, Stat. Constr. ¶ 333-454.

When one section of a statute treats solely and especially of a matter, it will prevail, as to that matter, over sections in which only incidental references are made thereto.

Long v. Culp, 14 Kan. 413; *Re Donnelly*, 30 Kan. 191, 1 Pac. 648; *Shattuck v. Chandler*, 40 Kan. 520, 10 Am. St. Rep. 227, 20 Pac. 225; *South Carolina v. Stoll*, 17 Wall. 425, 21 L. ed. 650; *Nelden v. Clark*, 20 Utah, 382, 77 Am. St. Rep. 917, 59 Pac. 524.

Burch, J., delivered the opinion of the court:

Charles M. Bowles was indicted by a grand

jury of Wyandotte county. The indictment charged that the defendant did unlawfully, feloniously, wickedly, and corruptly offer and promise to a person named that he would give his vote, opinion, judgment, and action as a member of the board of education of the city of Kansas City in favor of a certain matter on condition that he be paid a sum of money as a bribe and reward for so doing, and did unlawfully, feloniously, and corruptly seek and solicit from the party named the payment of the sum of money stated as a reward and bribe unlawfully and corruptly to be given to influence him in the giving of his opinion, vote, judgment, and action. The indictment concluded and was signed as follows: "And the said grand jurors do present that, by the means and acts aforesaid, the said Charles M. Bowles did then and there unlawfully, feloniously, and corruptly attempt to commit the crime of unlawfully, feloniously, and corruptly accepting and receiving money from the said George E. Rose under an understanding and agreement which he, the said Charles M. Bowles, then and there unlawfully, feloniously, and corruptly attempted to make and enter into, that the vote, opinion, and judgment of the said Charles M. Bowles should thereby be corruptly influenced to be cast and given in favor of the election of the said George E. Rose as principal and teacher in the said public schools, contrary to the statutes in such case made and provided, and against the peace and dignity of the state of Kansas. C. C. Coleman, Attorney General of the State of Kansas, prosecuting in Wyandotte County." A motion was made to quash the indictment on the following grounds: "(1) The indictment is not signed by the county attorney, as required by law. (2) That said indictment is not signed by the prosecuting attorney of said county, as required by law. (3) That said indictment is not signed by any person as attorney who by law is authorized to sign indictments in said county. (4) That the facts stated in such indictment are not sufficient to constitute any offense or crime under the laws of the state of Kansas." The district court sustained the motion and quashed the indictment. The state appeals upon a question reserved.

The essence of the defendant's claim in reference to the form of the indictment is that it can be signed by no officer of the state except the county attorney of the county in which the grand jury sits. While the argument is re-enforced from other sources, its fundamental content is derived from the Code of Criminal Procedure and two decisions rendered in this state. Section 5540, Gen. Stat. 1901, reads as follows: "Each indictment must be signed by the prosecut-

ing attorney; and when the grand jury return any indictment into court the judge must examine it, and if the foreman has neglected to indorse it, 'A true bill,' with his name signed thereto, or if the prosecuting attorney has neglected to sign his name, the court must cause the foreman to indorse, or the prosecuting attorney to sign it, as the case may require, in the presence of the jury." In the case of *State v. Nulf*, 15 Kan. 404, the following language is used: "Under the laws of Kansas the 'prosecuting attorney' is always the 'county attorney' (Gen. Stat. 283, 284, §§ 135-137). That is, every criminal action prosecuted in the name of the state must be prosecuted by the county attorney, who is the public prosecutor. Therefore, for the purpose of prosecuting criminal actions, the prosecuting attorney and the county attorney is one and the same person." And in the case of *United States v. Weld*, 1 Kan. Dassel's ed., 21 Appx., decided in 1860 by the United States district court for the first judicial district of the territory of Kansas, the syllabus reads: "When one person or class of persons is named in a power of attorney, or an act of the lawmaking power, as being authorized to do a certain thing therein named, all other persons are thereby excluded from doing the same thing as effectually as if they were positively forbidden."

The attorney general justifies his conduct under § 7271, Gen. Stat. 1901, which provides: "The attorney general shall appear for the state, and prosecute and defend all actions and proceedings, civil or criminal, in the supreme court, in which the state shall be interested or a party; and shall also, when required by the governor or either branch of the legislature, appear for the state and prosecute or defend, in any other court, or before any officer, in any cause or matter, civil or criminal, in which this state may be a party or interested." In the year 1855 the legislature of the territory of Kansas provided for the election of a district attorney for each district organized for judicial purposes. He was required to appear in each county at the district court and prosecute and defend on behalf of the territory or county all suits, indictments, applications, or motions, civil or criminal, in which the territory or county should be a party, and, among other things, to draw, and sign all indictments or other pleadings connected with his office. The same legislature adopted a Code of Criminal Procedure which made it the duty of the attorney prosecuting in the county to attend any grand jury whenever required, and aid in various ways in the conduct of its proceedings; but no reference was made to the matter of signatures to indictments. By an act approved

February 12, 1858 (Laws 1857-58, chap. 13, p. 195), the territorial legislature changed the system relating to local prosecutors, and created the office of county attorney for each county organized for judicial purposes. Its incumbent was required to appear in the several courts of the county and prosecute or defend actions, attend the sittings of the grand jury when required, and draw bills of indictment. The law provided that county attorneys should be elected at the general election following the session of the legislature; and, of necessity, district attorneys remained in office until the new system became operative. By another act, approved February 12, 1858, the same legislature changed the Code of Criminal Procedure, and adopted a provision in reference to the manner in which indictments should be signed, in all respects identical with § 5540, Gen. Stat. 1901, already quoted. This act took effect immediately after its passage. It is plain, therefore, that the words "prosecuting attorney," in the new Code, were designed to embrace both the district attorney who would have authority to prosecute until the next general election and the county attorney, who would then be the local prosecutor.

During territorial days the attorney general was an official deriving his power and authority from the government of the United States. There was therefore no multiplicity of officers, some one of whom needed to be designated to perform the special duty of signing indictments, to the exclusion of all others. All that was necessary was to provide for the due authentication of true bills returned by the grand jury. The object of the statute was not to confer a special power upon an individual, according to the principle announced in the case of the *United States v. Weld*, but to protect the legitimacy of a document. To the attorney in charge of the territory's case at the time was assigned this duty. He might be district attorney, with jurisdiction extending over all the counties of a judicial district, or he might be county attorney, with a much more limited range of authority, but the prosecuting attorney, whatever his official title and whatever the scope of his territory, was to sign indictments. Upon its admission into the Union the new state abolished the office of county attorney, and returned to the former system of district attorneys. In 1864 the office of county attorney was restored. But the statute of 1858 relating to the authentication of indictments has persisted, unmodified, to the present time. In the organization of the state government the office of attorney general was created, and by an act approved June 3, 1861 (Laws 1861, chap. 58, p. 216), it was

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provided that the attorney general, whenever required by the governor or either branch of the legislature, should appear for the state and prosecute or defend, in any court, or before any officer, in any cause or matter, civil or criminal, in which the state might be a party or interested. The substance of this act has been preserved in all subsequent revisions of the law, and it now appears as § 7271, Gen. Stat. 1901. The experience of members of the legislature during territorial times had taught them the necessity of a state government equipped with sufficient power to protect public rights and redress public injuries throughout the entire state, independent of the attitude of local authorities who might be indifferent, incapable, or even antagonistic. They had suffered from the baleful manifestations of sectionalism within the state as well as between different states, and the purpose was to make the authority of the government felt, through its chief law officer, in every part of its territory, if the chief executive or either branch of the legislature should determine it to be necessary. The language of the statute indicates that the intention was to grant plenary power to the attorney general to this end, and he was invested with full authority to use all the means afforded by the law to meet the requirements of any situation and fully protect the interests of the state. When directed by the governor or either branch of the legislature to appear and prosecute criminal proceedings in any county, he becomes the prosecuting attorney of that county in those proceedings, and has all the rights that any prosecuting officer there may have, including those of appearing before the grand jury, signing indictments, and pursuing cases to final determination.

In 23 Am. & Eng. Enc. Law, 2d ed. p. 268, there is a fair statement of what is included in the term "prosecute": "To prosecute is to proceed against judicially. A prosecution is the act of conducting or waging a proceeding in court; the means adopted to bring a supposed offender to justice and punishment by due course of law. It is also defined as the institution or commencement and continuance of a criminal suit; the process of exhibiting formal charges against an offender before a legal tribunal, and pursuing them to final judgment on behalf of the state or government, as by indictment or information." The reasoning of decided cases, involving differing states of fact, leads to the same conclusion. *Choen v. State*, 85 Ind. 209; *Territory v. Harding*, 6 Mont. 323, 12 Pac. 750; *State ex rel. Nolan v. District Court*, 22 Mont. 25, 55 Pac. 916, 918.

The remark of Mr. Justice Valentine in

State v. Nulf, 15 Kan. 404, was made without attention having been called to this power of the attorney general. The court was not then considering, and did not pretend to decide, the question now under discussion. Certainly it was not the intention of the court to nullify, by that decision, the statute which gives the attorney general the right to prosecute whenever required by the governor or either branch of the legislature to do so.

Time has abated nothing from the strength of purpose indicated by the words of the statute under consideration. Indeed, the power of the attorney general in our political system has subsequently been enlarged, and he may now, upon his own motion, undertake the enforcement of the prohibitory liquor law in any county of the state, if the county attorney is unable or neglects to do so, and to that end may perform any act which the county attorney may perform. What, if any, common-law powers he may possess, it is not necessary, in view of the statute, to determine.

The indictment was signed by an attorney who was by law authorized to sign indictments in Wyandotte county, and it should not have been quashed upon any one of the first three grounds stated in the motion to quash.

In the brief for the defendant it is urged that the indictment was insufficient because the authority of the attorney general to sign it was not stated. The motion to quash does not raise this question, but the attorney general argues it as if it were a matter in dispute before the district court. Therefore, it is proper to say that the signature was sufficient. The district court was obliged to take judicial notice of the official character and identity of the attorney general, and of the executive requirement upon him to appear and prosecute. The action of the governor was a matter of court cognizance, and not a matter for the indictment to express. The attorney general was no more required to indicate that he was acting under an executive order than the county attorney is required to refer to the fact of his election, the taking of his oath, and the filing of his bond. Having authority to sign the indictment, the attorney general did all the statute requires when he signed it. *State v. Nulf*, 15 Kan. 404; *State v. Tannahill*, 4 Kan. 117; *State v. Kinney*, 81 Mo. 101; *Choen v. State*, 85 Ind. 209; 10 Enc. Pl. & Pr. p. 448.

The act charged against the defendant in the body of the indictment is the solicitation of a bribe. The legislature has not seen fit to make the solicitation of a bribe punishable in express terms, and the question is if the same end may be reached through the statute relating to attempts. In the

light of the history of the legislation of this state concerning bribery, the omission from the statute may well be regarded as conclusive. The subject is an old one. When the aged Samuel was testifying his integrity, he said: "Whose ox have I taken? or whose ass have I taken? or whom have I defrauded? whom have I oppressed? or of whose hand have I received any bribe to blind mine eyes therewith? and I will restore it you." Isaiah accorded the privileges of the godly to him "that shaketh his hands from holding of bribes," and David sang of a separation of life and soul from those whose "right hand is full of bribes." The governments of all the civilized peoples which have arisen since those ancient days have struggled with the problem. Previous to the year 1869 receiving a bribe was a crime in this state. By chapter 43, p. 128, of the Laws of that year the legislature repealed all sections of the bribery statute then in force, so far as they related to bribe takers. For a period of twenty six years following this repeal, officers who received rewards for official conduct were not amenable to criminal punishment at all for their corrupt acts. In 1895 the matter again became the subject of legislative cognizance, and the present law was enacted, providing as follows: "Any officer of the state or of any county, city, district, or township, after his election or appointment, and either before or after he shall have qualified, or entered upon his official duties, who shall accept or receive any money, or the loan of any money, or any real or personal property or any pecuniary or other personal advantage, present or prospective, under any agreement or understanding that his vote, opinion, judgment, or action shall be thereby influenced, or as a reward for having given or withheld any vote, opinion, or judgment, in any matter before him in his official capacity, or having wrongfully done or omitted to do any official act, shall be punished by a fine of not less than \$200 nor more than \$1,000, or by imprisonment for not less than one year nor more than seven years in the penitentiary at hard labor, or by both such fine and imprisonment, at the discretion of the court." Gen. Stat. 1901, § 2212. The statutes of many states by express provision punish the solicitation of bribes. The statute of this state in force in 1895 relating to the giving of bribes devoted a separate section to offering or attempting to bribe. The appearance in the new law of an analogous section relating to soliciting or attempting to secure a bribe might well have been anticipated, but nothing of the kind was inserted. Presumably the legislature expressed itself fully, and did not intend to punish a solicitor unless he actually received

the bribe. The spectacle of a public officer soliciting his own purchase is so disgusting that the subject scarcely could have escaped the legislative attention. But many practical considerations are involved in the detection and punishment of bribery. Ordinarily, disclosure must come from one or the other of the participants in the despicable business. Solicitation, however, is extremely rare compared with offers to corrupt, and the same policy which so long exempted the bribe taker altogether may have been deemed wisest in regard to solicitation. In any event, this court should not be called upon to strip the legislature and by construction invent a crime which, with many precedents before them the law-makers might have delineated in a few words while engaged in the work of remodeling the bribery law.

Aside from these considerations, the court is of the opinion that the solicitation of a bribe is not an attempt to accept or receive a bribe within the meaning of the statute relating to attempts. That statute reads: "Every person who shall attempt to commit an offense prohibited by law, and in such attempt shall do any act toward the commission of such offense but shall fail in the perpetration thereof, or shall be prevented or intercepted in executing the same, upon conviction thereof, shall, in cases where no provision is made by law for the punishment of such attempt, be punished as follows." Gen. Stat. 1901, § 2284.

In determining whether certain conduct was punishable criminally at common law, English judges have frequently made the statement that soliciting is an act done which in itself is sufficient, when coupled with wrongful intent, to constitute a crime. In discussing the subject, the word "solicit" has been used in the same connection with words like "incite," "endeavor," and "attempt," but the purpose in view has been to show that solicitation in itself embodied the elements of an independent crime, and not to discriminate it as an ineffectual attempt to commit another crime in the sense of our statute. This is plain from a critical reading of the leading case of *King v. Higgins*, 2 East, 5. The headnote accurately expresses the conclusion of the judges, as follows: "To solicit a servant to steal his master's goods is a misdemeanor, though it be not charged in the indictment that the servant stole the goods, nor that any other act was done except the soliciting and inciting. And such offense is indictable at the sessions, having a tendency to a breach of the peace." Lord Kenyon, Ch. J., and Le Blanc, J., were able to express themselves without confusing attempt and solicitation. Justices Grose and Lawrence were more discursive, and by their language opened the way to 69 L. R. A.

much of the uncertainty relating to the law of attempt in this country. In his work on Criminal Law, Mr. Bishop has evidently seized upon the words most favorable to his purpose in this and other similar cases, in an effort, supported, however, by some authority, to establish the doctrine that solicitation is an attempt. The case of *Heslton v. Lister*, Cooke C. P. 88, is cited. The entire report of that case is here given, because it is apparently referred to as deciding that solicitation is an attempt in a bribery case. "A motion to justify bail upon examination of the bail in court. The plaintiff's attorney showed to the court that the same persons were bail in another cause, and represented that he verily believed they were very insufficient, for the defendant himself had told him they were not worth a groat. He likewise informed the court that one Dewell, a sheriff's officer, had just then been with him, and told him if he would go out of court the defendant would give him half a guinea. Dewell was likewise examined upon oath, and declared the same. Upon this the court all agreed that this was an attempt in the defendant to pervert justice, and a notorious contempt of the court, and committed him to the Fleet till farther order." A number of American cases used as authority for the proposition of the same text throw no more light on the subject than *King v. Higgins*. The reporter of the case of *United States v. Worrall*, 2 Dall. 384, 1 L. ed. 426, Fed. Cas. No. 16,766, says the defendant in that proceeding was charged with an attempt to bribe. The indictment uses no such language, and the only legal question argued and determined was if the courts of the United States had jurisdiction of common law offenses, and that question was decided wrong. In the case of *State v. Avery*, 7 Conn. 267, 18 Am. Dec. 105, the sole question was if the solicitation of another to commit adultery was a high crime and misdemeanor cognizable by the superior court, and not if an attempt could be made out from mere solicitation. In the case of *Com. v. Harrington*, 3 Pick. 26, the headnote is accurate, and reads: "Exciting, encouraging, and aiding a person to commit a misdemeanor is of itself a misdemeanor." The same is true of the case of *Com. v. Flagg*, 135 Mass. 545, where it is said: "It is an indictable offense at common law for one to counsel and solicit another to commit a felony, although the solicitation is of no effect, and the crime counseled is not in fact committed." The citation of the case of *Com. v. M' Gill*, Addison (Pa.) 21, to prove that solicitation is equivalent to attempt, is astonishing. The report is of an occurrence in the county court of Allegheny county, and reads thus:

"Indictment for a misdemeanor. Boggs persuaded M'Gill to steal, and deliver to him, a conveyance, for 100 acres of land, executed by Henry Shaver to his son and daughter. This land was part of a larger tract of which Shaver had been possessed under a location of a Virginia certificate. He intended this 100 acres as a provision for his two children, and, having sold the rest to Boggs, he conveyed the location or certificate to him that he might take a patent for the whole in his name, and took an article or bond on Boggs to convey this 100 acres to his children after he obtained the patent for the whole. They were convicted. The court suggested that it might be useful if Boggs, having the title to this land, should before sentence execute a conveyance to the son and daughter of Shaver. He did so, and judgment was given." The case of *People v. Bush*, 4 Hill, 133, is the strongest authority cited in support of the text referred to. Concerning that case, however, it might be argued that the conduct proceeded beyond solicitation. The prisoner, besides soliciting to arson, furnished materials to accomplish the burning, and was held guilty of an attempt under a statute similar to that of this state. The doctrine of *People v. Bush* is repudiated by the supreme court of West Virginia in an able and exhaustive opinion in the case of *State v. Baller*, 26 W. Va. 90, 53 Am. Rep. 66, and contrary to *State v. Avery*, the supreme court of Washington, in a recent carefully reasoned case, holds that "mere solicitation to commit adultery is not an attempt to commit the crime." *State v. Butler*, 8 Wash. 194, 25 L. R. A. 434, 40 Am. St. Rep. 900, 35 Pac. 1093. Appended to the reprint of this decision in 25 L. R. A. 434, is an editorial note relating to the criminality of solicitation to crime which is not consummated, in which many cases are analyzed and classified. Upon the branch of the subject now under consideration the following conclusion is reached: "The authorities are not so uniform upon the question how far solicitation is an attempt. But the weight of authority is in accord with *State v. Butler*, that it is not an attempt. The very definition of attempt precludes the possibility of its including a mere solicitation." Likewise, in 12 Cyc. Law & Proc. p. 183, where numerous authorities are collated, it is said: "Some of the courts have treated solicitation to commit a crime as an attempt. By the weight of authority, however, it is not a sufficient overt act to be indictable as an attempt, but must be indicted as a distinct offense." In the state of Illinois a statute (Hurd's Rev. Stat. 1903, chap. 38, § 273, p. 670,) was enacted reading

as follows: "Whoever attempts to commit an offense prohibited by law, and does any act toward it, but fails, or is intercepted or prevented in its execution, where no express provision is made by law for the punishment of such attempt, shall be punished." In construing this statute, the supreme court of that state said: "The words 'whosoever attempts to commit any offense prohibited by law, and does any act towards it,' must be construed, in cases like the present, to mean a physical act, as contradistinguished from a verbal declaration; that is, it must be a step taken towards the actual commission of the offense, and not a mere effort, by persuasion, to produce the condition of mind essential to the commission of the offense." *Cox v. People*, 82 Ill. 191, 193. In the case of *State v. Harney*, 101 Mo. 470, 14 S. W. 657, the opinion reads: "For a man to have sexual intercourse with a female child under the age of twelve years is for that man to be guilty of rape. Rev. Stat. 1879, § 1253. And the law declares that 'every person who shall attempt to commit an offense prohibited by law, and in such attempt shall do any act towards the commission of such offense, but shall fail in the perpetration thereof, shall be punished,' etc. Rev. Stat. 1879, § 1645. The only charge that can be evolved from the verbose reiterations of this indictment is that the defendant by verbal solicitations tried to obtain the consent of a child under the age of twelve years to have sexual intercourse with him, and failed. However despicable and deserving of punishment such conduct may be, it falls short of the criminal offense attempted to be charged, to constitute which there must be an actual attempt to have intercourse with such child. So long as the evil purpose dwells in contemplation only, it is beyond the grasp of these provisions of the law." And in the case of *Hicks v. Com.* 86 Va. 223, 19 Am. St. Rep. 891, 9 S. E. 1024, it is said: "The act must reach far enough towards the accomplishment of the desired result to amount to the commencement of the consummation. It must not be merely preparatory. In other words, while it need not be the last proximate act to the consummation of the offense attempted to be perpetrated, it must approach sufficiently near to it to stand either as the first, or some subsequent, step in a direct movement towards the commission of the offense after the preparations are made." This court has virtually adopted the restricted meaning of the word "attempt" indicated by these decisions.

In the case of *Re Lloyd*, 51 Kan. 501, 502, 33 Pac. 307, the position is taken that an attempt must involve an overt act beyond

solicitation, and in the case of *Re Schurman*, 40 Kan. 633, 542, 20 Pac. 277, 282, it is said: "If what was charged would naturally have resulted in inducing the company to part with its money, such attempt would probably be an offense; 'but when between the attempt and the execution is interposed the volition of an independent moral agent, then, by stress of the definition just given, an indictable attempt is not made out.' 1 Wharton, *Crim. Law*, §§ 177, 178." In a very recent case the supreme court of Michigan admitted the principle announced by Dr. Wharton to be applicable to the crime of bribery, and held the solicitation of a bribe to be punishable, not as an attempt, but as an independent common-law crime. "It is strenuously contended that the indictment charges no offense known to the laws of this state. It is conceded by the learned counsel for the state that there is no statute defining the offense set out in the indictment, but it is contended that the case falls within the statute (3 Comp. Laws, § 11,795) providing for the punishment of offenses indictable at the common law. In other words, it is claimed that the indictment sets out an offense at the common law. Respondent's counsel assert that solicitation to commit a crime is not indictable when there is interposed between the solicitation on the one hand and the proposed illegal act on the other the resisting will of another person, which other person refuses assent and co-operation; citing, among other cases, *McDade v. People*, 29 Mich. 50, and *Smith v. Com.* 54 Pa. 209, 93 Am. Dec. 686. It may be accurate to say that what is treated in the law as an attempt to commit a crime is not complete where there is interposed between the solicitor and the consummation of the completed offense the resisting will of the one whom the solicitor seeks to employ as the active agent. But to say that a solicitation may not amount to an offense under these circumstances is to deny that a solicitation to commit a felony is punishable at the common law as a substantive and completed offense." *People v. Hammond*, 132 Mich. 422, 93 N. W. 1084. The inference from this decision is that soliciting a bribe would not be punishable in Michigan, except for the statute recognizing common-law offenses. That it is not punishable in Texas appears from the case of *Hutchinson v. State*, 36 Tex. 293, in which it is said: "The indictment was drawn under article 1870, *Paschal's Digest*, and the pleader attempted to charge the defendant with accepting a bribe; but the indictment wholly fails to make any such charge specifically, and only charges him with offering to receive a bribe. This is

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not an offense punishable as a crime under the law." There are no common-law offenses in this state, and there can be no convictions in this state except for such crimes as are defined by statute. *State v. Young*, 55 Kan. 349, 40 Pac. 659.

In harmony with what is undoubtedly the modern trend of the law, this court is constrained to hold that, so long as the will of the person solicited is opposed to the corrupt conduct, there can be no attempt, in the legal sense, to accept or receive a bribe. After a willingness of mind on the part of both participants has been established, the matter of giving and receiving the bribe money or other pecuniary or personal advantage must still be accomplished. That transaction may be very simple or very complex, and the room for attempt may be very wide or very narrow, but until it is finally undertaken and some act done, the stage of attempt has not been entered upon. The remarks of the supreme court of Maryland in an opinion denying that solicitation constitutes an attempt are pertinent to this case: "Certainly it would be a great public calamity to invent crimes by subtle, ingenious, and astute deduction. In all free countries the criminal law ought to be plain, perspicuous, and easily apprehended by the common intelligence of the community. It is the essence of cruelty and injustice to punish men for acts which can be construed to be crimes only by the application of artificial principles according to a mode of disquisition unknown in the ordinary business and pursuits of life. The legislature, with ample power over the whole subject, determined what offenses should be punished. If it had desired that other actions of a cognate character should become penal, it would have so enacted. It is the duty of the courts to interpret and administer the legislative will, but in cases of criminal cognizance they must resolutely determine never to exceed it. . . . The law would not be a practical system if it did not define with precision the nature and circumstances of the attempts which are criminal, and determine what acts are necessary to make the attempt a substantive offense. In our judgment it has done so, and not left us to grope after results under the guidance of vague general expressions." *Lamb v. State*, 67 Md. 524, 10 Atl. 208, 298.

The indictment was properly quashed upon the last ground stated in the motion, and the judgment of the District Court is affirmed.

All the Justices concur.

MICHIGAN SUPREME COURT.

PEOPLE of the State of Michigan *ex rel.*
City of DETROIT

v.

BOARD OF INSPECTORS OF ELECTION
for the Fourth District, Second Ward,
City of Detroit.

(.....Mich.....)

A statute permitting the use of a voting machine which assures secrecy, free choice of candidates, a correct record of the vote, and a correct record and announcement of the total vote given for each candidate, does not contravene a constitutional requirement that all votes at elections shall be given by ballot.

(March 30, 1905.)

CERTIORARI to the Circuit Court for Wayne County to review a judgment denying a writ of mandamus to compel respondent to utilize voting machines at a coming election. *Reversed.*

The facts are stated in the opinion.

Mr. Lewis A. Stoneman, with Mr. Timothy E. Tarsney, for relator:

The word "ballot," as used in the Constitution and in literature, means secret voting, in contradistinction to *viva voce*, or open, voting.

23 Am. Law Rev. p. 725; *Opinion of Justices*, 7 Me. 495, Appx.; *Temple v. Mead*, 4 Vt. 540; *Williams v. Stein*, 38 Ind. 90, 10 Am. Rep. 97; *Ritchie v. Richards*, 14 Utah, 345, 47 Pac. 670; *Brisbin v. Cleary*, 26 Minn. 107, 1 N. W. 825; *Otero v. Gallegos*, 1 Bartlett Contested Elect. Cas. 177; *People ex rel. Williams v. Cicott*, 16 Mich. 297, 97 Am. Dec. 141; *People ex rel. Smith v. Pease*, 27 N. Y. 81, 84 Am. Dec. 242; *Atty. Gen. v. Detroit*, 58 Mich. 213, 55 Am. Rep. 675, 24 N. W. 887; *State v. Shaw*, 9 S. C. N. S. 138; *State ex rel. Smith v. Anderson*, 26 Fla. 240, 8 So. 1; *Ex parte Arnold*, 128 Mo. 260, 33 L. R. A. 386, 49 Am. St. Rep. 557, 30 S. W. 768, 1036; 4 Encyclopedia Britannica, 8th ed. 399.

The Australian ballot created two difficulties: First, it invited mistakes in marking the ballot, and, second, caused needless delay and controversy in the count, resulting in the throwing out of many of the votes, and requiring, in some precincts, as much as forty hours to count the votes.

Coulehan v. White, 95 Md. 703, 53 Atl. 786; *McCrory, Elections*, § 728.

NOTE.—For other cases in this series as to right to use voting machine under constitutional provisions providing for voting by ballot, see *Opinion of Justices*, 38 L. R. A. 547, and *Re House Bill No. 1,291*, 54 L. R. A. 430.

The voting machine is the next step, and is the outgrowth of the Australian ballot, and cures its defects, and a vote cast thereby is voting by ballot in the meaning of the Constitution.

The keyboard of the machine, with the ballot labels thereon, constitutes a mechanical Australian ballot, and affords the voter an opportunity to vote secretly and accurately by ballot, prevents mistakes, and insures the counting of his vote as cast.

The test of the validity of the method employed is secret voting.

Henshaw v. Foster, 9 Pick. 319; *Temple v. Mead*, 4 Vt. 540; *Opinion of Justices*, 7 Me. 495, Appx.

Voting by machine is constitutional voting.

Re House Bill No. 1,291, 178 Mass. 605, 54 L. R. A. 430, 60 N. E. 129; *Re Voting Machine*, 19 R. I. 729, 36 L. R. A. 547, 36 Atl. 716; *Cooley, Const. Lim.* 6th ed. p. 760.

Mr. Frank Keiper also for relator.

Mr. Sherman D. Callender, for respondent:

The Constitution must be construed in the light of the surrounding facts, to understand its provisions and their intended application.

The voting machine does not permit a vote by ballot.

Where the Constitution provides a means for the exercise of a power, no other can be employed by the legislature.

Boehm v. Hertz, 182 Ill. 154, 48 L. R. A. 575, 54 N. E. 973; *People v. Dean*, 14 Mich. 406; *Beardstown v. Virginia*, 76 Ill. 34; *People ex rel. Bay City v. State Treasurer*, 23 Mich. 499; *People ex rel. Kennedy v. Gies*, 25 Mich. 83.

It is proper to take into consideration the uniform, continued, and contemporaneous construction of the Constitution given by the legislature, and generally recognized, as to its meaning or intention, and such contemporaneous construction affords a strong presumption that it rightly interprets the meaning and intention.

Cooley, Const. Lim. 82; *Bunn v. People*, 45 Ill. 397; *People ex rel. Woodyatt v. Thompson*, 155 Ill. 451, 40 N. E. 307; *People ex rel. Lynch v. La Salle County*, 100 Ill. 495; *Boehm v. Hertz*, 182 Ill. 154, 48 L. R. A. 575, 54 N. E. 973; *People ex rel. Badger v. Lowenthal*, 93 Ill. 191.

It is a matter of common knowledge that, up to a very short time ago, voting by ballot has been construed to mean voting by depositing with the election officers some material thing, usually, in modern times, a paper

ticket, upon which is indicated, by printing or writing, the choice of the elector.

Cooley, Const. Lim. 604; Wharton, Law Dict.

When the Constitution was framed, the term "ballot," as designating a mode of election, was then well ascertained and clearly defined.

Williams v. Stein, 38 Ind. 95, 10 Am. Rep. 97; *Collins v. Henderson*, 11 Bush, 74.

In construing a statute, great regard ought to be paid to the construction which the sages of the law who lived about the time or soon after it was made put upon it, because they were best able to judge of the intention of the makers at the time when the law was made.

3 Coke Inst. 11, 136, 181.

At the time our Constitution was adopted, the word "ballot" was defined by law dictionaries, and generally referred to in legal decisions, as a piece of paper.

Comstock v. Gage, 91 Ill. 328; *Anderson*, Law Dict. 104; *Cyclopædic Law Dict.* 84; *Cohen v. Virginia*, 6 Wheat. 264, 5 L. ed. 257; *People ex rel. Williams v. Dayton*, 55 N. Y. 377.

Contemporaneous construction of an ambiguous provision of the Constitution is always important, and is frequently of controlling influence in determining its meaning.

6 Am. & Eng. Enc. Law, 2d ed. p. 931; *Martin v. Hunter*, 1 Wheat. 351, 4 L. ed. 97; *Ex parte McNeil*, 13 Wall. 236, 20 L. ed. 624; *Bank of United States v. Halstead*, 10 Wheat. 63, 6 L. ed. 267; *Stuart v. Laird*, 1 Cranch, 308, 2 L. ed. 118; *Briscoe v. Bank of Commonwealth*, 11 Pet. 257, 9 L. ed. 709; *People ex rel. Livesay v. Wright*, 6 Colo. 92; *Morgan v. Dudley*, 18 B. Mon. 694, 68 Am. Dec. 735; *State ex rel. Cardwell v. Glenn*, 18 Nev. 44, 1 Pac. 186; *People ex rel. Gallup v. Green*, 2 Wend. 266; *People ex rel. Lynch v. La Salle County*, 100 Ill. 495; *Field v. People*, 3 Ill. 79; *Easton v. Scott*, *Clarke & H. Contested Elect. Cas.* 272.

The meaning of our Constitution was fixed when it was adopted, and cannot be changed by events alone.

People ex rel. Twitchell v. Blodgett, 13 Mich. 139.

The voting machine does not permit the voter to cast a ballot.

Cushing, Parliamentary Law, chap. 4.

Every qualified elector is entitled to vote, under the Constitution. If a voter is not permitted to see and know that he has dealt with the officers of the election some material thing upon which is expressed his choice, he is deprived of his constitutional right to vote.

Anderson, Law Dict. 104; *Black*, Law Dict. 116; *People ex rel. Budd v. Holden*, 28 N. L. R. A.

Cal. 136; *Taylor v. Bleakley*, 55 Kan. 14, 28 L. R. A. 683, 49 Am. St. Rep. 233, 39 Pac. 1045; *State ex rel. Runge v. Anderson*, 100 Wis. 530, 42 L. R. A. 239, 76 N. W. 482.

Ostrander, J., delivered the opinion of the court:

The relator, the city of Detroit, filed its petition in the circuit court for the county of Wayne, setting out, in substance, the following facts: That at the meeting of the common council of the city of Detroit, held March 7, 1905, the city clerk was directed by resolution to have voting machines placed in divers election districts in said city (amongst others, in the fourth district of the second ward), to be used at the election to be held Monday, April 3, 1905; that the resolution specified a particular kind of voting machine; that the board of inspectors of the named district, and each of them, have refused to obey the order of the common council, and assert that they will not obey it, giving as reason for their refusal that such method of voting is not a constitutional method. It is further set out that the particular voting machine is a complete and perfect piece of mechanism, thoroughly tested and reliable, constructed and operated in such a way as to permit an elector to vote secretly for a candidate or candidates of his choice upon any and all tickets, and that the same opportunity for discrimination is provided for the elector as if a paper ticket were used. The petition prays for a writ of mandamus, directed to the board of inspectors of said election district, commanding them to obey the resolution of the council. An order to show cause was issued, and the inspectors of said election district filed an answer, in which they admit the facts stated and set forth in the petition of relator, and they aver that they have refused and will refuse to obey the said order and direction of the common council to use the voting machine named, or any other voting machine, because they are advised that, under and by virtue of the provisions of § 2 of article 7 of the Constitution of this state, all votes given at any election must be by ballot, except as stated in said Constitution, "and that the word 'ballot,' as contained in said provision of the Constitution, does not permit the use of said voting machines, or any other voting machine, at elections, but means only a ticket upon which shall be written or printed the names of the candidates to be voted for at said election, and that the use of any other device is without warrant or authority of law." The cause coming on to be heard upon the petition and answer, the court denied the writ. The proceeding is brought into this court by certiorari, has been argued

orally, and very full briefs have been submitted in behalf of both the relator and the respondents.

The act of the legislature which is brought into question is act No. 61, p. 71, of 1897, Comp. Laws 1897, §§ 3750-3758, as amended by act No. 234, p. 383, of the Public Acts of 1903. The title of the act is, "An Act to Authorize the Use of Any Thoroughly Tested and Reliable Voting Machine at Any Election Held in This State." The act provides that any city council or village council may, at any regular meeting, authorize the use of such voting machines at any election to be held within their respective cities or incorporated villages during the ensuing year, but that "all voting by machine shall be a secret vote, as hereinafter provided," and that all election laws not incompatible with the act are continued in full force and effect. The pleadings before us, read in connection with the legislation referred to, not only assume, but afford assurance of, the fact that the voting machines in question will, if used, insure to the elector proper instruction in the use of the machines, absolute secrecy in voting, opportunity to vote for any person or candidate of his choice for any office to be filled at a particular election, a knowledge that he has voted, a correct record of the vote or votes, and a public and correct declaration of the total result of the election, and the recording and preservation of such result by officers chosen and sworn for that purpose. It is with reference to this statement of facts, and upon the assumption of the verity of each of them, that we proceed to discuss the only question before us, which is, Does the legislation in question contravene the provisions of § 2 of article 7 of the Constitution? That section reads: "All votes shall be given by ballot, except for such township officers as may be authorized by law to be otherwise chosen." The same language was used in the Constitution of 1835. There is but one other provision of the Constitution relating to the method of voting at elections, and that is § 11 of article 4, which is: "In all elections by either house or in joint convention, the vote shall be given *viva voce*." The question may be stated in simpler form in this way: Is a vote given or cast by the use of the machine—secrecy, free choice of candidates, a correct record of the vote, and a correct record and announcement of the total vote given for each candidate being assured—a vote "given by ballot?"

All reasonable presumptions are to be indulged to support the questioned legislation. The Constitution of Michigan is not a code, nor is the particular provision in any way self-executing. The language is imperative, and requires that whatever system of con-

ducting elections shall receive legislative sanction must have, as an integral, mandatory part of it, voting by ballot. In our opinion, the question is not to be determined as one of mere philology; nor should we apply, as we are asked to do, the rule of construction, often of great assistance, which limits the meaning of the words "given by ballot" to the vehicle used in voting or the method of depositing the vote which was probably in the contemplation of the framers of the Constitution. Neither do we regard as controlling the fact that previous legislative enactments have, with few exceptions, and those like the one now before us, uniformly provided for written or printed tickets for use in elections. We may assume that they have adopted the best known and most convenient way of voting by ballot,—of obeying the constitutional mandate. And a ticket so provided was not a ballot, but, when properly deposited, or properly marked and deposited, by the elector, was a vote given by ballot. *State ex rel. Runge v. Anderson*, 100 Wis. 523, 531, 42 L. R. A. 239, 76 N. W. 482. We regard the provision of the Constitution as a declaration of state policy, assuring to the elector a secret, as distinguished from an open, or announced, vote. And in reaching this conclusion, we apply those rules of construction which subserve the apparent purpose of the provision questioned.—its generality,—whether the language used is broader in meaning than the individual conceptions at the time of its adoption, and broad enough to sustain the legislation now considered.

The necessity for an early opinion in this case prevents any considerable references to the history of voting by ballot. The uses of the white and black balls in the club and in the lodge are familiar. Some of the early laws of the colonies provided that freemen might vote in the affirmative by the use of an Indian corn; in the negative, by putting in a bean. Lexicographers seem not agreed upon the derivation of the word "ballot." It has been said that it was adopted from the French language, without change of meaning (*State v. Shaw*, 9 S. C. N. S. 94, 138); that it comes from the Greek word meaning "to throw" (2 Am. Cyc. 245). In common speech, the word "ballot" is used to mean the ball or ticket used in voting; the act of voting; the result of voting. It seems clear, however, that, from the earliest times, voting by ballot has been a term used to contradi-

stinguish open, *viva voce*, or public voting, and secret voting. "Voting by ballots is by a ticket or ball, and secrecy is an essential part of this manner of voting." Bouvier, Law Dict. (Rawle's Rev.) title *Ballots*. "The material guaranty of the provision of the Constitution (§ 6, art. 6), that

"all elections by the people shall be by ballot" is inviolable secrecy as to the person for whom an elector shall vote; and this guaranty is binding upon municipal governments in the regulation of elections." *State ex rel. Smith v. Anderson*, 26 Fla. 240, 8 So. 1 (syllabus). "The expression 'election by ballots' had been expounded and construed by the various courts of last resort, and, with entire unanimity, they had declared it meant a secret ballot, and that the essential principle of this manner of voting was that the elector might conceal from every person the name of the candidate for whom he voted." *Ex parte Arnold*, 128 Mo. 280, 33 L. R. A. 386, 49 Am. St. Rep. 557, 30 S. W. 769, 1036. See also *Williams v. Stein*, 38 Ind. 90, 10 Am. Rep. 97; *Ritchie v. Richards*, 14 Utah, 345, 47 Pac. 670; *Brisbin v. Cleary*, 26 Minn. 107, 1 N. W. 825. References to the principal lexicographers will discover the same concept and definitions of ballot voting. In *Opinion of Justices*, 7 Me. 495, Appx., one of the questions answered was whether printed ballots came within the meaning of a constitutional provision which required that all elections shall be by written ballots. The answer was, in part: "It may be observed that those who framed the Constitution undoubtedly intended to guard against many inconveniences in the before-named elections, by excluding all those other modes by which questions are often decided in popular assemblies. This was the general object. The word 'ballot' may be considered as opposed to a vote by word or by signs,—as, for instance, a vote by yeas and nays, or the common mode of voting, by holding up the hand, or by rising and standing till counted. It may well be supposed that the mode prescribed was preferred . . . because it secures a greater degree of independence than any other in the exercise of the elective franchise." And the printed ballot was held good. *Henshaw v. Foster*, 9 Pick. 312, 320, is, as to the question presented, like the case last cited, and to that question the same answer was returned. But the opinion is of further interest here. It was urged "that the uniform and constant use of manuscript ballots in elections amounts to a construction of the terms of the Constitution which ought now to be received as the only true one." Of this the court, speaking by Chief Justice Parker, said: "This practice of a mode of voting which is undoubtedly constitutional, founded in existing convenience, and never brought into competition with the use of printed votes, scarcely furnishes an argument against the latter. . . . It merely shows a preference of one over the other, or that one during the time of the practice is more convenient than the other." To the same ef-

fect is *Temple v. Mead*, 4 Vt. 535. In the opinions and briefs in *State v. Shaw*, 9 S. C. N. S. 94, will be found an exhaustive discussion of the meaning of the word "ballot," its derivation and definitions, some history of its employment, and its meaning, as used in the Constitution of that state. That Constitution provided that "in all elections by the general assembly, or either house thereof, the members shall vote *viva voce*, and their votes thus given shall be entered upon the journal of the house to which they respectively belong." [S. C. Const. art. 2, § 24.] Another section of the same instrument required the state to be divided into convenient circuits, and that for each the assembly should elect a judge by "joint ballot." In the election of certain judges, the vote was given *viva voce*; and upon application of the attorney general, who invoked the original jurisdiction of the supreme court of the state, and who contended that a secret ballot was, by the Constitution, made imperative in such elections, there was a judgment of ouster. The case, *Re Voting Machine*, 19 R. I. 729, 36 L. R. A. 547, 36 Atl. 716, is not precisely in point here, because of differences in the constitutional provisions of the two states. The opinion is of interest, however, because the court considered the argument that the framers of the Constitution, as individuals, never had in mind such a method of voting. Of this it is said: "The question, however, is not what limitations they may have had in mind, by reason of the methods to which they were accustomed, but what the language of the Constitution means, or may reasonably mean, with reference to the matter before us." In *Re House Bill No. 1,291*, 178 Mass. 605, 54 L. R. A. 430, 60 N. E. 129, the question presented was: "Has the general court the right to authorize the use of voting and counting machines at elections by the people of national, state, district, county, city, or town officers?" The Constitution, as has been noticed, provided that representatives shall be chosen by written vote. It was held by three of the justices that the requirement might be complied with in voting by a machine which registers each vote cast, without the use of separate ballots. One justice concurred, provided the results of the action of the machine in registering each vote were visible to the voter, and the work of the machine in adding up votes was done under the supervision of some person or persons charged with the duty of counting the votes cast. Three justices dissented upon the ground that "the turn of a wheel or a dial, the punching of a hole in an unseen roll of paper on which are the names of candidates, by a voter who pulls a lever or turns a key, is not the use of a written vote, within the

meaning of the Constitution." The majority opinion, which seems to have been prepared by Chief Justice Holmes, referring to the opinion in *Henshaw v. Foster*, in which it was said that the word "ballot" is ambiguous, which was the reason for the constitutional requirement of a written vote, contains this language: "No doubt, the picture in the minds of those who used the words was that of a piece of paper with the names of the candidates voted for written upon it in manuscript; but the thing which they meant to stop was oral or hand voting, and the benefits which they meant to secure were the greater certainty and permanence of a material record of each voter's act, and the relative privacy incident to doing that act in silence. . . . It seems to us that the object and even the words of the Constitution, in requiring 'written votes,' are satisfied when the voter makes a change in a material object,—for instance, by causing a wheel to revolve a fixed distance,—if the material object changed is so connected with or related to a written or printed name purporting to be the name of a candidate for office that, by the understanding of all, the making of the change expresses a vote for the candidate whose name is thus connected with the device."

Our attention has been called to no decisions precisely in point. We have referred to those mentioned as supporting substantially our reasoning and the result arrived at. We do not regard the decision in *State ex rel. Runge v. Anderson*, 100 Wis. 523, 42 L. R. A. 239, 76 N. W. 482, as opposed in principle to either our reasoning or conclusions.

The purpose of the framers of our Constitution in requiring that, in all elections in either house of the legislature, the votes shall be given *viva voce*, is obvious. Equally

obvious, in our opinion, is the purpose of the provision under consideration. It is undoubted, as is claimed by counsel for respondents, that, as early as 1835, the method of voting by the use of tickets was known. It was nevertheless important that the policy of the new state with reference to the subject of voting at elections should be declared in the Constitution. Agitation for the vote by ballot had only then begun in England, nor was it ended and the ballot assured until 1872. In 1835, and after, voting other than by ballot was practised in the United States. To say that the purpose of the framers of our Constitution was not to secure a particular mode of voting secretly, but was to make manifest in the organic and continuing law a policy to be perpetuated, is to give to the words of the instrument no forced or unnatural meaning. As was said by Mr. Justice Campbell in *People ex rel. Williams v. Cicott*, 16 Mich. 283, 297, 97 Am. Dec. 141: "Our whole ballot system is based upon the idea that, unless inviolable secrecy is preserved concerning every voter's action, there can be no safety against those personal or political influences which destroy individual freedom of choice." If we could imagine our Constitution adopted to-day, and the legislation in question enacted, with reference to all the facts stated, to-morrow, would it be contended that the legislation was unconstitutional because not providing that "votes shall be given by ballot?"

We are of opinion that we should not hold the legislation to be invalid for any of the reasons urged. *The Circuit Court for the County of Wayne was in error in denying the writ of mandamus*, which should issue as prayed. The proceeding being one of public interest and importance, no costs will be awarded.

RHODE ISLAND SUPREME COURT.

Maria VIZACCHERO, Admr., etc., of
—— Vizacchero, Deceased,
v.

RHODE ISLAND COMPANY.

(.....R. I.....)

1. The speed of an electric car running along a sparsely settled coun-

try road in the space between intersecting crossroads in the dark is to be governed, not by the ability of the motorman to stop his car after discovering an object on the track by the aid of his headlight, but by the ability of persons on the track conveniently to leave it after seeing the light and hearing or understanding the signals given by the approaching car.

2. Failure to anticipate the presence

NOTE.—For a case in this series as to care required of persons crossing tracks of electric railway in country, see *Keenan v. Union Traction Co.* 58 L. R. A. 217.

For intoxication as affecting negligence, see *Kingston v. Ft. Wayne & E. R. Co.* 40 L. R. A. 131, and *note*; *Bageard v. Consolidated Traction Co.* 49 L. R. A. 424; and *Wheeler v. Grand Trunk R. Co.* 54 L. R. A. 955.

As to doctrine of last clear chance, see also *Bogan v. North Carolina C. R. Co.* 55 L. R. A. 418, and *note*, and *Harrington v. Los Angeles R. Co.* 63 L. R. A. 238.

of a man on his hands and knees on the track in front of an electric car on a dark night, and to run the car so as to provide for that contingency, is not negligence on the part of the motorman.

3. **The negligence of a man in crawling on his hands and knees towards an approaching electric car in the dark after the appearance of the headlight, which can be seen 800 feet away, is continuing, so as not to entitle his personal representative to hold the company liable for his death on the theory of last clear chance, because the speed of the car is so great that it cannot be stopped after his presence on the track is discovered.**

4. **Intoxication does not relieve a man from the degree of care required of a sober man under the same circumstances.**

(September 21, 1904.)

PETITION by defendant for a new trial after verdict in plaintiff's favor in an action brought to recover damages for the alleged negligent killing of plaintiff's intestate. *Judgment for defendant.*

The facts are stated in the opinion.

Mr. Henry W. Hayes, for defendant:

To say that a street car shall not be run any faster than at a speed which will enable the car to be stopped within the distance within which the headlight throws its rays is manifestly absurd.

Kline v. Electric Traction Co. 181 Pa. 276, 37 Atl. 522.

The decision that the motorman was proceeding in violation of his duty is wholly contrary to the rule established by innumerable decisions throughout the country, and also by the decisions of our own court.

Stelk v. McNulta, 40 C. C. A. 357, 99 Fed. 138; *New York Condensed-Milk Co. v. Nassau Electric R. Co.* 29 Misc. 127, 60 N. Y. Supp. 234; *Murray v. Forty-Second Street, M. & St. N. R. Co.* 9 App. Div. 610, 41 N. Y. Supp. 620; *Mathison v. Staten Island Midland R. Co.* 66 App. Div. 610, 72 N. Y. Supp. 954; *Chicago City R. Co. v. Lewis*, 5 Ill. App. 243; *Winter v. Federal Street & P. Valley Pass. R. Co.* 153 Pa. 27, 19 L. R. A. 232, 25 Atl. 1028; *State use of Meidling v. United Railways & Electric Co.* 97 Md. 73, 54 Atl. 612; *Bittner v. Crosstown Street R. Co.* 153 N. Y. 76, 60 Am. St. Rep. 588, 46 N. E. 1044.

Messrs. Frank T. Easton and Lofferts S. Hoffman also for defendant.

Messrs. Lewis S. Thompson and Livingston Ham, for plaintiff:

In the absence of evidence of due care, or want of due care, the plaintiff is entitled to the benefit of a presumption of due care on his part.

Cassidy v. Angell, 12 R. I. 447, 34 Am. Rep. 690; *Judge v. Narragansett Electric Lighting Co.* 21 R. I. 128, 42 Atl. 507; 69 L. R. A.

Northern C. R. Co. v. State, 29 Md. 420, 96 Am. Dec. 545; *Johnson v. Hudson River R. Co.* 20 N. Y. 65, 75 Am. Dec. 375; *Prue v. New York, P. & B. R. Co.* 18 R. I. 360, 27 Atl. 450; *Tuff v. Warman*, 5 C. B. N. S. 573.

Where both parties are negligent, and the negligence of each contributes in some degree to the injury sustained by the plaintiff, yet, if the negligence of the plaintiff is remote in point of time, and results merely in putting him or his property in a position or condition of danger, so that the acting or casual negligence of the defendant, otherwise harmless in the particular case, is given an opportunity to operate, a verdict for the plaintiff is proper.

Davies v. Mann, 10 Mees. & W. 546; *Tuff v. Warman*, 2 C. B. N. S. 740, 5 C. B. N. S. 573; *Radley v. London & N. W. R. Co.* L. R. 10 Exch. 100; *Pickett v. Wilmington & W. R. Co.* 117 N. C. 616, 30 L. R. A. 257, 53 Am. St. Rep. 611, 23 S. E. 264; *Lloyd v. Albemarle & R. R. Co.* 118 N. C. 1010, 54 Am. St. Rep. 764, 24 S. E. 805; *Pharr v. Southern R. Co.* 119 N. C. 751, 26 S. E. 149; *Chicago, B. & Q. R. Co. v. Grablin*, 38 Neb. 90, 56 N. W. 796, 57 N. W. 522; *Omaha Street R. Co. v. Martin*, 48 Neb. 65, 66 N. W. 1007; *Hilz v. Missouri P. R. Co.* 101 Mo. 36, 13 S. W. 946; *Moore v. St. Louis Transit Co.* (Mo. App.) 75 S. W. 699; *Haley v. Earle*, 30 N. Y. 208; *O'Brien v. McGlinchy*, 68 Me. 552; *Nashua Iron & Steel Co. v. Worcester & N. R. Co.* 62 N. H. 159; *Isbell v. New York & N. H. R. Co.* 27 Conn. 393, 71 Am. Dec. 78; *Northern C. R. Co. v. State*, 29 Md. 420, 96 Am. Dec. 545; *Prue v. New York, P. & B. R. Co.* 18 R. I. 360, 27 Atl. 450.

This principle is not dependent upon an actual discovery of the plaintiff's dangerous position, and a want of due care after such discovery on the part of the defendant.

The liability is based, not on negligence arising after the discovery of the plaintiff's perilous predicament, but on negligence in failing to discover that predicament. Negligence after actual discovery of another's dangerous position comes very close to intentional injury, and in such cases the doctrine of contributory negligence does not apply.

Straus v. Kansas City, St. J. & C. B. R. Co. 75 Mo. 185.

Conceding that the plaintiff's intestate was drunk upon the track, this would not alter the defendant's duty towards him.

Lloyd v. Albemarle & R. R. Co. 118 N. C. 1010, 54 Am. St. Rep. 764, 24 S. E. 805; *Pharr v. Southern R. Co.* 119 N. C. 751, 26 S. E. 149; *Isbell v. New York & N. H. R. Co.* 27 Conn. 393, 71 Am. Dec. 78; *Clayards v. Dethick*, 12 Q. B. 439; *Radley v. London & N. W. R. Co.* L. R. 10 Exch. 100.

Douglas, J., delivered the opinion of the court:

This action is brought to recover damages for the death of the plaintiff's intestate, who was struck and mortally wounded by one of the defendant's electric trolley cars, which was coming towards the city, in the town of Johnston, about 8 o'clock, P. M., March 8, 1903. The place where the accident occurred was on Atwood avenue, a thinly settled country road 50 feet wide, having the car track located along one side, next to the sidewalk, leaving about 30 feet of unoccupied highway. The evening was dark and stormy, and the headlight and other lights of the car were lighted, and a person on the track approaching the place of the accident, and facing towards the car, had an uninterrupted view for at least 800 feet. The headlight enabled the motorman to distinguish objects upon the track within a distance of about 25 feet. A witness, who, with his wife and child, were the only passengers on the car, testifies that the car at the time of the accident was going, as he thinks, at the rate of 20 miles an hour. In cross-examination he admits that he could not see through the windows, which were obscured by the weather; that his attention was taken up by the child, with whom he was playing; and that his estimate of the speed of the car was merely a guess. The motorman and conductor testify that the car was going at the rate of from 9 to 12 miles an hour, as was customary at that place. The motorman testifies that, looking carefully ahead, he first saw the intestate on his hands and knees, upon the track, facing the car, about 25 feet away; that he immediately applied his brake and reversed the power, but, notwithstanding these efforts, which were all that he could make, the car struck the man, threw him to one side of the track, and stopped about 20 feet further on. It appeared from the evidence of the physicians who examined the plaintiff's intestate at the hospital that he had been drinking spirituous liquor, but there is no direct evidence that he was intoxicated. He had been seen, shortly before the accident, walking in his usual manner on the road. Jury trial having been waived, the case was tried before a single judge in this division, who decided that, while the plaintiff's intestate was negligent in approaching the car as he did, the defendant's servant was negligent in running the car so rapidly that, with the appliances at his command, he could not stop the car after the man was distinguishable by the headlight. And his conclusion was that the negligence of the defendant was the proximate cause of the accident. He therefore decided in favor of the plaintiff, and assessed the damages at \$5,000.

69 L. R. A.

We think the learned judge erred in his finding that the defendant's servant was guilty of neglect of duty, and also in finding that the intestate's negligence was not the proximate cause of the accident. The duty of the driver of an electric car passing along a sparsely settled country road in the space between intersecting roads is not to be judged by the same rules with regard to speed which apply to the same car passing along the crowded street of a city. The care to be exercised is relative, and must be proportional to the danger reasonably to be apprehended at the time and place. *Steik v. McNulta*, 40 C. C. A. 357, 99 Fed. 138. The popular demand for electric cars rather than horse cars or omnibuses prevails at the present day because the former can carry more passengers, and at a more rapid rate, than the latter. In order to serve the public, these cars must be propelled as rapidly as safety will permit; and on long stretches of country road, where the statutes and town ordinances fix no limit to their speed, no given rate of speed is *per se* excessive. *Kline v. Electric Traction Co.* 181 Pa. 276, 37 Atl. 522. The duty of a traveler upon an unimpeded country road is to yield the use of the railroad track to an approaching car. The wilful and malicious obstruction of a street railway company in the use of its tracks is punishable as a misdemeanor. Gen. Laws 1896, chap. 279, § 65. The car cannot turn out, and so the traveler must. The conduct of the operator of the car may be lawfully predicated upon the expectation that the traveler will observe his duty in that regard.

The duty of the railroad company towards such travelers is not to stop its car when they appear, but to give them sufficient notice of the approach of the car to enable them to leave the track before the car arrives. *Terre Haute & I. R. Co. v. Graham*, 46 Ind. 239-245; *West Chicago Street R. Co. v. Schwartz*, 93 Ill. App. 387; *McQuade v. Metropolitan Street R. Co.* 17 Misc. 154, 39 N. Y. Supp. 335. If the car is going only at such speed as will give a traveler ample time to leave the track, after he sees the light or hears the signal of the car, before the car reaches him, he has nothing to complain of. It is not running at excessive speed with regard to him. *Bethel v. Cincinnati Street R. Co.* 15 Ohio C. C. 381, 8 Ohio C. D. 310. It is therefore plain that the distance at which the light of the car can be seen or the bell or whistle can be heard and understood by travelers, so as to enable them conveniently to leave the track—not the distance that the motorman can see ahead—is the standard by which the speed of the car should be regulated. As it is not the duty of the car to stop within the limit of the illumination of the headlight, its speed need not be restricted

to the rate prescribed by such a necessity. Such a general rule as that which the court announced is neither necessary nor reasonable as applied to the locality in question.

In the particular circumstances of this case we are unable to see that the defendant's servant was guilty of any negligence. Negligence is the failure to provide for some condition or event which may reasonably be expected, and the motorman in this case, in the place where he was going, had no reason to expect that any pedestrian would remain upon the track after the lights of the car were plainly visible. Certainly he had no reason to anticipate that he would encounter a human being upon the track, crawling towards the car upon his hands and knees, and it was not his duty to run his car so as to provide for such a contingency. After the man was seen, it is not suggested that the motorman was guilty of negligence, as he used every means in his power to stop the car before the collision. *Stelk v. McNulta*, 40 C. C. A. 357, 99 Fed. 138; *Murray v. Forty-Second Street, M. & St. N. Ave. R. Co.* 9 App. Div. 610, 41 N. Y. Supp. 620. It may be added, also, that there is no evidence that upon the wet and slippery track the car could have been stopped in time if it had been proceeding at a very moderate rate of speed.

Again, the court erred in holding that the plaintiff could recover notwithstanding his own negligence. The doctrine of proximate cause, sustained by a long series of decisions following *Davies v. Mann*, 10 Mees. & W. 546, as we have adopted it in this state, is clearly stated in *Mahogany v. Ward*, 16 R. I. 479, 27 Am. St. Rep. 753, 17 Atl. 860, and *Prue v. New York, P. & B. R. Co.* 18 R. I. 360, 27 Atl. 450. The plaintiff's counsel cites many cases in support of his contention that this case is governed by the rule. Some of the cases cited make, as it seems to us, quite unwarranted applications of it, to the extent almost of making a railroad company responsible for damages to the heirs of a suicide; but none go so far as would be necessary to absolve the plaintiff from contributory negligence in this case. Taking the words of Baron Parke in *Davies v. Mann*, "the negligence which is to preclude a plaintiff from recovering in an action of this nature must be such as that he could by ordinary care have avoided the consequences of the defendant's negligence," as a guide, it is plain that the plaintiff cannot recover; for her intestate, by ordinary care, could have avoided the car, which was visible at a distance of 800 feet, no matter how fast it was going. It was just as much the duty of the plaintiff's intestate to avoid the consequences of the defendant's negligence, if there was any, as for the defendant's servant

to avoid the consequences of the intestate's negligence, if by any care and foresight he could have done so. The intestate's negligence was not remote in point of time, but continuous and coefficient with the act of the company. The court says, in *O'Brien v. McGlinchy*, 68 Me. 552, 558: "But this principle would not govern where both parties are contemporaneously and actively in fault, and by their mutual carelessness an injury ensues to one or both of them." In *Isbell v. New York & N. H. R. Co.* 27 Conn. 393, 71 Am. Dec. 78, it is said: "The negligence of the plaintiff, if there has been any, was not the proximate cause of the accident. To be so, it must have been simultaneous in its operation with that of the defendants, of the same kind, immediate, growing out of the same transaction, and not something distinct and independent of a prior date, remotely related to the negligence of the defendants." In the case of *Prue v. New York, P. & B. R. Co.* 18 R. I. 360, 27 Atl. 450, the victim was proceeding to extricate himself from the danger, and could have escaped but for the independent mistaken act of the gateman after he saw the position of the traveler. If the traveler had remained upon the track, with the gates open, the case must have been decided differently. In one of the most reliable textbooks on the subject of negligence, the rule, as formulated by a writer in the *Quarterly Law Review*, vol. 2, p. 507, is adopted as follows: "The party who last has a clear opportunity of avoiding the accident, notwithstanding the negligence of his opponent, is considered solely responsible." 1 Shearm. & Redf. Neg. 165, § 99. The negligence of the plaintiff's intestate did not consist in walking upon the track, which he had a right to do until the car approached, but in remaining upon it after the car was plainly visible; and this negligence continued until the car struck him. The opportunity for him to escape began when he could have seen the car 800 feet away, and only ended a few seconds before he was struck. His neglect of this opportunity, as much as the approaching car, caused the accident. In *Randall v. Union R. Co.* (R. I.) 59 Atl. 165, we held that a nonsuit was properly granted where it appeared that the accident was caused by the failure of the plaintiff seasonably to turn off of the track after the car had reached a point where it could have been seen, or by the slipping of the horse on the hard snow. It has been held that a person riding between the rails of an electric street railway upon a bicycle has the duty to look out for and endeavor to avoid danger from the electric cars, and the negligence of a bicycle rider who continued to ride on the track of an electric car up to the very moment when he was struck, when, by the

slightest care and effort on his part, he could have put himself out of danger up to the last moment, is a contributing and efficient cause of the injury which precludes the conclusion that the negligence in managing the car was later in time, and therefore the proximate cause of injury. *Everett v. Los Angeles Consol. Electric R. Co.* 115 Cal. 105, 127, 34 L. R. A. 350, 46 Pac. 889, 43 Pac. 207. The duty of a pedestrian is the same, and his opportunity is as great; and so it is clear that the contributory negligence of the plaintiff's intestate was a proximate cause of his death. In *Ormsbee v. Boston & P. R. Corp.* 14 R. I. 104, 51 Am. Rep. 354, it was held to be contributory negligence on the part of a deaf mute to cross a railroad track without looking for an approaching train, and that his administratrix could not recover, though the train gave no signal as it should have done.

A very instructive case, though not presenting the same facts affecting the question of the defendant's negligence as the case at bar, is *State use of Meidling v. United Railways & Electric Co.* 97 Md. 73, 54 Atl. 612, 613. The care required of one who attempts to cross the track of an electric road in the open country is strongly insisted upon. The case is directly in point on the questions of contributory negligence. The court says: "It is evident from all the evidence that we have here . . . a rapidly approaching car in the sight of the traveler, who, in spite of the fact that he saw it, drove leisurely on the track, and was run over and killed. It is conceded, of course, that the defendant was negligent in failing, perhaps, to give signals, and in running at a higher rate of speed than was allowable; but, under all the authorities, such negligence of the defendant does not palliate or excuse the negligence of the plaintiff;" citing *Keenan v. Union Traction Co.* 202 Pa. 107, 58 L. R. A. 217, 51 Atl. 742. So in *Gilmore v. Federal Street & P. Valley Pass. R. Co.* 153 Pa. 31, 34 Am. St. Rep. 682, 25 Atl. 651, it was held that "a person is guilty of contributory negligence 69 L. R. A.

who leaves a horse and wagon unguarded upon the track of an electric street railway, in a narrow and unlighted alley, on a dark night; and he cannot recover for injuries to the horse and wagon, although the railway company was also negligent in running the car at a rate of speed that did not permit its stoppage within the distance covered by its own headlight." The court says: "It is an unbending rule, to be observed at all times and under all circumstances, that a person about to cross the track of a street railway must look in both directions for an approaching car before attempting to cross. *Ehrisman v. East Harrisburg City Pass. R. Co.* 150 Pa. 180, 17 L. R. A. 448, 24 Atl. 596; *Wheelahan v. Philadelphia Traction Co.* 150 Pa. 187, 24 Atl. 688. But compliance with this rule would be an idle ceremony if a person might afterwards stop his horse or vehicle upon the track, relax his vigilance, and, leaving his horse unguarded, go into a building in the vicinity, and there remain any length of time whatever." And the judgment for the plaintiff was accordingly reversed. See also, to the same effect, *New York Condensed-Milk Co. v. Nassau Electric R. Co.* 29 Misc. 127, 60 N. Y. Supp. 234.

If the plaintiff's intestate had impaired his ability to take care of himself by getting intoxicated, that fact in no wise affects the case. Intoxication does not relieve a man from the degree of care required of a sober man in the same circumstances. *Chicago City R. Co. v. Lewis*, 5 Ill. App. 242; *Baggeard v. Consolidated Traction Co.* 64 N. J. L. 316, 49 L. R. A. 424, 81 Am. St. Rep. 498, 45 Atl. 620. In *Bugbee v. Union R. Co.* (R. I.) 59 Atl. 165, the plaintiff was walking upon the track, intoxicated, when he was struck by an electric car, and the court considered him culpably negligent.

As the record presents all the evidence attainable, and it conclusively appears that the plaintiff's intestate has no cause of action against the defendant, *judgment will be entered for the defendant.*

TEXAS COURT OF CRIMINAL APPEALS

Lee BEASON, Appt.,

v.

STATE of Texas.

(43 Tex. Crim. Rep. 442.)

1. The record of a prior conviction of theft, based upon a plea of guilty, is admissible in a prosecution for burglary, where the taking alleged in both cases is the same.
2. That accused was not admonished does not destroy the effect of a judicial confession in the nature of a plea of guilty in a prosecution for a misdemeanor.
3. A plea of guilty of the theft to commit which a burglary is alleged to have been

committed does not, where the fact of burglary itself depends on circumstantial evidence, relieve the court of the necessity of instructing the jury as to the law governing convictions on circumstantial evidence.

4. A remark by the trial judge to counsel in the presence of the jury in a criminal case, indicating that in his opinion the case is not one depending on circumstantial evidence, and that he gives instructions on that subject only in deference to the opinion of the higher court, is reversible error.
5. It is reversible error for the trial judge to permit, without rebuke, the prosecuting attorney to state to the jury, in a prosecution for burglary, that, if they do not convict, we might as well tear down the courthouses; that, if defendant is not guilty,

NOTE.—Necessity of instruction as to law on circumstantial evidence.

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I. *Introductory*.

This note will be strictly limited to the subject contained in the title: that is to say, to the necessity of the instruction. It is believed that there is a unanimity of opinion among the several jurisdictions as to the rules which govern this subject, and that they are, in substance, that, in a criminal case where the prosecution is dependent solely upon circumstantial

evidence, it is the duty of the court to instruct the jury as to the law governing that character of evidence, and that this is so only in those cases which depend solely upon circumstantial evidence. In many cases given herein the courts have quoted largely from opinions relating mostly, if not entirely, to the question of the sufficiency of a charge upon circumstantial evidence, but such cases have no place in the examination of the particular subject here being considered, and, of course, have not been included.

The other rule consists in the converse of the proposition mentioned, and is that where there is direct evidence of what the courts have frequently styled the inculpatory fact, whether such evidence consists in the positive assertions of witnesses, or the direct testimony, such as the confession, admission, statement, or testimony of the accused, or a plea the natural and only effect of which is to admit the existence of the inculpatory fact, no instruction concerning it need be given. As is well said in *BEASON V. STATE*, "What constitutes circumstantial evidence, and what constitutes a case depending solely upon circumstantial evidence, are two different questions." An endeavor has been made to preserve the distinction between the two, and to eliminate the consideration of the question first mentioned from the discussion.

II. *When evidence is entirely circumstantial*.a. *In general*.

The following cases are those which hold unqualifiedly to the rule mentioned, that where, in a criminal case, the evidence is purely circumstantial, a charge upon that branch of the law must be given, and severally contain the different circumstances and character of trials wherein the strict rule has been applied.

1. *Homicide*.

On a trial for murder, where all the evidence against the accused is circumstantial, he is entitled to an instruction on the law of circumstantial evidence, and the refusal to give an instruction asked for by him, which in all respects correctly states the law as to the ef-

there are too many courts for the case to go through to permit his conviction; that the state has proved that defendant stole the property by his pleas of guilty, which the judge would not have entered if it was not true; so that the case is one of direct, and not circumstantial, evidence, although a 2 x 4 appellate court had held that it was the latter.

6. A claim that the jury in a criminal case was prejudiced by a report of a grand jury as to the enforcement of criminal law, which was read before them, comes too late on a motion for a new trial.

(February 12, 1902.)

A PPEAL by defendant from a judgment of the District Court for Clay County convicting him of burglary. *Reversed*.
The facts are stated in the opinion.

fect of such evidence, will nullify his conviction. *State v. Moxley*, 102 Mo. 374, 14 S. W. 969, 15 S. W. 556.

On a trial for murder, while the essential facts may be proved by circumstantial evidence, it is a well-established principle that it is necessary to caution the jury, in a proper instruction, as to the weight and effect to be given the circumstances detailed by the witnesses; and, where the evidence in the case is wholly circumstantial, the jury should be instructed as to the nature and conclusiveness of that character of testimony to warrant a conviction upon it. *Territory v. Lermo*, 8 N. M. 566, 46 Pac. 16.

On a trial for murder a witness testified that she saw the accused strike the deceased on the head with a piece of iron, and several minutes thereafter she heard a pistol shot, which she thought was in the same room where she had witnessed the blow. The evidence of experts made it clear that death did not result from the blow, but alone from the shot, although it was testified that the blow could, or might, have produced or brought about death in a few days, depending upon probable attendant and resultant effects of the blow. The court said, that conceding that the blow could have produced death in a few days, yet that time did not elapse, for the evidence showed that the shot took effect while deceased was living, and that it produced death, and, as no witness saw the pistol fired, it was left to be ascertained from inference or conclusions from the circumstances and facts developed on the trial who did the shooting, and, this being the case, the conviction was wholly dependent for its support on circumstantial evidence; and, although a charge upon this phase of the law was prepared, and requested by the accused, it was not given, and this was held to be error. *Leftwich v. State*, 34 Tex. Crim. Rep. 489, 31 S. W. 385.

Where, on a trial for murder of a new-born infant, it appeared by the evidence of the child's mother that, directly after its birth, the defendant took the child into another room, and while there with the child she heard the sound of water; that thereafter the defendant brought the child, or its body, she could not tell which, into the room, there being no sound coming from the child showing that it was alive; and there, to her positive knowledge, he burned the child,—the court said that, if the

Messrs. Barrett & Barrett, for appellant:

The record of the former conviction was not admissible, because the state failed to show that the defendant had been properly admonished before he pleaded guilty.

Allen v. State, 18 Tex. App. 120; *Black v. State*, 18 Tex. App. 124; *Walker v. State*, 7 Tex. App. 245, 32 Am. Rep. 595.

Where the remarks of the district attorney in his closing argument are improper, and have probably injured the rights of defendant, when they are properly excepted to, and the court is requested to tell the jury not to consider them, and the objection and request are overruled by the court, the cause should be reversed.

Crow v. State, 33 Tex. Crim. Rep. 264,

child was drowned, then it was a case of circumstantial evidence, and the facts demonstrated this proposition. That the proof tended more strongly to show that it was drowned, and, this being a case of circumstantial evidence, the rules applicable to such a case should have been given in charge to the jury. And, even conceding that the circumstances—the facts—were in such close juxtaposition that they amount to positive proof that the child was burned to death, still the theory that it was drowned might have been adopted by the jury, and the accused convicted upon that theory, without proper instructions upon the rule applicable to a case depending upon circumstantial evidence. *Puryear v. State*, 28 Tex. App. 73, 11 S. W. 929.

Notwithstanding the fact that the court, on a trial for homicide, has already embraced in its charge the doctrine of reasonable doubt, an additional instruction must be given where the guilt of the accused is sought to be established upon circumstantial evidence only, viz., that the proof must be so clear and convincing as to exclude every other reasonable hypothesis than that of the guilt of the accused. *Barnard v. State*, 88 Tenn. 183, 12 S. W. 431.

In a criminal prosecution for murder, in which nothing is proved by positive testimony save the *corpus delicti*, and all the evidence to connect the accused with the crime is circumstantial, it is essential that the jury be further instructed as to the conviction which must impress itself upon their minds, drawn by inference from the circumstances in evidence, before they can say that, beyond a reasonable doubt, the accused perpetrated the act. *Hunt v. State*, 7 Tex. App. 212.

In this immediate connection, the court said further: "And it is believed that the adjudged cases in our state furnish no instance of a conviction for a grave felony upon circumstantial testimony alone, unless the charge of the court plainly directed the jury as to the principles of law which should govern them in reaching their conclusion: and we have already held it error to refuse a charge of this character when asked in a proper case. *Harrison v. State*, 6 Tex. App. 42."

On the trial of an indictment against two brothers for murder the trial court limited its charge upon circumstantial evidence to the case of one, thereby (as stated by the court of appeals) giving the jury to understand that the

26 S. W. 209; *Brazell v. State*, 33 Tex. Crim. Rep. 333, 26 S. W. 723.

Neither the district attorney nor the court should be allowed to appeal to the prejudice of the jury, directly or indirectly, in order to obtain a conviction in a criminal case.

Moncallo v. State, 12 Tex. App. 171; *Moore v. State*, 33 Tex. Crim. Rep. 306, 26 S. W. 403; *Kirk v. State*, 35 Tex. Crim. Rep. 224, 32 S. W. 1045; *Crow v. State*, 33 Tex. Crim. Rep. 264, 26 S. W. 209.

The court is not allowed in this state, and is expressly prohibited by the statute, from either directly or indirectly expressing or intimating an opinion as to the guilt of the

defendant in a criminal case being tried before it.

Ibid.

In a criminal case the judge should so construct his charge as to place the burden of proof on the state.

Philbrick v. State, 2 Tex. App. 517.

Mr. Robert A. John for appellee.

Brooks, J., delivered the opinion of the court:

Appellant, Lee Beason, was charged by indictment with burglarizing a house occupied and controlled by Paul Schucht with the intent to commit the crime of theft, and that he did fraudulently take 15 bushels of corn, of the value of \$6. His trial resulted

case of the other did not depend wholly upon that character of evidence, but was supported, in part at least, by direct evidence. This was held to be error, as the charge upon circumstantial evidence should have been made applicable to the case of the one as well as to that of the other. It was a part of the law of both cases, and its omission from the charge has been repeatedly held to be error for which the judgment must be reversed, although such error was not excepted to at the trial. *Conner v. State*, 17 Tex. App. 1.

Upon an appeal from a conviction for manslaughter the court said that it was a case clearly of circumstantial evidence, and the trial court should have charged the law applicable to such a case, and a failure to do so was fundamental error, and the conviction was reversed. *Elley v. State*, 20 Tex. App. 106.

2. Larceny.

In the following cases the rule has been applied in trials for larceny.

On a trial for larceny, where all the evidence as to the accused was circumstantial, and the court, when requested by the counsel for the accused to charge the law of circumstantial evidence, refused to do so, and stated in the presence and hearing of the jury that he did not think that was in the case, this was held to be error, and a conviction was reversed. *Hart v. State*, 97 Ga. 365, 23 S. E. 831.

On a trial for larceny the evidence on behalf of the state, tending to prove the appellant's guilt, was all circumstantial, there being no direct evidence of such guilt, and the court having refused a request for an instruction as to the effect of circumstantial evidence,—that it was a case where the state sought a conviction on circumstantial evidence; that the accused was presumed to be innocent until the contrary was made to appear by the evidence; and that, in order to convict, the circumstances must be so strong as to exclude every other reasonable hypothesis, except that of the defendant's guilt,—this was held to be error for which a conviction was reversed. *Wantland v. State*, 145 Ind. 38, 43 N. E. 931.

On a trial for larceny, where there was no direct or positive evidence of the guilt of the accused, a refusal to instruct the jury that, before they could convict upon circumstantial evidence alone, the circumstances should be such as to exclude every other reasonable hypothesis

than that of the defendant's guilt, is error for which a conviction will be reversed. *Turner v. State*, 4 Lea, 207.

On a trial for larceny, where it became necessary for the jury to determine from the evidence that the animals charged to have been stolen from the alleged owner were taken in a particular county, the evidence on this question being purely circumstantial, it was necessary for the judge to give to the jury an appropriate charge on circumstantial evidence, and the failure to do so was reversible error. *Lindley v. State*, 8 Tex. App. 445.

Where, on a trial for larceny, the evidence—apart from that establishing the *corpus delicti*, which was of a positive character—tended to the establishment of independent facts, from which the guilt of the accused must have been inferred, it was held that such evidence, in so far as it tended to fix guilt upon the accused, was wholly circumstantial, and the instruction requested by him as to the force and effect of such evidence was pertinent to the case, and should have been given. *Eckert v. State*, 9 Tex. App. 105.

Where the court in a case of theft gave two charges to the jury, the first of which was that the law prescribes no rule for the kind or amount of testimony other than that it must be sufficient fully to satisfy the jury of the existence of every fact necessary to constitute the guilt of the accused beyond a reasonable doubt; and the second instruction was that, unless the jury were satisfied of the existence of all the facts necessary to the guilt of the defendant, they would find him not guilty,—these were held to be defective and insufficient as a charge on circumstantial evidence, in that they failed to call attention to the subject at all, or to meet the requisites of any charges on the subject which had been approved in terms by either the supreme court or the court of appeals; but more particularly in that the charge failed to instruct the jury that the facts proved, from which the defendant's guilt was to be inferred, must not only be consistent with his guilt, but they must also be incapable of any other conclusion than the single one of his guilt. *Barr v. State*, 10 Tex. App. 507. In this case the court said that, in the opinion of the court, neither *Taylor v. State*, 9 Tex. App. 100, nor *Brown v. State*, 23 Tex. 195, decided the question whether or not a charge on circumstantial evidence should be given in a proper case, as a part of the law of the case.

in his conviction, and his punishment assessed at confinement in the penitentiary for a term of two years.

This is the second appeal (*Beason v. State*, 2 Tex. Ct. Rep. 921, 63 S. W. 633), and is a companion case to *Murmutt v. State*, now pending, involving substantially the same issues. The record contains eight bills of exception. The bills will be treated seriatim.

1. The facts show that the burglary committed and the theft which was consummated in its perpetration occurred some time between 12 o'clock noon of February 24th, and 12 o'clock of February 25, 1901, being Sunday and Monday, respectively. Appellant was arrested on Tuesday, February 26th, about 11 o'clock. When arrested he was in

company with his codefendant, Murmutt. This arrest was upon a charge by information and complaint of theft of the corn from the house alleged to have been burglarized. On Thursday, February 28th, appellant duly entered his plea of guilty to the offense of theft in the county court of Clay county, and a judgment was on that day entered adjudging him guilty, assessing his punishment at a fine of \$25 and ten days' imprisonment in the county jail. Subsequent to this judgment appellant was arrested, charged with burglarizing the said house, and was indicted by the grand jury of Clay county on March 19, 1901. Upon the trial of this case the state introduced the complaint and information and the judgment upon his plea of guilty in the theft case, to the introduc-

And yet in at least two cases (*Vaughn v. State*, 17 Tex. App. 562, and *Wright v. State*, 18 Tex. App. 358) Brown's Case has been cited as an authority that in a criminal case, where all the evidence is circumstantial, a failure to charge on the law of that kind of evidence is a fatal error.

And in *Thomas v. State*, 13 Tex. App. 493, the court said, in reversing a judgment of conviction because the charge did not present the law of the case: "Appellant was convicted in this case upon evidence wholly circumstantial. A rule of practice, settled in this state by decisions which have been iterated and reiterated, is that, where the inculpatory evidence is purely circumstantial, the charge of the court must expound to the jury the nature and conclusiveness of that character of evidence, to warrant a conviction upon it. It is part of the law applicable to the case, and cannot be omitted from the charge without causing error fatal to the conviction."

And in *Lee v. State*, 14 Tex. App. 266, the court said: "This is a case in which the evidence adduced on the trial to establish the guilt of the defendant was all circumstantial. There was no direct evidence proving that she committed the theft. Such being the character of the evidence, it was incumbent upon the trial judge to instruct the jury on the legal principles having relation to that kind of evidence. . . . In this case the court failed to charge the jury upon this subject, and therefore failed to charge the law applicable to the case, as has been well settled by the repeated decisions of the supreme court and of this court."

Upon an appeal from a conviction for the theft of a horse, where the trial court had neglected to charge upon the law of circumstantial evidence, the court, in reversing the judgment of conviction, said: "We are of the opinion that the evidence upon which the appellant was convicted is purely circumstantial; and that, therefore, the trial judge should have charged the jury the law applicable to such a case." *Faulkner v. State*, 15 Tex. App. 115.

On the trial of a prosecution for cattle stealing, where the evidence consisted mainly in facts which with more or less cogency tended to connect the accused with the killing of the animal in question, and some freshly butchered beef was found at their house, and there was a statement of one of the accused which tended

to show his knowledge of the killing of the animal; but no witness saw the animal killed and no witness undertook to testify that the accused were ever in charge of the animal, or had possession of it, or were connected with the killing, otherwise than as stated,—it was held that, under this state of the case, a charge of the law applicable to a case of circumstantial evidence was demanded. *Lopes v. State* (Tex. Crim. App.) 40 S. W. 595.

A charge that "theft may be established by circumstances—If the circumstances are sufficient to establish it beyond a reasonable doubt—that the defendant on trial, and no other person, took the same, if taken, from the possession of the owner," is tantamount to no charge on circumstantial evidence; and the refusal to make, in addition thereto, a charge which correctly states the law on the subject, is error for which a conviction will be reversed. *Davis v. State* (Tex. Crim. App.) 54 S. W. 583.

On a trial for hog stealing, where the defense was that the accused took up several head of hogs that had been getting into his corn field, and they all got out but two, which he concluded to kill and appropriate, his defense being that he took up the entire bunch of hogs for an innocent purpose, *i. e.*, to keep them out of his field, and that he subsequently formed the intent to kill and appropriate them, which he did; and the trial court refused to charge on circumstantial evidence,—on appeal from a conviction, the court said that, while there was some testimony on the part of the defendant in reference to his taking the hogs, it was not of the character of taking relied upon by the state for a conviction, and so the state's case depended mainly on circumstantial evidence, and a charge on that subject should have been given. *Veasly v. State* (Tex. Crim. App.) 85 S. W. 274.

In each of the following cases it is decided that on a trial for larceny, where there is no direct evidence of the taking, or where all the evidence is circumstantial, an instruction on the law of circumstantial evidence is essential; and that a failure so to instruct the jury is error, for which a judgment of conviction will be reversed: *Wyers v. State*, 13 Tex. App. 57; *Harris v. State*, 13 Tex. App. 309; *Montgomery v. State*, 13 Tex. App. 669; *Cook v. State*, 14 Tex. App. 96; *Garcia v. State*, 15 Tex. App. 120; *Howell v. State*, 16 Tex. App. 93; *Allen v. State*, 16 Tex. App. 237; *Kennedy v. State*,

tion of which appellant objected as shown by his first bill of exceptions. This evidence was admissible. The facts clearly show that the plea was entered for the identical theft that is alleged in the indictment in this case, it being alleged in this case as one of the elements of burglary. The objection that appellant was not admonished will not apply to a judicial confession in the nature of a plea of guilty in a misdemeanor, but only applies to felonies. *Johnson v. State*, 39 Tex. Crim. Rep. 625, 48 S. W. 70; *Berliner v. State*, 6 Tex. App. 181. We are now discussing only its admissibility. The legal effect of said plea of guilty and its probative force will be discussed later.

2. Bills of exception Nos. 1 and 2 complain that the court erred in permitting the

witness Paul Schucht to give his opinion as to whether a man could step in at the south window of the west room of the house alleged to have been burglarized without raising it, and his opinion as to whether or not the door could have been opened by stock that were in the inclosure where the house was situated, his opinion as to the latter being based upon the fact that there was no evidence of stock being near the entrance in question. These two questions will be thoroughly discussed in the *Murmutt Case* (Tex. Crim. App.) 67 S. W. 508.

3. Bills Nos. 3, 4, 5, and 6 all involve the same subject-matter. A synopsis of the bills may be stated. In bill No. 4 an exception was taken to the following remarks of the district attorney: "The facts in this case

16 Tex. App. 258; *Cooper v. State*, 16 Tex. App. 341; *Schindler v. State*, 17 Tex. App. 408; *Mathews v. State*, 17 Tex. App. 472; *Vaughn v. State*, 17 Tex. App. 562; *Dupree v. State*, 17 Tex. App. 591; *Murphy v. State*, 17 Tex. App. 645; *Wright v. State*, 18 Tex. App. 358; *Ramirez v. State*, 20 Tex. App. 133; *Crowell v. State*, 24 Tex. App. 404, 6 S. W. 318; *Fuller v. State*, 24 Tex. App. 596, 7 S. W. 330; *Guajardo v. State*, 24 Tex. App. 603, 7 S. W. 331; *Willard v. State*, 26 Tex. App. 126, 9 S. W. 358; *Arlsmendis v. State*, 41 Tex. Crim. Rep. 374, 54 S. W. 599, 41 Tex. Crim. Rep. 378, 54 S. W. 601; *Scott v. State* (Tex. App.) 12 S. W. 504; *Deaton v. State* (Tex. App.) 13 S. W. 1009; *Bennett v. State* (Tex. App.) 15 S. W. 405; *Poston v. State* (Tex. Crim. App.) 35 S. W. 656; *Stewart v. State* (Tex. Crim. App.) 77 S. W. 791.

See also *Ray v. State*, 13 Tex. App. 51; and *Flores v. State*, 13 Tex. App. 665, *infra*, VII.

8. Burglary.

Where, on a trial for burglary, the defendant requested the trial court to charge that the evidence against the defendant was purely circumstantial; and that his innocence must be presumed until the case against him is proved in all its material circumstances beyond a reasonable doubt; and that to find him guilty as charged the evidence must be so strong and cogent as to show his guilt to a moral certainty; and, unless it is established, the jury must find him not guilty, which request was refused,—this was held to be error, the record showing that the evidence against the accused was purely circumstantial. *Gilmore v. State*, 99 Ala. 154, 13 So. 536.

Upon a trial for burglary, where there was no contest at the trial as to the *corpus delicti*, and the inculpatory evidence tending to identify the accused as the guilty party was wholly circumstantial, and the jury, after remaining out from twelve to twenty hours, returned and requested the court for a further charge in reference to circumstantial testimony, in response to which the court said, among other things: "This case is not founded entirely upon circumstantial testimony. There is both positive and circumstantial testimony,"—the jury must have understood this to mean that there was some direct evidence to connect the accused with the offense charged. The charge was held 60 L. R. A.

to be erroneous, and the judgment of conviction reversed. *Simmons v. State*, 85 Ga. 224, 11 S. E. 555.

On a trial for burglary, when the evidence is entirely circumstantial, the jury should not be given a loose rein, but should have careful direction as to the quantum of proof necessary to justify a conviction. *State v. Brady*, 121 Iowa, 561, 91 N. W. 801.

Where the evidence on a trial for burglary is wholly circumstantial, the jury should be instructed as to the nature and conclusiveness of that character of testimony to warrant a conviction upon it. *Struckman v. State*, 7 Tex. App. 581.

And in *Black v. State*, 18 Tex. App. 124, a trial for burglary, the court, after holding that the charge was objectionable for another reason, said: "Another fatal objection to the sufficiency of the charge of the court is that it omits entirely to give the jury any instructions with regard to circumstantial evidence. The case was one wholly of circumstantial evidence, and the jury should have been properly instructed with regard to the rules pertaining to that character of testimony."

Where, upon a trial for burglary, the accused (who was a boy, in regard to whom there was a question whether he would have sense enough to know right from wrong), after a witness had stated to him that he knew all about it, and he might as well own up, as he had been seen in the store, and tell all about it, went off, and in a short while returned with a pistol that had been taken from the store at the time, and delivered it to the witness; but the witness did not say that the accused confessed to him that he committed the burglary,—while his bringing the pistol was a very strong circumstance of guilt, yet, not being accompanied by a direct confession, it was only a circumstance; and, such being the character of the testimony, it was the duty of the court to charge the law relative to that character of testimony; and, as this was not done, the judgment was reversed. *Parker v. State*, 20 Tex. App. 451.

On appeal from a conviction for burglary. It appeared that just prior to the arrest of the accused he made conflicting statements as to his right of possession of the property stolen, which he had undertaken to pawn on the day following the burglary. Such statements were made to the pawnbroker and the officer who arrested him. He introduced evidence to prove

are so clear that you can't have a reasonable doubt as to the defendant's guilt; and, if you do not convict this defendant, we had just as well tear down our courthouses, and stop paying our officers salaries to try to enforce the law. The grand jury has done all that they could do. I have prosecuted this case with all my might, and the officers of the court have done all that they could do; and His Honor, the judge on the bench, is not going to help turn a guilty man loose. He is not that kind of a man that would let a criminal go free. It is true that, if the jury return a verdict of not guilty, the case will be ended; and, if this court thinks this defendant is not guilty, the jury should not think that he would sit there and let him be convicted. He is not made of that kind

of stuff. If a defendant is not guilty, there is no danger of his being convicted, because there are too many courts for this case to go through for an innocent man to be convicted in the courts of Texas." The bill shows that this argument was made in reply to the following argument of defendant's counsel, which is quoted, as follows: "Gentlemen of the jury, I am now about to close this case. You see from evidence there have been several trials in this cause, which is indicative of the fact that there is something wrong about this matter, and illustrates the adage that 'a thing is never settled until it is settled right.' Therefore, gentlemen of the jury, I hope you will settle this case right, and end it by returning a verdict of not

an alibi, and also in support of one of his statements,—that he obtained the property from another party. It was urged for reversal that the trial court had failed to charge the law applicable to a case dependent upon circumstantial evidence, and the court held that the charge should have been given. *Robertson v. State* (Tex. Crim. App.) 26 S. W. 728.

In *Gonzales v. State*, 12 Tex. App. 657, a trial for burglary, the court said: "We find but a single error in the proceedings of which defendant can justly complain. The evidence against him was entirely circumstantial. It is well settled that, when the inculpatory evidence in a case is purely circumstantial, the charge of the court must expound to the jury the nature and conclusiveness of that character of testimony, to warrant a conviction upon it. It is a part of the law applicable to the case, and cannot be omitted from the charge without causing error fatal to the conviction. . . . In this case the court wholly failed to instruct the jury in regard to circumstantial evidence, which error was properly complained of by defendant in a bill of exceptions, and also in his motion for a new trial."

4. Other crimes.

In *Daniels v. State* (Tex. App.) 14 S. W. 895, the court said: "In the statement of facts we find no direct evidence that defendant, by a promise to marry the female, seduced and had carnal knowledge of her. Penal Code, art. 814. That he promised to marry her is proved only by the circumstance that he asked her mother's permission to do so. He never told anyone that he promised to marry her; nor did any witness testify that he made such a promise. No one testified that he ever had carnal knowledge of her, and, if he did have such carnal knowledge, it does not appear, at least by direct evidence, whether it was before or after he had made such promise. We regard the case as one of circumstantial evidence only, and to our minds the circumstances are of a weak and inconclusive character. Such being the character of the evidence, it was material and fundamental error to omit to instruct the jury in the charge as to the rules of law applicable to such evidence."

Where one was indicted for making a false instrument, but there was no charge of uttering the same, and the evidence is direct and

positive as to the passing, but is only circumstantial as to the making thereof, which is the crime with which the accused is charged, a failure to charge on circumstantial evidence is fatal, and a judgment of conviction will be reversed. *Hanks v. State* (Tex. Crim. App.) 56 S. W. 922.

b. Possession of stolen property.

The finding of property that has been stolen in the possession of the accused, which possession he does not satisfactorily excuse, explain or account for, or does so untruthfully, has been held to be prima facie evidence that he committed the larceny; but the single possession of such property, shown in the accused, is only a circumstance tending to prove his guilt, and which, without any positive proof as to the taking, renders the case one wholly depending upon circumstantial evidence, and a failure of the court to charge upon the subject is error; and the cases in this subdivision are those which, under varying circumstances, point out this rule.

In *Gablick v. People*, 40 Mich. 292, the court, in holding that the accused, on a trial for larceny, was entitled to an instruction that the fact of possession of stolen property, standing alone and unconnected with any other circumstance, afforded but slight presumption of guilt, for the real criminal may have artfully placed the property in the possession, or on the premises, of an innocent person, said that, while it was perfectly true that the jury must judge of the proper weight of the evidence, yet, when evidence was laid before them which only indirectly tended to raise an inference of guilt, and the importance of which must depend altogether upon circumstances, it was the right of the accused to have the jury instructed how those circumstances bore upon the presumption of guilt.

On a trial for theft, the court said that the case against the defendant—that is, his complicity with the taking of the stolen animal—was one wholly of a circumstantial character, as no witness testified to having seen him take the animal, and his first connection with it, as disclosed, was in his pasture after it had been taken from its accustomed range by someone; that he was the party who took it, therefore, was a fact derivable alone from other circumstances; and it was plainly the duty of the

guilty; that a verdict of not guilty in a criminal case is so authoritative that it cannot be gainsaid by any power in this state; that it is the highest and most binding proceeding in such a case." In bill No. 5 the language complained of, as used by the district attorney, is as follows: "The state has proved that defendant stole the corn mentioned in the indictment by his plea of guilty. Do you believe that such a man as Judge Allen, your county judge, would let a man plead guilty that was not guilty and did not want to plead? You know that he would not. There is no circumstantial evidence in this case. The old court decided that when a man confessed his crime it was positive evidence, notwithstanding the fact that a little 2 x 4 court has since decided to

the contrary. And I will say to you, gentlemen, you have positive evidence in this case, although the court may think it the safest to give you in charge the rule governing circumstantial evidence." And in bill No. 6, the following language, used by the district attorney and the court, is complained of: "The district attorney, in his argument before the court and jury, stated to the court, in the presence and hearing of the jury, and read an authority to the court, to the effect that, where a defendant had confessed his guilt, that a charge on circumstantial evidence should not be given; and that the rule of circumstantial evidence should not be given in this case, because this defendant had confessed the crime. And the court thereupon remarked, in the presence and

court, under the facts of the case, to charge the jury with regard to circumstantial evidence; and the conviction was reversed. *White v. State*, 18 Tex. App. 57.

In *Sullivan v. State*, 18 Tex. App. 623, the court said: "The learned trial judge, and likewise the assistant attorney general, appear to entertain the view that evidence which proves that the defendant was found in possession of property recently stolen, and of which possession he gives no reasonable explanation, is positive and direct evidence that he committed the theft of such property; and that in such case a charge upon the rules governing circumstantial evidence is not required. We have always understood, and still understand, such evidence to be purely circumstantial, when regarded as evidence to prove the guilt of the defendant. Such is the character of evidence in this case, and the court failed to instruct the jury in the rules governing in such cases; for which error the judgment is reversed and the cause remanded."

Where one was convicted of the theft of a horse, and was seen in possession of the stolen animal about the time it was missed, but 25 miles distant from its range, no one seeing him take it from its range; and he did not confess to anyone that he had taken it, although his possession of the same, and his conduct in relation thereto, and all the other facts in the case sufficiently and cogently established his guilt of the theft; still all this evidence was circumstantial and none of it was direct and positive,—the court, on appeal, said: "We have no idea that the required instruction, which the court failed to give the jury, would have affected the result of the trial had it been given but the law required that such instruction should be given, and we have no discretion in the matter;" and the judgment, for that reason alone, was reversed. *Counts v. State*, 19 Tex. App. 450.

Recent possession is not positive evidence of theft; it is but a circumstance tending to establish it. A case dependent, alone, upon recent possession is a case of circumstantial testimony, and the law presenting that character of case should be submitted to the jury; because, while under certain conditions recent possession will support a conviction for theft, it is, in connection with such other conditions, only one of the circumstances from which guilt

is inferred. *Boyd v. State*, 24 Tex. App. 570. 5 Am. St. Rep. 908, 6 S. W. 853.

Upon a trial for theft the evidence upon which the conviction was based was wholly circumstantial as to the taking of the alleged stolen animal by the accused. He claimed the animal as his property, admitted that he put his brand upon it, but claimed, also, that he had bought it, and he never admitted the taking; such being the character of the evidence, it was held that the trial court committed a material error in failing to charge the jury with respect to circumstantial evidence, and for this error alone the judgment was reversed. *Crowley v. State*, 26 Tex. App. 578, 10 S. W. 217.

Possession of recently stolen property is not positive evidence of theft, but is, at most, a circumstance tending to establish theft. A case, therefore, depending alone upon the possession of recently stolen property is a case resting upon circumstantial evidence; and in such case the omission of the trial court to charge the jury upon the law of circumstantial evidence is material error. *Taylor v. State*, 27 Tex. App. 463, 11 S. W. 462.

Where, on a trial for theft, there was no positive evidence that accused was the original taker of the horses, but the state relied for conviction mainly upon the fact of his possession of them shortly after their theft, together with such other inculpatory circumstances as were adduced to show such possession a guilty one, a charge upon the law of circumstantial evidence should have been given; and, as it was omitted, the judgment of conviction was reversed. *Hyden v. State*, 31 Tex. Crim. Rep. 401, 20 S. W. 764.

Where, on a trial for theft, the original taking is to be inferred from the fact of subsequent possession, by the accused, of the alleged stolen property, this is a case of circumstantial evidence, and a failure to give a charge thereon to the jury will cause a reversal of a judgment of conviction. *York v. State*, 42 Tex. Crim. Rep. 528, 61 S. W. 128.

Upon a trial for stealing a cow, the court declined to charge as to circumstantial evidence, because the case did not depend wholly upon that character of evidence; but, on appeal from a conviction, the court said that it differed with the learned trial judge; that, while there were very strong circumstances to show that the defendant had put a cow in his field within a week

hearing of the jury: 'I agree with you in your contention; but you know the court has ruled different in this case, and I can't say whether I will charge on circumstantial evidence.'" As a rule of practice it has been uniformly held that an improper argument—which, for the purpose of this case, must be conceded—is not ground for reversal, unless appellant not only objected to the same at the time, but followed up this objection by requesting the court by a charge in writing to instruct the jury to disregard the same; and that this charge, so requested, was refused by the court. *White's Anno. Code Crim. Proc. § 766*, and authorities cited. The exception to this rule is where the argument is so obviously of a character that is injurious in its nature, and such a

flagrant disregard of the rights of the defendant, that it will be assumed a written charge requested and granted will not cure the error. However, in this case, the crucial test is not the impropriety of the district attorney in his argument, but rather the injury inflicted on appellant by the conduct of the learned judge. To better understand this, it will be necessary to state the history of this case. This was its second trial, the former trial being reversed by this court upon the sole ground that the trial court had failed to give a charge upon circumstantial evidence. The facts on this appeal and upon the former appeal are identical. If it was a case of circumstantial evidence on the first trial, it was likewise a case of circumstantial evidence on the

of the time that the stolen cow was missed, searched for, and the beef and hide found at defendant's house, which was alleged to be that of the stolen animal, still the witness did not see and identify the hide as that of the animal he had seen defendant drive up and have turned into his field, but the identity of the animal was wholly an inference to be deduced from circumstances; and this rendered a charge on circumstantial evidence essential. *Smith v. State (Tex. App.) 12 S. W. 869*.

In *Navarow v. State (Tex. App.) 17 S. W. 545*, where the defendant had been convicted of stealing a horse, the alleged owner testified that the horse was taken on the night of one day, or the morning of the next, and two other witnesses testified that on one or the other of two days, at night, the accused brought the horse to their house, and offered to sell one of them the horse on his paying him a small sum and agreeing to pay the balance the next day, when the accused should deliver the horse. He delivered the horse as agreed, and received the deferred payment, and later gave them a bill of sale. When accused offered to sell the horse the purchasers questioned his title. He assured them that the title was in himself; that the horse was his, and that he had purchased it. It was held that, under this state of the case, the court should have charged the jury upon the law of circumstantial evidence, which was not done, and the failure so to charge constituted such error as required a reversal.

On a trial for hog stealing it appeared that the hogs were taken perhaps half a mile or more from where they were found, and the accused was present with others who stole them, and, when discovered in possession of the hogs, ran off with the other persons. The court said that, if the accused ran because of his guilt, then his flight was a cogent fact against him; but, conceding the flight, it was not positive evidence of the taking, as it was as consistent with receiving or guilty connection with the transaction after the theft as with the original taking; and the trial court committed reversible error, under the facts of the case, in failing to explain to the jury the rules governing cases depending purely upon circumstantial evidence. *Montgomery v. State (Tex. Crim. App.) 20 S. W. 926*.

Where, on a trial for stealing a horse in the Indian nation, and bringing it into a county

where the trial was had, it appeared that the accused stated that he had brought the horse from the nation, it was held that this did not relieve it from being a case resting alone upon circumstantial evidence, as the main fact in the case was the theft of the horse in the nation, and not the bringing of it into the state, and there was no positive proof that the accused stole the horse, and the court should have given in charge to the jury the law applicable to a case of circumstantial evidence, which it failed to do; and the conviction was reversed. *Green v. State (Tex. Crim. App.) 34 S. W. 283*.

Where, on a trial for cattle theft, there is no positive evidence of any eyewitness to the original taking, and possession by the accused alone is relied upon to prove inferentially the original fraudulent taking, the trial court should charge on the law of circumstantial evidence, and a failure to do so will reverse the conviction. *Wallace v. State (Tex. Crim. App.) 66 S. W. 1102*.

Where on a trial for theft the only evidence against the accused was the possession of the property shown to have been recently stolen, this, by the unbroken decisions, is a case of circumstantial evidence, and requires the court to charge the law applicable thereto. *Cortez v. State (Tex. Crim. App.) 74 S. W. 907*.

See also *Doucette v. State (Tex. Crim. App.) 45 S. W. 800, infra*, III. b, 2, and *Alderman v. State (Tex. Crim. App.) 23 S. W. 685, infra*, IX.

On trial for horse theft the defendant admitted the branding of the stolen animal, and it was proved that the animal was in his possession, and these two facts constituted a taking; and there is no error in failing to charge upon the law of circumstantial evidence. *Gentry v. State, 41 Tex. Crim. Rep. 497, 56 S. W. 68*.

See also *Alderman v. State (Tex. Crim. App.) 23 S. W. 685, infra*, IX.

III. When the evidence of guilt of accused is direct.

a. By positive testimony.

As has been stated in the beginning, the necessity or propriety of instructing the jury upon the subject of circumstantial evidence is excluded wherever the testimony as to the in-

second trial. The reluctance of the trial judge on the second trial to treat it as a case of circumstantial evidence justifies this court in making a critical review of that proposition, because, if this court was in error in holding in the first instance that it was a case of circumstantial evidence, the remarks made by the trial judge on this trial might be rendered harmless. The court will assume, in approaching the discussion of this proposition, that the learned trial judge understood that if the case was one of circumstantial evidence, it was his duty to give the jury in charge the law upon the same. This rule is so universal in its acceptance, and has been so repeatedly announced by not only this court but the courts of other jurisdictions, that it would

be a useless consumption of time and space to enter into its discussion. It is equally as well settled that a case is not to be treated as a case of circumstantial evidence requiring a charge upon the same where some of the material issues, incriminating and inculpatory, rest solely upon that kind of evidence. The distinction between circumstantial evidence and direct evidence is that in the first instance the facts apply directly to the *factum probandum*, while circumstantial evidence is proof of a minor fact, which, by indirection, logically and rationally demonstrates the *factum probandum*. This is illustrated by proof of recent possession of stolen property. In such a case, resting alone upon such inculpatory evidence, the eye of no witness saw the thief

culpable fact is direct; and the following cases are those wherein the proof was the positive testimony of witnesses.

1. *Homicide*.

Where the court, in a criminal case, was requested to instruct the jury that, although the facts and circumstances might be strong enough to prove beyond a reasonable doubt every material link in the chain of evidence, save one, necessary to show the guilt of the defendant, yet, if the jury had a reasonable doubt, issuing out of the evidence, as to the truth of this one link, they should acquit the defendant, the court, in reviewing a conviction for murder, said that, apart from the obscurity involved in the truth charged as to what was meant by this reference as to doubting the truth in a chain of evidence, the metaphor was inapt as applied to the case, where the evidence connecting the defendant with the killing did not consist of a chain of circumstances, but was direct, positive, and undisputed. *Wilson v. State*, 128 Ala. 17, 29 So. 569.

In *Purvis v. State*, 71 Miss. 706, 14 So. 268, the court said that some of the instructions given for the defendant might well have been refused, for the proof of his guilt was not dependent upon circumstantial evidence, but rested upon the direct and positive testimony of an eyewitness; that all those instructions, therefore, which were predicated on the weight to be given to circumstantial evidence might well have been refused, and that those of the same character which were denied were properly denied.

The report only shows that the conviction was for a capital offense, but the particular offense is not stated.

In *State v. Robinson*, 117 Mo. 649, 23 S. W. 1066, a conviction of murder, where it was claimed, upon the authority of *State v. Moxley*, 102 Mo. 374, 14 S. W. 969, 15 S. W. 556, *supra*, II., a. 1, that an instruction such as was held to be necessary in that case, should have been given, the court said that such an instruction was inapplicable to the facts in this case, because here, although there was some circumstantial evidence which strongly corroborated the confession of the accused, yet the whole was positive testimony, and a charge as to the circumstantial evidence was unnecessary.

In *State v. Fairlamb*, 121 Mo. 137, 25 S. W. 69 L. R. A.

895, on a trial for murder it would appear that the jury had been instructed on behalf of the state on circumstantial evidence, which instruction the court held should not have been given, as the killing was shown by direct and positive evidence, and did not depend for its proof on circumstances, and that it was only where the crime is sought to be shown by facts and circumstances that such an instruction should be given; but added that the case should not be reversed upon that ground alone.

See *Rountree v. State* (Tex. Crim. App.) 58 S. W. 106, *infra*, III. a. 5.

In *Taylor v. State*, 9 Tex. App. 100, the court said that it was not clear that a charge by the court upon the law of circumstantial evidence was essential, as the presence of the accused at the scene of the homicide was established by competent evidence of a positive nature.

Where, upon a trial for murder, the court had properly admitted the testimony of the deceased, in writing, taken at the examining trial of the accused upon a charge of assault with intent to murder deceased, which rendered the case not one of circumstantial evidence; and the court was not required to charge the law applicable to that character of testimony,—the charge, having failed to do so, was not, therefore, obnoxious to the objection urged in that regard. *Hart v. State*, 15 Tex. App. 202, 49 Am. Rep. 188.

In *Sharpe v. State*, 17 Tex. App. 486, the court said: "It is further objected to the charge that it does not instruct the jury as to the law of circumstantial evidence. This objection is clearly not tenable, because the evidence establishing defendant's guilt is direct and positive, and not of a circumstantial character. The law of circumstantial evidence should not be charged, except in cases where the state relies solely upon that character of evidence to obtain a conviction."

It is not required, in order to dispense with a charge on circumstantial evidence, that the defendant's guilt should be established by direct evidence. It is only when the inculpatory evidence is wholly circumstantial, and where the defendant's guilt is dependent wholly upon that character of evidence, that an instruction as to circumstantial evidence is required. And, upon a trial for murder, that the defendant killed the deceased is an inculpatory fact, and when this fact is proved by direct evidence the

in the act of taking the property stolen. But the witness may testify directly to the fact of seeing the thief, recently after the crime, in possession of the stolen property, and, when his possession was challenged, either declined to explain, or gave an explanation which was false, from which circumstances of the possession, directly sworn to, and circumstances of a failure to explain or a false explanation, the *factum* of the taking is inferred or deduced by the process of reasoning. But what constitutes circumstantial evidence, and what constitutes a case depending solely upon circumstantial evidence, are two different questions. It has been held that a charge on circumstantial evidence is necessary only when the case rests "solely" and "alone" upon cir-

cumstantial evidence. The construction of the word "solely" or "alone" has been repeatedly construed in this state by every court of last resort, and the decisions of this state have been followed with approval by the courts of other jurisdictions. The rule is this: That it is only necessary where the main fact, or, as one case puts it, "where the gravamen of the offense," or, as another case has it, "where the act of the crime," rests solely upon circumstantial evidence, that then it becomes a case known as a case of circumstantial evidence requiring a charge upon that. In the *Buntain Case*, 15 Tex. App. 515, Judge White used the following language: "If a court were required to charge the law of circumstantial evidence in all cases where reliance was had

necessity of a charge upon circumstantial evidence is dispensed with. *Self v. State*, 28 Tex. App. 398, 13 S. W. 602.

Where the accused and another were indicted for murder of a person who had been shot by such other person, and the accused had demanded and been granted a separate trial, and on such trial the theory of the state was that the defendant and the other person indicted with him and who had fired the shot which killed the person for whose murder they were charged, acted together in the commission of the homicide in pursuance of a previously formed and common design, the evidence of which was circumstantial, it was held that a charge as to circumstantial evidence was not necessary, the killing of the deceased being proved by direct and positive evidence. *Weatherby v. State*, 29 Tex. App. 278, 15 S. W. 823.

But see *Jones v. State*, 34 Tex. Crim. Rep. 490, 30 S. W. 1059, 31 S. W. 664, *infra*, X.

Where, on a trial for murder, the facts relating to the homicide are testified to by an eyewitness, there is no necessity for the court to charge on circumstantial evidence. *Campbell v. State* (Tex. Crim. App.) 38 S. W. 171.

Where, on a trial for murder, the evidence was direct and positive from an eyewitness that the defendant shot and killed the person for whose murder he was being tried in the perpetration of robbery, the court did not err in failing to charge on the law of circumstantial evidence. *Jones v. State*, 31 Tex. Crim. Rep. 177, 20 S. W. 354.

Where, on a trial for murder, the presence of the accused at the place of the homicide, and that he fired the fatal shot, were established by the positive testimony of eyewitnesses, an omission of the court to charge on circumstantial evidence was not error. *Russell v. State*, 38 Tex. Crim. Rep. 590, 44 S. W. 159.

Where, on a trial for murder, several eyewitnesses testified to the killing, the court did not err in failing to charge on the law of circumstantial evidence. *Jones v. State* (Tex. Crim. App.) 77 S. W. 802.

Where, on a trial for murder, it appeared that there was proof of the confession of the accused to a witness, and the evidence of another witness testifying to the fact of the killing, he being an eyewitness, and the testimony of the defendant himself, in which he testified positively that he did the killing, a charge upon circumstantial evidence was un-

necessary; as a charge on this subject is only necessary where the case is one wholly of that character of evidence. *Yancy v. State* (Tex. Crim. App.) 87 S. W. 693.

Where the main proof of the prosecution in a criminal case was the direct testimony of eyewitnesses, who testified that they saw the accused shoot the deceased, a request to instruct the jury as to the effect of circumstantial evidence, which assumes that the main case of the prosecution rested upon circumstantial evidence, which was not the fact, should be denied. *People v. Lem Deo*, 132 Cal. 199, 64 Pac. 265.

The court said further, in the same connection, that the substance of the instruction was given in other parts of the charge.

Where, on a trial for homicide, the killing of the person for whose murder the accused is on trial is shown by positive testimony, a failure of the court to charge on circumstantial evidence is not error. *Augustine v. State*, 41 Tex. Crim. Rep. 59, 96 Am. St. Rep. 765, 52 S. W. 77.

On a trial for murder, where there is a witness to the killing whose testimony, as to all facts prior to the killing, except one, is corroborated by the statement of the accused himself, there is such direct evidence as will render a charge on circumstantial evidence unnecessary. *Gibbs v. State* (Tex. Crim. App.) 20 S. W. 919.

Upon a trial for assault with intent to murder, where the evidence was pointedly positive that the accused inflicted several wounds upon the assaulted party, who testified directly to it, and the defendant himself testified that he inflicted two of the wounds, the court, in affirming a conviction, said that it was unable to see how a charge on circumstantial evidence was applicable to, or required by, the facts of the case. *Upchurch v. State* (Tex. Crim. App.) 39 S. W. 371.

On a trial for murder the dying declarations of the deceased, as well as testimony of eyewitnesses, showed that the accused committed the crime; and it was held that this took the case out of the realm of circumstantial evidence. *Cruse v. State* (Tex. Crim. App.) 77 S. W. 818.

Where, on a trial of one for the murder of his wife, after she was shot, and when she said she was dying, she stated that the accused, her husband, naming him, shot her, and she died in about an hour and a half thereafter, it was

upon circumstances to establish any particular fact, then, indeed, there would be but few, if any, cases in which such a charge would not be required; but such is not the rule. A charge upon circumstantial evidence is only required when the evidence of the main facts essential to guilt is purely and entirely circumstantial." In the *Hanks Case*, 56 S. W. 922 (opinion rendered by this court), in reference to whether or not positive evidence of uttering a forged instrument, where the indictment was for the forgery, was sufficiently direct to lift the case out of the realm of circumstantial evidence, the following language was used: "We are aware of the rule, and we adhere to the same, that, when the main act constituting the gravamen of the offense is

proved by direct testimony, and the intent merely with which the act was done is proved by circumstantial evidence, the charge on circumstantial evidence will not be absolutely necessary." But perhaps the best case in point is *Jones v. State*, 34 Tex. Crim. Rep. 492, 30 S. W. 1059, 31 S. W. 664. In this case the discussion of the principles applied to burglary is involved. At the risk of being prolix, but in order that the same may be made clear, we quote copiously from that case: "Mr. Starkie, in his work on Evidence (§ 863), says: 'The force of circumstantial evidence being exclusive in its nature, and the mere coincidence of the hypothesis with the circumstances being, in the abstract, insufficient, unless they exclude every other supposition, it is essential to

held that her statements, whether regarded as *res gestæ*, or dying declarations, relieved the court of the necessity of charging the law of circumstantial evidence, as they were an emphatic declaration that the accused shot her. *Hernandez v. State* (Tex. Crim. App.) 81 S. W. 1210.

2. Larceny.

Where two witnesses testified on the trial of an indictment for larceny to seeing accused in the act of removing the ring from the cravat of the prosecuting witness while he was asleep, such can hardly be said to be a case of circumstantial evidence, and a refusal to charge as to the effect thereof is not error. *People v. Burns*, 121 Cal. 520, 58 Pac. 1096.

Where, on a trial for the theft of two head of cattle, it appeared, in substance, that the alleged owner was the owner of the cattle and the brand upon them, and that the accused knew both the facts, and had advised another against estraying one of them, assigning as his reason therefor that it was the owner's and in his brand; and subsequently this animal found its way into the pasture of the accused, a few miles from where it usually ran, and ran in his pasture two or three months, but there was no evidence as to how it reached there; and the accused knew of the presence of the animal in his pasture for some months, and so stated after his arrest for its theft; and thereafter the accused appeared at the pasture with a stranger, whom he introduced to a witness whom he had agreed to meet there, and the stranger sold the animals in question to the accused, who wrote a bill of sale from the stranger to himself, and the stranger signed it, and, as soon as the bill was executed the stranger changed the marks and brand on the cattle so as to obliterate the old ones; and the accused then drove the cattle away, and the stranger disappeared and was never heard of,—this was held not to be a case demanding an instruction to the jury on the law of circumstantial evidence. *Hayes v. State*, 80 Tex. App. 404, 17 S. W. 940.

In *Rodgers v. State*, 36 Tex. Crim. Rep. 563, 38 S. W. 184, the court said: "A charge on circumstantial evidence in theft is not required if a taking is shown by positive testimony."

On appeal from a conviction for theft, where there was direct and positive evidence as to the

taking by the accused, it was held that the court did not err in omitting to charge on circumstantial evidence. *Granado v. State*, 37 Tex. Crim. Rep. 426, 35 S. W. 1069.

On a trial for theft of cattle, where the evidence was positive and direct as to the taking, the defendant himself having so testified, it was held that it was not a case of circumstantial evidence, and therefore the court did not err in omitting a charge on that phase of the law. *Blanton v. State* (Tex. Crim. App.) 26 S. W. 624.

On a trial for theft of cattle, where a witness testifies positively as to the act of taking, if he is to be believed by the jury the case is one of positive testimony, and a charge upon the law of circumstantial evidence is not required. *Taylor v. State* (Tex. Crim. App.) 42 S. W. 285.

On a trial for larceny, where positive evidence of the guilt of the prisoner had been adduced, a refusal of the court to charge that, the case being one of circumstantial evidence, the jury must acquit, unless the circumstances exclude any other hypothesis except that of the prisoner's guilt, was held to be correct, as such an instruction must necessarily have been predicated upon the assumption that positive evidence which had been adduced was unworthy of credit. *People v. Kaatz*, 3 Park. Crim. Rep. 129.

Where, upon a trial for the theft of cattle, the evidence for the state showed that the defendant sold the animals, went with the purchaser upon the accustomed range, and drove them up and delivered them, this was held by the court, on appeal from a conviction, to be the actual taking and proof positive thereof, and the court committed no error in failing to charge the law of circumstantial evidence. *Williams v. State* (Tex. Crim. App.) 44 S. W. 1103.

Where, on a trial for cattle theft, the only issue in the case was the identity of the animal, and the prosecuting witness swore that the animal stolen belonged to him, this did not raise the issue of circumstantial evidence, and a failure to charge thereon was not error. *Gann v. State* (Tex. Crim. App.) 59 S. W. 896.

3. Robbery.

In *Colter v. State*, 37 Tex. Crim. Rep. 284, 39 S. W. 576, it was held that on a trial for

inquire with the most scrupulous attention what other hypotheses there may be which may agree wholly or partially with the facts in evidence.' The court, in *Beavers' Case*, said: 'We can conceive of no hypothesis by which, in the order of natural causes and effects, the facts proved can be explained consistently with the innocence of the prisoner; and this is the true test of circumstantial evidence. It excludes all reasonable doubt of the prisoner's guilt.' 58 Ind. 531, 537. But this principle applies only to proof of the act, and not to proof of the intent. Accordingly, in a case of burglary, an instruction which contained the following sentence was properly refused: 'Where a criminal intent is to be established by circumstantial evidence, the proof ought

to be, not only consistent with the defendant's guilt, but it must be wholly inconsistent with any other rational conclusion than that of the defendant's guilt.' The court said: 'This rule is proper when the act which is claimed to be criminal is sought to be established by circumstantial testimony. But when the act is proved by direct testimony, and all that remains to be found is the intent which accompanied the act, and which may be inferred from the circumstances accompanying the act, then this principle does not apply.' In the reversal of this case upon its former appeal this court said: "Now, while it is true a confession to the burglary would take the case out of the rule, yet a confession to theft alone, under the circumstances of this case, would not make

robbery a charge on circumstantial evidence is not called for where there is positive evidence of the participation by the accused in the robbery.

On a trial for robbery, where the prosecuting witness identified the accused as one of the parties who robbed him, this was held to be a case of positive testimony, which did not require that the court give a charge on circumstantial evidence. *Evans v. State* (Tex. Crim. App.) 31 S. W. 648.

Where, on a trial for robbery, the person robbed testifies directly to the facts, and positively identifies the accused as the person who robbed him, this is not a case dependent upon circumstantial evidence, and a failure to charge in regard to the same is not error. *Broak v. State* (Tex. Crim. App.) 43 S. W. 988.

4. Rape.

Where, on a trial for rape, the defendant's guilt is established by direct and positive evidence,—in the language of the court, "as much so as possible for human evidence to be,"—a request by the accused that the court charge that the evidence for the state must exclude every other hypothesis than that of the prisoner's guilt, and, unless it is so conclusive, they shall find the defendant not guilty, is properly refused. *Cone v. State*, 13 Tex. App. 483.

And in *Ellis v. State*, 33 Tex. Crim. Rep. 86, 24 S. W. 895, the court said: "There was no error in refusing the charge of circumstantial evidence. The testimony is positive that defendant committed the rape."

In *Ricks v. State* (Tex. Crim. App.) 87 S. W. 345, the court, in affirming a judgment of conviction for rape, said: "Exceptions were reserved to the charge because it failed to submit the law of circumstantial evidence. This is not a case of circumstantial, but of most positive, testimony. The girl testified fully in regard to the whole matter,—as to the intercourse, and all the facts and attending circumstances. Nor was it necessary for the court to submit the law of aggravated assault, as urged by appellant. This was a case of rape, if the state's testimony is true. If appellant's theory is correct, the transaction did not occur. The [prosecutrix] testified directly and positively to the penetration. Appellant, the only other eyewitness, testified that it did not occur, and contradicted the entire testimony of the prosecutrix."

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Where a request to charge, on a trial for rape, is based upon the assumption that the case of the prosecution rests exclusively upon circumstantial evidence, which assumption is not true, such request is properly refused. *People v. Baldwin*, 117 Cal. 244, 49 Pac. 186.

5. Other crimes.

Where, on a criminal trial for forgery, all the evidence of the guilt of the accused is circumstantial, an assignment of error that the court erred in charging on circumstantial evidence because the case depended on positive evidence will not be sustained. *Rountree v. State* (Tex. Crim. App.) 58 S. W. 106.

See *State v. Fairlamb*, 121 Mo. 137, 25 S. W. 895, *supra*, III. a. 1.

It is never necessary to charge the law of circumstantial evidence in a criminal prosecution, where the testimony as to the inculpatory fact is direct and positive; and so a conviction for passing a forged check will not be reversed where the evidence as to the forgery was circumstantial, but the passing of the forged instrument by the appellant was direct and positive,—as where he testified to the fact himself. *Wolf v. State* (Tex. Crim. App.) 53 S. W. 108.

On a trial for fraudulently converting the property of another, where the evidence was positive and direct that the accused made a contract with the owner of the horse, and hired the horse to make a trip into the country from the place of the hiring, and was also direct and positive that the accused had possession of the horse in the county of the trial, and sold it; and the fact that the owner, having sent the horse by a hired hand, could not swear that the latter delivered the horse in person to the accused, did not take it out of the realm of positive testimony. *Lewallen v. State* (Tex. Crim. App.) 87 S. W. 1159.

Where the offense of which one was convicted was charged to be swindling by obtaining an amount of money of a bank on a false representation; and the proof showed that the accused made the representation directly to the bank, and drew his check in favor of the bank against another bank; and the representation was shown by an employee of the latter bank to be false; and the defense predicated on the defendant's testimony was a positive claim by him that he believed that he had at

the charge of burglary a case of positive evidence. The possession of the corn recently after it was stolen would only be a circumstance pointing to the burglary, for the corn may have been stolen, and yet no burglary committed." See *Wooldridge v. State*, 13 Tex. App. 443, 44 Am. Rep. 708; *State v. Calder*, 23 Mont. 504, 59 Pac. 909; *Leeper v. State*, 29 Tex. App. 154, 15 S. W. 411. Therefore it is clear that, where the act constituting the main essential fact of a crime is testified to by direct evidence, it is not a case of circumstantial evidence. But where the main fact or the act constituting the crime is shown by indirection, it is a case of circumstantial evidence, although the intent may rest upon positive proof. What is the main fact or the act of a crime in a case

of burglary? In murder it is the fact of the homicide; in theft it is the act of the taking; in burglary it is not the intent with which it is committed,—it may be with the intent to commit the crime of theft, robbery, rape, murder, or any other felony. The main essential fact of burglary is the breaking and entering of the house. The commission of the crime intended when the house was entered need not be executed, and yet the crime is complete. *Martin v. State*, 1 Tex. App. 525. In this case, both upon this trial and upon the former appeal, no human eye saw, nor did a human lip testify to, the actual breaking of the house alleged to have been burglarized. That it was broken and entered depends solely upon inferences and deductions. It was arrived

the time more than the amount in the latter bank,—there was no occasion for the court to give a requested instruction upon the law of circumstantial evidence, as the case did not depend wholly upon evidence of that character. *Brown v. State* (Tex. Crim. App.) 43 S. W. 986.

On a trial under what is ordinarily known as "the Whittcapping statute," for sending a threatening letter to the prosecutor, an assistant postmaster testified that he had seen three letters, one addressed to the prosecutor and two others each to another individual, and that he saw the accused put the envelopes containing those letters in a mail box. It was held that this was positive evidence as to the mailing of the letters by the accused, and, hence, it was not incumbent upon the court to charge on the law of circumstantial evidence. *Dunn v. State*, 43 Tex. Crim. Rep. 25, 63 S. W. 571.

Where one was convicted upon a count of an indictment which charged another with the offense of offering to bribe a witness in a criminal case to disobey an attachment, and charged the accused as being an accomplice of such other in the commission of the offense; and the witness in the criminal case testified that the defendant told him that he could make a certain sum if he would leave the country and not appear as a witness, and advised him to accept it,—it was held that the case was not one of circumstantial evidence only, as the testimony of the witness was direct as to the guilt of the accused; and the refusal of the court to give an instruction requested by counsel for the accused, explaining the rules as to the consideration and sufficiency of circumstantial evidence, was no error. *Leeper v. State*, 29 Tex. App. 154, 15 S. W. 411.

Where, upon the trial of an indictment for gaming, a witness testified directly to the commission of the offense by the accused, it was held that, in view of the direct testimony of the witness, the judge did not err in not giving in charge rules of law applicable to cases founded on circumstantial evidence. *Moore v. State*, 97 Ga. 759, 25 S. E. 362.

Upon the trial of an indictment for gaming it was held that the rule that the guilt of the accused must be established to the exclusion of any other hypothesis applies in cases depending upon circumstantial evidence, and a refusal to charge such rule is not error in a case where

the evidence is direct. *Cohen v. State*, 32 Ark. 226.

In *Jones v. State*, 23 Tex. App. 501, 5 S. W. 138, the court said: "It was not error to omit to give the jury a charge explaining the rules governing in cases of circumstantial evidence. In this case the evidence of defendant's incestuous acts was direct and positive. It is only when the evidence relied upon for a conviction is wholly circumstantial that such a charge is required."

b. By proof of the confession of accused.

Wherever evidence is given of the confession, admission, statement, or testimony of the accused as to the inculpatory fact, this is held to be the equivalent of positive proof of the same, and the cases herein are of that character.

1. Homicide.

Where the prosecution on a trial for murder has given evidence of the confession of a defendant as to the commission of the act constituting the crime, it is not error in the trial court to refuse to instruct as a fact that the evidence in the case is entirely circumstantial. *Green v. State*, 97 Ala. 59, 12 So. 416.

On an application for a rehearing the conviction was reversed for other reasons. See 97 Ala. 64, 15 So. 242.

Where, on a trial for manslaughter, the *corpus delicti* is clearly established by competent proof, and there is proof of the defendant's confession, these, if credited by the jury beyond a reasonable doubt, are alone sufficient to require a conviction, and other circumstances are additional proof of the guilt of the defendant; and charges as to the effect of circumstantial evidence are properly refused. *Dennis v. State*, 118 Ala. 72, 23 So. 1002.

Upon the trial of an indictment for murder, the court was requested to charge upon the law of circumstantial evidence, the request being evidently based upon the theory that there was no direct evidence of the guilt of the accused. The court said that it could not say that the request was improperly refused, for there was evidence of a confession that the accused actually participated in the killing, and such evidence is not circumstantial, but direct. *Perry v. State*, 110 Ga. 234, 36 S. E. 781.

As to the proposition that evidence of a con-

at by the method of exclusion. True, appellant pleaded guilty to the theft of the corn; but what was the effect of his plea? It was merely an admission of all the facts alleged in the complaint and information charging theft. "A plea of guilty," says Mr. Bishop, "is a recognition of whatever is well alleged in the indictment." *Crow v. State*, 6 Tex. 334; *Doans v. State*, 36 Tex. Crim. Rep. 468, 37 S. W. 751. There was no allegation in the complaint and information charging theft alleging the breaking of the house; and, if it were there, it would not be well alleged, and a confession by way of a plea of guilty to the theft would not evidence the fact of the breaking of the house alleged to have been burglarized. This court has never held that a confession of one

crime was direct proof and positive evidence of the commission of another. Such a contention is so illogical that the statement carries with it its own refutation. A judicial confession admitting only the necessary allegations of the charge, while it becomes a confession that is conclusive against appellant in the case in which the confession is judicially made, could only become an admission of those facts when they become a material inquiry in another case based upon another charge, tried in another forum. It is thus seen that the principle laid down in the former opinion in this case is not only well settled, not only in accordance with uniform precedent, but responds to the dictates of reason. In this case the only question that needs to be considered is whether

fession is not circumstantial, but direct, the court cited *Eberhart v. State*, 47 Ga. 598, in which the court said, at page 609: "Confessional evidence may be circumstantial; as, for instance, if it be of a fact, which is itself but a circumstance, from which guilt is inferable. But confessions may be of the fact of the crime itself,—of its actual commission, or of actual aid, by the prisoner, in the commission. It is, then, direct evidence. The confession is only the mode of proof."

Evidence of the confessions of the accused in a murder case is positive evidence, and, if believed, condemns the accused out of his own mouth; and in such case a charge as to circumstantial evidence is unnecessary. *Heard v. State*, 24 Tex. App. 103, 5 S. W. 846.

On a trial for murder, where the testimony is positive that the accused, and he alone, killed the person for whose murder he is being tried, of which fact there is not a shadow of doubt, he himself having said that he killed him, a failure of the court to instruct as to the law of circumstantial evidence is not reversible error. *Clore v. State*, 26 Tex. App. 624, 10 S. W. 242.

On a trial for murder, where the accused confessed and never denied that he himself, and he alone, killed the person for whose murder he is on trial, and there is no controversy at all as to that fact, a charge upon circumstantial evidence is not demanded. *Johnson v. State*, 28 Tex. App. 17, 11 S. W. 667. The case, however, was reversed for other reasons.

Where, upon a trial for murder, there was proof that the defendant confessed to having committed the murder, such a confession is direct, and not circumstantial, evidence, and the inculpatory evidence cannot be said to be wholly circumstantial; and it is only when the inculpatory evidence is wholly circumstantial that an instruction as to that character of evidence is demanded. *Smith v. State*, 28 Tex. App. 300, 12 S. W. 1104.

In homicide the *factum probandum* is the destruction of the life of the deceased by the act, agency, or procurement of the accused; and where, on his trial, the latter admits the killing of the deceased, that fact is not wholly proved by circumstances, but is also directly attested by an eyewitness,—that is, by the defendant himself. *Self v. State*, 28 Tex. App. 398, 13 S. W. 602.

In *White v. State*, 32 Tex. Crim. Rep. 625, 69 L. R. A.

25 S. W. 784, a conviction of homicide, the court said: "The contention that the court erred in failing to instruct the jury in regard to the law applicable to circumstantial evidence is without merit. The proof of the confessions of defendant relieved the court of the duty of so charging."

Where, on a trial for murder, three witnesses testified to the confession of the accused of having committed the crime, his admission of guilt to them was direct, and not circumstantial, evidence, and no instruction on that character of evidence was necessary; as it is only where the evidence is wholly circumstantial that the court is required so to charge. *Hedrick v. State*, 40 Tex. Crim. Rep. 532, 51 S. W. 252.

On a trial for the murder of a child, where there is evidence that the accused has confessed to the killing, a charge on circumstantial evidence is unnecessary. *Red v. State* (Tex. Crim. App.) 53 S. W. 618.

On appeal from a judgment of conviction of murder, the record showed that the appellant made a confession before a justice of the peace, admitting his presence and participation in the death of deceased, but claimed that he participated because coerced to do so; and it was held that this character of statement on the part of accused took the case out of the realm of circumstantial evidence, and it was, consequently, not error for the court to fail to charge thereon. *Jackson v. State* (Tex. Crim. App.) 62 S. W. 914.

See also *State v. Robinson*, 117 Mo. 649, 23 S. W. 1066; *Gibbs v. State* (Tex. Crim. App.) 20 S. W. 919; *Yancy v. State* (Tex. Crim. App.) 87 S. W. 693,—*supra*, III. a. 1.; *Mathley v. Com.* 27 Ky. L. Rep. 785, 86 S. W. 988, *infra*, III. c; *White v. State*, 40 Tex. Crim. Rep. 368, 50 S. W. 705, *infra*, VII.

2. Larceny.

In *Huffman v. State*, 28 Tex. App. 174, 12 S. W. 588, which was a trial for the theft of a mare, the court held that the charge was not defective in failing to instruct as to the character of the accused's possession of the mare, whether recent or remote. That this issue was not in the case, because the defendant himself testified that he took the mare, and, in view of such admission, it was not essential to charge as to circumstantial evidence.

the remarks of the learned trial judge operate to appellant's injury to that extent that it will be necessary to reverse this case. We have the right to assume that the trial judge thoroughly understands his judicial province, as distinguished from that of the jury, which, in a felony case, is not only a component, but a necessary, part of the court over which he presides. We assume that he knew he was forbidden by law to express any opinion as to the weight of any evidence admitted by him. We assume that he knew the law requires in case of circumstantial evidence that the jury be cautioned by a charge explaining to them the rules that govern a case where such evidence is solely relied upon to demonstrate the main fact of the crime charged. Undoubt-

edly, he knew that any remark made by him in the presence of the jury which had a tendency to prejudice their minds against the unsuccessful party will afford grounds for the reversal of the judgment. In this case the learned trial judge stated to the district attorney in the presence and hearing of the jury that he did not consider this a case of circumstantial evidence. Bill No. 7 shows that the district attorney was asserting that, if appellant had confessed his guilt on the charge of theft, the charge on circumstantial evidence in this trial for burglary should not be given, and that the rules of circumstantial evidence should not be given to the jury; and the court thereupon remarked, in the presence and hearing of the jury: "I agree with you in your con-

Where, on a charge for burglary and theft, the defendant was convicted of the latter crime, and on his trial admitted that he took the goods, but explained that he took them from another, who burglarized the house, the facts did not constitute a case of circumstantial evidence; and the court did not err in failing to charge upon that phase of the law. *Connors v. State*, 31 Tex. Crim. Rep. 453, 20 S. W. 981.

On a trial for theft of cattle the court said: "It has been repeatedly held by this court that, where the evidence shows a confession by defendant, the case is no longer one of circumstantial evidence;" and a failure of the court to charge on that character of evidence is not error. *Mathews v. State*, 39 Tex. Crim. Rep. 553, 47 S. W. 647, 48 S. W. 189. To the same effect, *Rios v. State*, 39 Tex. Crim. Rep. 675, 47 S. W. 987.

On a trial for theft by conversion of personal property, where the fraudulent conversion is not a disputed fact, under the evidence it is not necessary to charge the law on circumstantial evidence. *Steadham v. State*, 40 Tex. Crim. Rep. 43, 48 S. W. 177.

Where, upon a trial for theft of cattle, the state had proved a confession on the part of the accused, the court did not err in refusing a charge on circumstantial evidence. *Mathews v. State*, 41 Tex. Crim. Rep. 98, 51 S. W. 915.

In *Wilson v. State* (Tex. Crim. App.) 21 S. W. 361, it was held that it is necessary to charge upon the law governing circumstantial evidence only when the guilt of the accused is wholly dependent upon circumstantial evidence; and, where the confession of the defendant is proved in addition to other satisfactory criminative facts, a conviction of the defendant for theft will be sustained, although the court did not charge in reference to circumstantial evidence.

On a trial for theft of cattle, where the accused testified that she took the animal by virtue of purchase from a stranger, this relieved the court of the necessity of charging on circumstantial evidence, as she testified positively as to the taking. *Holmes v. State* (Tex. Crim. App.) 42 S. W. 979.

Where, on a trial for horse stealing, the testimony of the accused shows that he bought the horse as it ran upon the range together with another, and took a bill of sale from a person claiming to own it, and after securing

the bill of sale, took up the horse, claimed him, and disposed of him as his property, this was positive proof of the fact that he did not receive the horse from another party, but took it from the range himself, and excluded the idea of it being a case of circumstantial evidence; and a refusal and failure to charge the law applicable to a case of that kind of evidence was no error. *Baxter v. State* (Tex. Crim. App.) 43 S. W. 87.

On a criminal prosecution for hog stealing, where the defendant takes the stand himself, and testifies that he got possession of the hogs with the consent of the prosecutor, of whom he purchased them, there is no occasion for the court to give a charge on circumstantial evidence. *Reed v. State* (Tex. Crim. App.) 46 S. W. 931.

Where, on a trial for hog stealing, it appeared that two men were seen by two state's witnesses on the morning of the day the hogs were lost, driving a bunch of hogs which they took to be the prosecutor's, and they thought the accused was one of the parties driving the hogs, though they were not positive; and nine or ten of the prosecutor's hogs, with their ears cut off, were found on the premises of the brother-in-law of the accused, who lived several hundred yards distant from him; and the ears were found concealed in a pile of cotton seed; and one witness testified that on the morning after they found the hogs and the accused had been arrested, he confessed to him that he had stolen them,—it was held that the court did not err in failing to give a charge on circumstantial evidence. *Doucette v. State* (Tex. Crim. App.) 45 S. W. 800.

Where, on a trial for theft, the appellant confessed the taking, but insisted that he did not take with a fraudulent intent, but under a claim of right, this removed the case from the realm of circumstantial evidence, the only issue being as to the intent. *Roberts v. State*, 44 Tex. Crim. App. 267, 70 S. W. 423.

See also *Gentry v. State*, 41 Tex. Crim. Rep. 497, 56 S. W. 68, *supra*, II. b; *Blanton v. State* (Tex. Crim. App.) 26 S. W. 624, *supra*, III. a, 2.

3. Burglary.

On a trial for burglary, the defendant having confessed that he entered the house with intent to commit theft therefrom, the case is not

tention; but you know the court has ruled different in this case, and I cannot say whether I will charge on circumstantial evidence." This remark of the judge, in connection with the above-quoted excerpts of the speech made by the district attorney, presents this proposition: Can a court charge a necessary phase of the law, and then, by an indorsement, verbally, in the presence and hearing of the jury, of a contention by the district attorney that such is not the law, indicate to the jury how he, as an individual, deems the evidence should be weighed and tested? We think not. We are forced to assume that the judge knew that

the effect of his utterance was to indicate to the jury that he gave this charge reluctantly; that he did it in deference to the opinion of this court; that he was driven to it unwillingly; and that his idea of the case, which caused its reversal in the former trial, was still correct, regardless of the opinion of this court and the precedents cited. Of course, no such presumption of the knowledge of the law applies to this district attorney. The other remarks of the district attorney were made in the presence and hearing of the trial court. His conduct in permitting them to be made in the presence and hearing of the jury without rep-

one in which the conviction is sought, or wholly founded, upon circumstantial evidence; and it is not necessary, therefore, that the court should instruct the jury in regard to that kind of evidence. *Carr v. State*, 24 Tex. App. 562, 5 Am. St. Rep. 905, 7 S. W. 328.

In *Ricks v. State*, 41 Tex. Crim. Rep. 676, 56 S. W. 928, the court said: "The court did not err in failing to charge on circumstantial evidence, inasmuch as the record contains proof of appellant's confession of the alleged burglary."

On a trial for burglary it was proved that the defendant had voluntarily confessed that he had committed the burglary, and would bring back the meat stolen by him, and this was held to obviate the necessity of giving a charge on circumstantial evidence. *Albritton v. State* (Tex. Crim. App.) 26 S. W. 398.

Where, on a trial for burglary, the accused confessed to the burglary, there was no necessity for the court to charge the jury on circumstantial evidence; as it has been repeatedly held that the confessions of the defendant relieve the court of the necessity of charging on circumstantial evidence. *Franks v. State* (Tex. Crim. App.) 45 S. W. 1013.

Before a charge on the law of circumstantial evidence is required on a trial for burglary, the case must be one wholly of that character of evidence, and it is not where confessions of the accused are introduced in evidence. *Glover v. State* (Tex. Crim. App.) 46 S. W. 824.

Where there was proof of the confession of the accused of the burglary of which he was alleged to have been guilty, the trial court did not err in failing to charge on circumstantial evidence. *Ricks v. State*, 41 Tex. Crim. Rep. 676, 56 S. W. 928.

4. Other crimes.

On the trial of an indictment for forgery, if there is proof of the confession of the defendant of the commission of the act constituting the crime, a request for an instruction which assumes that all the evidence of the guilt of the accused is purely circumstantial is properly refused. *Langdon v. People*, 133 Ill. 382, 24 N. E. 874.

Where, on a trial for forgery, the accused admitted signing the name of the person whose name was alleged to be forged to the note, claimed that he had authority to do it, and testified positively that he did have such authority; and the person whose name was signed testified that he did not,—there was no suggestion of circumstantial evidence as to 60 L. R. A.

the matter of authority in signing the note, and the failure to charge thereon was no error. *Usher v. State* (Tex. Crim. App.) 81 S. W. 309.

On a trial for altering the brand on one head of cattle, there was evidence that the accused confessed to altering the brand on the animal, and it was stated on the part of the state that, under certain decisions, it was not necessary to charge on circumstantial evidence; but the court said, if it were true that the accused confessed to altering the mark on the identical animal belonging to the prosecutor, unquestionably it would not be necessary to give a charge on circumstantial evidence; but that there was some question as to the identity of the animal. The confession of the defendant was that he had changed the brand upon the animal that the prosecutor stated that he had lost, and this gap was filled up by circumstantial evidence that might or might not indicate that it was the same animal; hence, the court should have given a charge upon circumstantial evidence. *Childers v. State*, 37 Tex. Crim. Rep. 392, 35 S. W. 654.

c. Plea of insanity.

The two cases following illustrate the doctrine that the plea of insanity is inconsistent with the position of controverting the existence of the inculpatory fact, and is in truth practically an admission of it.

On a trial for murder, where there is no dispute as to the homicide having been committed by the accused without legal excuse or justification, and it is admitted that he shot the deceased without provocation, and his only defense is insanity, the rule in regard to which is well settled in Kentucky, that one charged with crime is presumed to be sane until the reverse is established by evidence, a refusal to charge expressly as to the presumption of innocence is not error. *Mathley v. Com.* 27 Ky. L. Rep. 785, 86 S. W. 988.

Where, on a trial for murder, the simple and single issue joined between the state and the accused was in *vanus vel non*, such a defense, the joining of such an issue, is tantamount to the plea of confession and avoidance. The court said that, this being the case, it was wholly unnecessary—indeed it would have been misleading—to have instructed the jury on the subject of circumstantial evidence; that there was no circumstantial evidence about who did the homicide,—that was undisputable,—while all the evidence as to defendant's mental condition was open, direct, and oral, and an instruction as to circumstantial evidence was

rimand indicates that he acquiesced and indorsed the same. This court is forced to assume that the trial judge recognized their impropriety. The only question, so far as the appellant is concerned, for us to pass upon, is whether or not the same injured his rights. We deem a mere statement of them is sufficient. We cannot conscientiously permit a verdict to stand under the circumstances disclosed by this record.

In concluding a disagreeable subject, we cannot refrain from quoting an admirable homily, which was uttered by a great judge. He says: "Government consists of fallible men, who do not always know their duty;

and parties may lose some of their rights if they do not aid public officers by notifying them of their views, and urging them; and questions of jurisdiction are very often as difficult to decide as any other. It is an essential element of judicial authority that it must be the judge of its own jurisdiction, and I do not know that this rule is peculiarly applicable to the higher courts. The lowest must act upon it, subject to the higher social law that is involved in official subordination. Often the question may be erroneously decided. Often such decisions may result in great injury to the citizen,

rightfully refused. *State v. Soper*, 148 Mo. 217, 49 S. W. 1007.

IV. Where evidence is both direct and circumstantial.

In the following cases the rule is the same as in *supra*, II., but they are segregated for the sake of convenience, and also that in a sense they are isolated from the others, being cases wherein there existed both direct and circumstantial evidence; but the rule in regard to them is the same, namely, that no charge on the subject of circumstantial evidence is required.

Where the evidence which tended to establish the guilt of the defendants in a criminal case was both direct and circumstantial, a request to charge on the sufficiency of circumstantial evidence was properly refused, as it ignored all the positive testimony in the case, and required the court to direct the attention of the jury to the circumstances alone which bore upon the question of guilt. *Cotton v. State*, 87 Ala. 75, 6 So. 396.

Where the prosecution in a criminal case did not rely on circumstantial evidence alone, there was no error in refusing to instruct the jury that, if there is a single fact proved to their satisfaction by a preponderance of the evidence which is inconsistent with defendant's guilt, it is sufficient to raise a reasonable doubt, and they should acquit. *Rains v. State*, 88 Ala. 91, 7 So. 315.

Where it is not clear that the testimony in a criminal action is entirely circumstantial, it appearing that, while no witness actually saw the defendant stab the deceased, several witnesses saw them fighting, giving each other violent blows, and, when the fight ended, deceased was found with a mortal stab in her breast, blood upon her garments, and she very soon died, a motion for a new trial on the ground that the court erred in charging the law in cases of direct testimony as applicable to the case, and in not charging as to circumstantial evidence, the evidence as to who gave the fatal stab being entirely circumstantial, should be denied. *Barrow v. State*, 80 Ga. 191, 5 S. E. 64.

In *State v. Donnelly*, 130 Mo. 642, 32 S. W. 1124, it was insisted on the part of the accused that the prosecution relied upon circumstantial evidence to convict the defendant, and that the court should have instructed the jury with reference to the weight and conclusiveness of such evidence; but it was held that such an

instruction would not have been applicable to the facts of the case, for the reason that there was direct and positive evidence that defendant committed the homicide, and that it is only when conviction is sought on circumstantial evidence alone that such an instruction becomes necessary; citing *State v. Robinson*, 117 Mo. 649, 23 S. W. 1066, *supra*, III. a. 1, and *State v. Moxley*, 102 Mo. 374, 14 S. W. 969, 15 S. W. 556, *supra*, II. a. 1.

In *State v. Calder*, 23 Mont. 504, 59 Pac. 903, the defendant asked, and the court refused to give, a charge in respect of the burden resting upon the state to establish beyond a reasonable doubt the existence of each link in the chain of circumstantial evidence, and this was held to be right; the court on appeal saying that the question of guilt or innocence was not dependent upon circumstantial evidence alone, or in a controlling degree upon such evidence, and therefore the case did not require a special instruction as to that means of proof; that there was direct evidence of the main fact, and the indirect evidence was merely in corroboration.

Except in cases where the defendant's guilt depends wholly and alone upon circumstantial evidence, it is not requisite that the court should give, in addition to the charge as to reasonable doubt, the usual instructions as to circumstantial evidence. *Smith v. State*, 2 Legal Rep. 56, 2 Shannon, Cas. 621.

Where, on a trial for larceny, the presence of the defendant at the scene of the theft, and his active confederation with the actual thief, were established by evidence of a positive nature, the evidence is not wholly circumstantial in a legal sense so as to require a charge on the question of the law of circumstantial evidence, as the rule as to circumstantial evidence has not yet been extended to a case of that character. *Hardin v. State*, 8 Tex. App. 653.

On a trial for robbery, where there is not only strong circumstantial evidence proving the guilt of the accused, but there is also direct, positive, and convincing proof that he is the identical party who committed the robbery charged in the indictment, it is not error for the court to omit and refuse to charge the jury in relation to circumstantial evidence. *Makinson v. State*, 16 Tex. App. 133.

In *Mackey v. State*, 20 Tex. App. 603, it was objected that the charge was defective in that it omitted to instruct the jury upon the law relative to circumstantial evidence. But the court held that the facts did not show a case purely of circumstantial evidence, and that, hence, it could not be held that the failure so to charge was reversible error.

and a man of well-trained mind will think it no great hardship to submit to authority, even in error." And again, in referring to the respect that should be given to those in authority, he says: "He that rejects this principle from his moral code, or gives it a low place there, can hardly be an orderly citizen, but must be dangerous to the public peace and progress in proportion as he is otherwise intelligent, influential, and active." We think that the above properly disposes of this case. However, before concluding, it is perhaps our duty to dispose of a question presented in the motion for new trial. In his motion for new trial appellant attaches a report made by the grand jury of Clay county, in reference to the enforcement of criminal law in that county and in the state; he contending that the report

being read before the trial of this case, and being received by the trial judge, was such as necessarily prejudiced the jury that tried this appellant, and that they therefore for that reason were not fair and impartial. The fact that a single juror was influenced by this report is not shown. In any event, this comes too late in motion for new trial. It is properly a plea that should be made *in limine*, as has been specifically held by this court. It cannot, therefore, be considered. *Furlow v. State*, 41 Tex. Crim. Rep. 12, 51 S. W. 938; *Hannaman v. State* (Tex. Crim. App.) 33 S. W. 538; *Caldwell v. State*, 12 Tex. App. 302; *Perry v. State* (Tex. Crim. App.) 45 S. W. 567.

The judgment is reversed, and the cause remanded.

And in *Stone v. State*, 22 Tex. App. 185, 2 S. W. 585, it was held that it was not error to omit to charge the jury on the rule as to circumstantial evidence, as the case was not one of circumstantial evidence alone, there being direct evidence proving the guilt of the defendant.

On a trial for murder proof of the killing of the deceased by the accused was by an eyewitness, and was not contradicted. In this case the court said: "A charge upon circumstantial evidence is not required of the court, unless the evidence relied upon by the state is purely and solely circumstantial in character." *Surrell v. State*, 29 Tex. App. 321, 15 S. W. 816.

Where, on a trial for murder, the confessions of the accused are introduced in evidence, the fact that these were only corroborated by circumstantial evidence will not necessitate a charge on that character of evidence. *Carmona v. State* (Tex. Crim. App.) 65 S. W. 928.

In *Buntain v. State*, 15 Tex. App. 515, the court, after holding that it was not a case of circumstantial evidence, and the court was not required to charge the jury with a view to such testimony, as there was positive evidence in the case, said further: "If a court were required to charge the law of circumstantial evidence in all cases where reliance was had upon circumstances to establish any particular fact, then, indeed, there would be but few, if any, cases in which such a charge would not be required. But such is not the rule. A charge upon circumstantial evidence is only required when the evidence of the main facts essential to guilt is purely and entirely circumstantial."

See also *Williams v. State* (Tex. Crim. App.) 45 S. W. 494, *infra*, VI.

But on a trial for larceny, where the prosecution had introduced both direct and circumstantial evidence, and the court had refused an instruction requested by the defendant as to the effect of circumstantial evidence, the court, on appeal, in reversing the judgment, said that it was within the province of the jury to disregard the direct testimony, and to base their verdict solely on the incriminating circumstances surrounding the accused; and that, this being true, it was proper to furnish a guide to the jury to govern them in the consideration of the probative force of such circumstances as were shown, tending to establish the guilt of

the accused. *State v. Andrews*, 62 Kan. 207, 61 Pac. 808.

V. Where instruction or request to charge simply states abstract proposition.

Where the general charge of the court has been correctly and fully given, and the rules of law as applicable to the particular case have been stated to the jury, a request to charge an abstract proposition of law, correct in and of itself as such, but wholly inapplicable to the circumstances of the particular case, is properly refused.

A charge which is not supported in its hypotheses by any phase of the testimony is abstract, and should be refused, no matter how correct the legal proposition it may assert. And so, where there was no testimony which tended in the slightest degree to prove any fact which was inconsistent with the defendant's guilt, a request that, if there is a fact inconsistent with the defendant's guilt sufficient to raise a reasonable doubt, the jury should acquit, is properly denied. *Rains v. State*, 88 Ala. 91, 7 So. 315.

In a case where the whole evidence is from the mouths of eyewitnesses to the occurrence constituting the crime for which defendant is on trial, and does not go circumstantially or inferentially, but directly and positively, to the details of the occurrence, a charge that a conviction should not be had upon circumstantial evidence, if positive evidence is attainable or before the jury, has no place. *Welch v. State*, 124 Ala. 41, 27 So. 307.

In *Coleman v. State*, 87 Ala. 14, 6 So. 290, the court had refused a request to charge that a conviction ought not to be had on circumstantial evidence when direct and positive evidence is attainable, and the refusal was held to be correct, as the request was not adapted to the testimony, there being some positive proof that the defendant stole the money, and the record did not tend to show that any additional positive testimony could be obtained, or was in existence.

Where, on a criminal trial, the section of the Code bearing upon the subject of circumstantial evidence is given in charge to the jury *in hæc verba*, the refusal to charge as requested by counsel for the accused on the subject of the sufficiency of circumstantial evidence to war-

rant a conviction is not error. *Seats v. State* (Ga.) 50 S. E. 65.

And the converse of this proposition is also true, as will be seen in the following case.

To justify a conviction of murder upon circumstantial evidence alone, the facts relied on must be absolutely incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of guilt. And, if this be so, a jury called to pass upon a case of that character should be informed of the rule as a part of the law applicable to the case. And an ordinary charge upon the law of reasonable doubt, copied from the statute, cannot convey to their minds a clear conception of this exaction of the law, when a conviction is sought upon circumstantial testimony alone; and without some definite rule for their guidance—a rule which will serve to impress itself on their minds, and cause them to weigh most carefully all the facts, isolated or connected, from which they must reach their conclusion of reasonable inference—they are not unlikely, in many instances, to found their verdict upon strong suspicion, or mere probability, which will not suffice under the law. *Hunt v. State*, 7 Tex. App. 212.

VI. *Testimony of accomplices.*

And it would seem to be the almost universal rule that, even though the direct testimony as to the inculpatory fact be given by an accomplice of the accused in the commission of the crime, yet it is so much direct and positive testimony as will not necessitate an instruction upon the subject of circumstantial evidence.

Where in a criminal action the theory of the prosecution was based upon the testimony of an accomplice, and there was nothing to indicate that without it a conviction was asked, a request to instruct the jury as to the effect of circumstantial evidence, based upon the theory that there was no direct testimony aside from that of the accomplice, and that he was impeached, was properly denied. *Vaughan v. State*, 57 Ark. 1, 20 S. W. 588.

Where the case on a trial for murder was not dependent alone, nor in a controlling degree, on circumstantial evidence, but was rather a case depending upon the testimony of an accomplice, and the necessity of corroborating his testimony, than one dependent upon circumstantial evidence, a request to charge on the subject of circumstantial evidence was properly refused. *Tooney v. State*, 8 Tex. App. 452.

Where, on a trial for larceny, a witness testified directly that the accused told him that he had stolen a horse from the owner, even though such witness was an accomplice in the theft, this fact will not make the case one dependent wholly on circumstantial evidence so as to demand a charge upon that character of evidence. *Wampler v. State*, 28 Tex. App. 352, 13 S. W. 144.

In *Thompson v. State*, 33 Tex. Crim. Rep. 217, 26 S. W. 198, which was an appeal from a conviction of murder, the court said: "The evidence does not bring this case within the rule of circumstantial evidence. The accomplice swears directly and positively as eyewitness that defendant committed the murder. The threats of defendant to kill the accomplice if she betrayed him were also proved. The court did not err in refusing the requested charge submitting the law applicable to circumstantial evidence."

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On a trial for murder the fact that the witness to the transaction was an accomplice furnishes no reason why a charge should be given on circumstantial evidence. *Kidwell v. State*, 35 Tex. Crim. Rep. 264, 33 S. W. 342.

On a trial for murder, where the charge was that the accused procured another person to kill the person for whose murder he was on trial, and the person who did the killing testified that he did so at the request and procurement of the accused, and that the latter furnished him the gun with which to do the killing, it was held that the court did not err in failing to charge the law applicable to circumstantial evidence. *Thomas v. State*, 43 Tex. Crim. Rep. 20, 96 Am. St. Rep. 834, 62 S. W. 919.

Upon a trial for larceny of a horse, it was proved that the party who took the horse went into the lot, put a rope around its neck, and was leading it off, when the officers, who were watching for the thief, undertook to make an arrest, when the party fled. There were present at the lot the thief and a companion. The companion was found just outside the lot at the time the horse was taken. It was held that the taking in the case of theft was the main fact, and in this case it was not deducible from circumstances, but testified to positively. The accomplice testified that he went with the accused according to a previous arrangement between them to take the horse in question. This was held to be positive evidence as to the identity of the defendant, although it was testified to by an accomplice; and on the whole case it was held that a charge on the law of circumstantial evidence was unnecessary. *Monk v. State* (Tex. Crim. App.) 44 S. W. 1101.

Where, on a trial for the theft of a head of cattle, a witness testified positively to the taking by the accused of the animal in controversy, and that he was an accomplice, this fact would not necessitate a charge upon circumstantial evidence. Nor would the fact that the identity of the animal taken by the accused and the witness, his accomplice, as being the same animal which belonged to the alleged owner, was established by circumstantial evidence, make it a case wholly depending upon that character of testimony. *Williams v. State* (Tex. Crim. App.) 45 S. W. 494.

Where the only witness to a homicide is an accomplice, this furnishes no reason why the court should give the law on circumstantial evidence in charge to the jury. *Red v. State* (Tex. Crim. App.) 53 S. W. 618.

The following case, however, would appear to differ from the general line of decisions on the subject, and there would seem to be considerable force in the reason given.

Where, on a trial for murder, the only direct evidence of the commission of the crime by the accused is that of an accomplice, who is overwhelmingly impeached; and, aside from his testimony the case against the accused is one largely of circumstantial evidence,—an instruction on the effect and sufficiency of circumstantial evidence is proper and necessary, when requested by the accused, as the jury might refuse to believe the accomplice. *State v. Woolard*, 111 Mo. 248, 20 S. W. 27.

VII. *Necessity of request for instruction; or exception.*

An exception to the failure or refusal to instruct on the law of circumstantial evidence in a case where such instruction should be given

is considered in the following cases. The rule would appear to be that a failure so to instruct the jury, whether requested or not, is material error, with the exception of a single case.

In every criminal case it is the duty of the judge, even without a request, to charge concerning the law of reasonable doubt; and, where the evidence against the accused on a trial for hog stealing was entirely circumstantial, and the presiding judge failed to state the rule of law applicable in criminal cases to proof of this character, this was held to be such error as would reverse a judgment of conviction. *Hamilton v. State*, 96 Ga. 301, 22 S. E. 528.

It is only another application of the doctrine of reasonable doubt, which the humanity of the law vouchsafes to prisoners on trial when the evidence against them is wholly circumstantial, that the law as to circumstantial evidence should be correctly given the jury by the court; and an instruction embodying it simply informs the jury what degree of certainty the facts in the evidence must produce in their mind before they can convict, just as a charge upon the reasonable doubt does in ordinary cases. And the failure of the court to give an instruction upon this branch of the law is error which will require a reversal of a judgment of conviction. *Hunt v. State*, 7 Tex. App. 212.

In *Barr v. State*, 10 Tex. App. 507, the statement was made by the court that it was not until the decision of the case of *Hunt v. State*, 7 Tex. App. 212, *supra*, that it was ever expressly decided in Texas that, in trials for felony, when the proof of guilt depended alone on circumstantial testimony, the court should charge on that character of evidence, as a part of the law of the case, whether requested to do so or not.

On a trial for theft it was held that the case was one of purely circumstantial evidence, and that it was the duty of the court below, whether asked or not, to give in charge the law applicable to such a case. *Ward v. State*, 10 Tex. App. 298.

And in *Ray v. State*, 13 Tex. App. 51, the court said: "The evidence upon which the conviction in this case is based is wholly circumstantial. It is well settled that in such case the court should instruct the jury in regard to the character of such evidence, as a part of the law of the case, whether requested to do so or not. There is no particular, definite form of language required to be used in giving such instructions. If the ideas are sufficient, and so expressed that the jury can readily comprehend the meaning of the language employed, the demand of the law will be satisfied. . . . In the case at bar the court failed to give the jury any charge upon circumstantial evidence, and therefore failed to give in charge all the law applicable to the case."

A conviction for homicide will be reversed where it is wholly dependent for its support on circumstantial evidence, where a charge upon that subject was not given at the trial; and this is so whether such charge is requested or not. *Leftwich v. State*, 34 Tex. Crim. Rep. 489, 31 S. W. 385.

When the testimony in a criminal case is entirely of a circumstantial character, and a request is made to charge upon the subject of circumstantial evidence, although the request is technically erroneous, it is still the duty of the court to give the law upon the subject, as it is to the court that the accused has the right 69 L. R. A.

to look to see if he has a fair trial, and a jury of inexperienced laymen are hardly expected to apply the rule applicable to this class of testimony without some assistance from the court. *People v. Scott*, 10 Utah, 217, 37 Pac. 335.

In *Dovalina v. State*, 14 Tex. App. 312, which was a trial for forgery, the court said: "A conviction was sought alone upon circumstantial evidence. The law applicable to such a case was not charged. However, as there was no charge requested, nor objection made because of the omission of a proper charge on the subject; and as such error is not relied upon in the motion for new trial,—we do not feel called upon to reverse upon this ground."

The last reason stated was probably a good one for not reversing the judgment, but under all the decisions given herein the first one certainly was not.

Where the material evidence in the case is in its nature circumstantial, the court should instruct the jury as to the law governing that character of evidence,—especially when such instruction is requested. *Smith v. State*, 7 Tex. App. 382.

In *Polanka v. State*, 33 Tex. Crim. Rep. 634, 28 S. W. 541, the court said: "This conviction was for hog theft. The statement of facts incorporated in the record constitutes this a conviction depending wholly upon circumstantial evidence. It was therefore incumbent upon the trial court to instruct the jury in regard to the law applicable to such testimony. This is the settled rule in this state by an unbroken line of decisions, and a failure to comply with it requires a reversal of the judgment though exception be not reserved."

In affirming a conviction of murder the court, in *White v. State*, 40 Tex. Crim. Rep. 366, 50 S. W. 705, said: "Appellant's next assignment is that the court erred in his charge to the jury, in not charging upon the law of circumstantial evidence. In answer to this assignment, we would observe that no bill of exceptions, nor exception in motion for new trial, was reserved to the failure of the court to give this charge, and hence we cannot review the same. Even if there had been, it is not necessary for the court to charge on circumstantial evidence, when the state relies on the confession of the defendant as part of the evidence on which to base the conviction."

The court having decided the last proposition, it was unnecessary for it to decide the first, but, if it had been, the decision would seem to be in direct opposition to all prior decisions of the same court, which has held repeatedly that a failure or omission of the court to charge on circumstantial evidence in a proper case is fatal error to a conviction, whether the instruction is requested or not, and, as stated in the last case, though exception be not reserved. The words quoted are all that was said on the subject, and no reference was made to *Polanka v. State*, 33 Tex. Crim. Rep. 634, 28 S. W. 541. See also *Richards v. State*, 102 Ga. 599, 27 S. E. 720, *infra*, IX.

From the following cases it would appear that in trials of offenses other than felonies a request for an instruction as to the law of circumstantial evidence in a proper case is necessary.

In *Howard v. State*, 8 Tex. App. 612, it was held that on a trial for a petty theft, inasmuch as with regard to some of the articles claimed to have been stolen the evidence was

wholly circumstantial, a proper charge on circumstantial testimony would have been appropriate; but that being a misdemeanor, it was perhaps the duty of the defendant's counsel to have asked suitable instructions on the subject, by preparing them for delivery to the jury and presenting them to the court.

In criminal actions for misdemeanors, the court is not required to charge the jury, except at the request of counsel on either side; but, when so requested, shall give or refuse such charges, with or without modification, as are asked, in writing; citing Code Crim. Proc. art. 681. *Ross v. State*, 9 Tex. App. 275.

And so, on a trial for a misdemeanor, where the inculpatory evidence is exclusively circumstantial, it is error for the court to refuse an appropriate instruction on circumstantial evidence when requested so to do by the accused. *Ibid.*

In the following cases it will be seen there were requests to charge, and there is a suggestion in each that the error consisted in a refusal of the request, but the cases in no sense militate against those which precede them.

Where, upon the trial of an indictment for larceny, there was no direct or positive proof of the guilt of the accused, and all the evidence adduced against them was circumstantial in character, the court said that, this being so, it devolved upon the trial court to charge the law relative to such testimony, and a failure so to charge in such cases had been so repeatedly held by the court to be reversible error that it would be but supererogation to cite authorities; that the charge given did not embrace the law in this respect, and a correct enunciation of it was submitted in the special requested instructions which were asked for defendant, and which were refused by the court. *Flores v. State*, 13 Tex. App. 685.

In *Dreyer v. State*, 11 Tex. App. 631, the court said: "Another error complained of is that the charge omits to instruct the jury upon the law of circumstantial evidence, and that the court refused a requested instruction upon this branch of the case. This error is well assigned, and the requested instruction should have been given."

See also *Conner v. State*, 17 Tex. App. 1, *supra*, 11, a. 1.

VIII. *Refusal of request, the substance of which is elsewhere charged.*

The court having instructed the jury in a criminal case that the law presumed the defendant to be innocent of the charge against him, it was neither necessary nor proper to caution the jury against a verdict based upon circumstantial testimony, or to prescribe a rule by which that character of testimony was to be considered by them. *Stricklin v. Com.* 83 Ky. 566.

In *Roberts v. State*, 110 Ga. 253, 34 S. E. 203, it was held that, although the evidence relied on for a conviction was entirely circumstantial, it is not cause for a new trial that the court, while instructing the jury on the law of reasonable doubt, failed to state in the same connection that the evidence must also be consistent with defendant's guilt, and must exclude every other reasonable hypothesis; the court having in another connection properly given to the jury this law on circumstantial evidence; citing *Young v. State*, 95 Ga. 456, 20 S. E. 270.

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In *Cave v. State*, 41 Tex. 182, the court said that the case depended upon circumstantial evidence, and required full instruction on that branch of the law; but that the several charges as given by the court embraced substantially the instructions asked by the defendant, and it was not necessary that the instructions given by the court should be repeated or given in the language asked by the defendant; and that the charge was in accordance with the rulings of the court.

Where, on a trial for murder, there was proof positive that the accused was the voluntary agent who committed the homicide, and the court had, without request, instructed the jury that circumstantial testimony must tend closely to prove the fact, or it is not of itself sufficient, but may still be entitled to great weight in connection with positive testimony; and that the jury would determine from the testimony, and from all the facts and circumstances, whether one of the accused committed the deed, and the other aided and abetted it,—there was no occasion to lay down the law with greater particularity upon the subject of circumstantial evidence. *Burrell v. State*, 18 Tex. 713.

On a trial for murder, where the charge of the court sufficiently instructed the jury as to the conclusiveness of circumstantial evidence to warrant them in finding a verdict on that character of testimony alone, and was a substantial compliance with the law on that subject, and, being sufficient of itself, a special instruction requested by the defendant became unnecessary, the court was not required to give it, and did not err to the prejudice of the defendant's rights to have the jury properly instructed in the law of the case. *Rye v. State*, 8 Tex. App. 153.

On appeal from a conviction for the theft of a pair of gloves, it was claimed by the counsel for the accused that it was a case of circumstantial evidence, as no witness saw the taking, and that the fact that the accused was found in the possession of recently stolen property did not take the case out of the rule; neither did the fact that it was a misdemeanor case render it unnecessary to charge on the issue of circumstantial evidence; and yet the court did not charge on it, though a special charge was requested by the accused when instructing the jury on that issue, and refused. All the court said on the subject was that the charges asked and given correctly and sufficiently instructed the jury in regard to the law of the case, and there was no error in refusing additional requested instructions. *Martin v. State*, 32 Tex. Crim. Rep. 441, 24 S. W. 512.

See also *People v. Lem Deo*, 132 Cal. 199, 64 Pac. 265, *supra*, III. a. 1.

IX. *Accused in juxtaposition to main or inculpatory fact.*

The following are cases where the court conceded that there was no direct evidence as to the main fact constituting the crime, yet the facts and circumstances testified to were in such juxtaposition to the main fact, or the testimony placed the accused in such juxtaposition to the main fact, as in homicide to the fact of killing, or in larceny to the fact of the taking, that this was equivalent to direct testimony, and a refusal to charge on the law of circumstantial evidence was no error. The cases following show under what circumstances such juxtaposition will be held to have existed.

Upon a trial for the theft of hogs the evidence showed that the missing hogs were tracked a short distance from the place where they were taken, and discovered in the possession of the defendant and his brother, who were driving them, and who drove them on home and butchered them. The court held that, while no witness saw defendant actually take possession of the hogs, yet the criminative circumstances were in such juxtaposition to the main fact that the omission to give a charge upon the law of circumstantial evidence was not calculated to injure the defendant's right. *Baldwin v. State*, 31 Tex. Crim. Rep. 589, 21 S. W. 679.

Where, on a trial for theft of a cow, the witness testified that he saw the accused and another at a point a mile and a half distant from the place of the alleged theft; that two or three hours later he heard a gun shot at or about the place of the alleged theft; and that a few minutes later he saw the defendant and the other person "at work" on the carcass of the cow they had killed,—it was held that the court did not err in failing to tell the jury that this was a case wholly of circumstantial evidence, as the evidence was direct and positive as to the guilt of the accused, as testified by an eyewitness, and, if the shooting was not seen, the facts were in such close juxtaposition to the shooting as to be equivalent to direct testimony. *Bennett v. State*, 32 Tex. Crim. Rep. 216, 22 S. W. 684.

In *Adams v. State*, 84 Tex. Crim. Rep. 470, 31 S. W. 372, which was an appeal from a conviction for horse stealing, it appeared that the horse in question was placed in the pasture, and was seen on the day of the alleged theft, outside the pasture, near a road which led along the fence; and the accused was just ahead of the animal, which seemed to be following him. The accused told the witness, as he passed him, that the colt had just jumped out of the pasture, and that he was following him, and that he was going to drive him back. Afterward the accused offered to, and did, sell the animal to another witness. In holding that the failure of the court to charge on circumstantial evidence was not error, the court said: "If it be conceded that no witness saw him in the very act of taking possession of said colt, yet the testimony places defendant in juxtaposition to the main fact, which is the act of taking in this case, so that the omission to give the charge on circumstantial evidence was not calculated to injure defendant's rights."

On appeal from a conviction for murder, the failure of the court to give a charge on circumstantial evidence was assigned as error. The evidence was to the effect that the person for whose murder the accused was on trial was killed in his barn, and his wife, who was killed at the same time, was heard to address the accused, beseeching him not to injure her husband, and immediately on being found, the husband, being still alive and conscious, and being asked who did it, replied with the name of the accused. It was held that, while no witness testified that he saw the act of killing, yet the facts and circumstances of the case were of a character to place the accused in such proximity and juxtaposition to the fact of killing as to render a charge on circumstantial evidence unnecessary, and, besides, the statements of deceased and his wife were in the nature of positive evidence. *Crews v. State*, 34 Tex. Crim. Rep. 533, 31 S. W. 373.

On a trial for murder the accused asked a 69 L. R. A.

charge on circumstantial evidence, and contended that, although the accomplice who testified as to the killing was present and saw the killing, yet it being dark, and at the very time of the killing he being some little distance from the parties when it occurred, it was such a case that required of the court a charge on circumstantial evidence. The charge was refused, and, in affirming the conviction, the court said that at the time the fatal stroke was given the witness was so near and in such juxtaposition that, though he may not have seen which one of the two parties inflicted the stabs and blows, several of which were fatal, yet it would make no difference, as to their guilt, which one may have caused the wounds. *Kidwell v. State*, 35 Tex. Crim. Rep. 264, 33 S. W. 342.

On a trial for rape, where the facts and circumstances of the case are of such a character as to place the accused in such close proximity and juxtaposition to the main fact as to make it certain that he committed the act, a charge on circumstantial evidence is unnecessary. *Allen v. State*, 36 Tex. Crim. Rep. 381, 37 S. W. 429.

On trial for murder, where it appeared that the accused was one of a gang who had conspired to rob a bank, in the commission of which robbery the person for whose murder the accused was on trial was killed, and one of the members of the gang had entered the bank with the accused, and, while they were in the act of robbing, shooting commenced on the outside, and the member alluded to said the boys had opened up the ball, these facts, together with the other facts in regard to the conspiracy to rob the bank, rendered a charge on circumstantial evidence unnecessary, and the court did not err in failing so to instruct the jury. *Nite v. State*, 41 Tex. Crim. Rep. 340, 54 S. W. 763.

While, upon the trial of a criminal case, it is ordinarily the duty of the judge, whether requested so to do or not, to give in charge to the jury the rule respecting the degree of certainty required to sustain a conviction where circumstantial evidence is alone relied upon, yet, where the evidence, even though circumstantial, is full and satisfactory, without serious conflict, and clearly shows the guilt of the accused, a failure so to charge will not require the granting of a new trial. *Richards v. State*, 102 Ga. 569, 27 S. E. 726.

In *Jones v. State*, 105 Ga. 649, 31 S. E. 574, the court said that it was entirely in harmony with *Tarver v. State*, 95 Ga. 222, 21 S. E. 381, where it was ruled that, "in passing upon the possession of stolen goods as evidence offered to show criminality, the time which elapsed between the theft and the possession, and the manner in which the possession was accounted for, or that it was not accounted for at all, are material matters for the consideration of the jury, to which the court, by appropriate instructions, should direct their attention;" and also what was ruled in the case of *Hamilton v. State*, 96 Ga. 302, 22 S. E. 528, that "the failure to give some such instruction, in a close and doubtful case . . . [like the case then being considered], will entitle the accused to a new trial." The court then said, further, that it found that the charge of the court in the case under consideration, while it omitted to deal with the law applicable to the question of stolen goods, and instructions as to conviction on circumstantial evidence, was otherwise full and explicit, and, it appearing that the accused

was plainly guilty under the law, the failure of the court below to charge the law applicable to the recent possession of stolen goods as a circumstance tending to show the guilt of the defendant, and the amount and the character of circumstantial evidence necessary to convict, was just ground of criticism from a legal standpoint; yet they were not satisfied to reverse the judgment because of these omissions from the charge, when with them the same verdict must have been rendered.

On a trial for theft it was shown that the accused was found in possession of the stolen property some months after the theft, with the brand upon the animal changed, and it was held that, while the evidence might be sufficient to sustain a conviction, yet the facts tending to connect the accused with the original taking were not in such close proximity to such taking as to relieve the court of the duty of instructing the jury in regard to the law governing cases of circumstantial evidence. *Alderman v. State* (Tex. Crim. App.) 23 S. W. 685.

In *Scott v. State* (Tex. Crim. App.) 23 S. W. 685, the court said that the conviction was wholly dependent upon circumstantial evidence, the facts not being in such close relation or juxtaposition to the main facts, or original taking of the cattle charged to have been stolen, as to bring the case within the rule laid down in *Montgomery v. State* (Tex. Crim. App.) 20 S. W. 928, *supra*, II., b, and that, under the facts of the case as found in the record, such omission required a reversal of the judgment. The court stated that it desired to reaffirm the doctrine announced in the *Montgomery* case.

Where, upon a trial for theft of an animal, there was no proof that the defendant took the animal, and the state had to rely upon the fact of recent possession to prove the taking, and there were other incriminatory facts in the testimony, all of a circumstantial character, none of which placed the defendant in such juxtaposition as to relieve the case of being one wholly dependent upon circumstantial evidence for a conviction,—it was held to have been the rule by a long line of decisions that, in cases of this character, it is incumbent upon the court to give in charge to the jury the law pertaining to circumstantial evidence, and, where this is not done, a conviction will be reversed. *McCamant v. State* (Tex. Crim. App.) 37 S. W. 437.

Where, on a trial for stealing a cow, the proof showed that she would come home every night from the range, but failed to come one night, and was seen no more until a month thereafter, when the accused, whose business was hunting stray stock and bringing them to their owners, found the cow, according to his evidence, and brought her to the prosecutor, who some days previously had offered accused a reward if he would find his cow and bring her home, the state proved by another witness that he saw accused in possession of the cow three days after she was missed by her owner, when accused was leading her by a rope around her neck, and, being asked what he was going to do with her, said he was going to turn her loose on the prairie. He was told by the witness that she was the prosecutor's cow, and was shown where the latter lived, the house being in plain view. The court said that this evidence did not place the accused in such juxtaposition to the fact of taking as not to require a charge on circumstantial evidence, and, because of the failure to give a charge

thereon, the judgment was reversed. *Davis v. State* (Tex. Crim. App.) 74 S. W. 544.

Where, on a trial for murder, a witness testified that while in her room asleep she was awakened by a pistol shot, and going to the window saw the accused at the window, and he remarked to her to be careful not to say that he did it, and smoke was coming in through the shutters of the window, but she saw no arms about the accused, and the person killed was afterwards found dead directly under the window, and the autopsy showed that he had been killed by a bullet wound, the court held that, while it is true that the circumstances might be so close and cogent, throwing the accused in such juxtaposition with the main fact that it might not require a charge upon circumstantial evidence, yet, where the facts are in doubt upon this theory, it is the safer and sounder rule to charge in regard to circumstantial evidence. That, in order to justify the trial court in not charging upon this phase of the law, it must be taken as certain, first, that the witness testified to the truth fully, and, growing out of that, secondly, that the accused was at the window, as testified by the witness, and thirdly, that his remark to her was a confession of the killing; and that, while these conclusions of the court might or might not be proper deductions from the testimony, it was not believed to be of sufficient cogency to exempt it from the rules of circumstantial evidence, or bring it within the rules of positive evidence to the exclusion of the law of circumstantial evidence. *Trejo v. State* (Tex. Crim. App.) 74 S. W. 546.

Where, upon a trial for hog stealing, a witness testified that he heard four shots, and after a time another, and, after hearing the five shots, he walked half a mile to where he heard them, and saw defendant hanging up a pig that he hid in the brush, and then walked toward the witness, and, when within about 50 yards, worked the lever of his gun several times, and then went in the direction of his home; and witness examined the pig and recognized it as belonging to his uncle, the owner; and the pig was killed by a gunshot; and the following day after the arrest of the accused he was carried to the point designated by this witness, where a track was found and that the shoe the accused was wearing corresponded exactly with the tracks found upon the ground,—it was held that these facts were not of sufficient cogency in their nearness and proximity to the transaction to relieve the court of the duty of charging the law of circumstantial evidence; and the judgment of conviction was reversed. *Guerrero v. State* (Tex. Crim. App.) 80 S. W. 1001.

X. As to question of intent.

As frequently before stated, it is only when the evidence as to the inculpatory or main fact constituting the crime is wholly circumstantial that a trial court is required to instruct the jury upon that branch of the law of the case; but in the case of a prosecution for a crime, one of the essential ingredients of which is the criminal intent of the accused in committing it, and there is direct evidence as to the main or inculpatory fact, such as the killing in homicide, the taking in larceny, or the breaking in burglary, although the evidence tending to prove the guilty intent of the accused may be wholly circumstantial no charge on the law relating to that character of evidence is required.

Where the fact is that the accused stood by and saw another kill the person for whose murder he is on trial, but there is no positive testimony that he took an active part in the killing, and his conviction of murder is sought to be upheld by the prosecution upon the theory that he consented to the killing in pursuance of a conspiracy previously entered into by him and the person who actually did the killing to effect the same, and all the evidence except the killing is circumstantial, a failure to charge the law upon evidence of that character is fatal to the conviction. *Jones v. State*, 34 Tex. Crim. Rep. 490, 30 S. W. 1059, 31 S. W. 684. The court said that the rule requiring an instruction upon circumstantial evidence, and of what that instruction should consist, applied only to proof of the act, and not to proof of the intent. On motion for a rehearing the majority of the court adhered to the opinion and judgment of reversal previously rendered in the case, but one of the judges dissented from the views expressed, and said that on a more thorough examination of the questions involved he was forced to do so, giving as his reason that, as the presence of the accused at the killing was proved by positive testimony, and while the intent and purpose of being there, to give color and character to his presence, and what he did or did not do there, were to be gathered by circumstantial evidence, yet, when the act was established by positive evidence, and the intent was to be inferred from circumstances, it was not necessary in such case to give a charge upon circumstantial evidence. The difference between this and the majority opinion seems to be that the latter went upon the theory that the existence of the conspiracy, and what the accused did at the killing, or did not do there, formed the inculpatory act.

The case of *Weatherby v. State*, 29 Tex. App. 278, 15 S. W. 823, *supra*, III. a, 1, would seem to sustain the views set forth in the dissenting opinion.

Where, on an appeal from a conviction for unlawfully selling intoxicating liquor, it appeared from the statement of facts, giving in detail the conversation between the accused and the witness who bought the whisky at the time it was purchased, that the accused must have known the object and purpose with which the witness went there because he got the bottle of whisky, it was not a case of circumstantial evidence requiring a charge upon that subject. *Leftwich v. State* (Tex. Crim. App.) 55 S. W. 571.

On a trial for unlawfully selling intoxicating liquor, where it was conceded that the party got the whisky of the accused, and the only fact left to be proved was, What was the intent of the accused in the transaction?—a failure to charge on circumstantial evidence is no error. *Becker v. State* (Tex. Crim. App.) 50 S. W. 949.

Where, on a trial for murder, the act is proved by direct or positive testimony, and all that remains to be found is the intent which caused the act, and which may be inferred from the circumstances accompanying the same, the rule requiring a charge upon circumstantial evidence does not apply. *Red v. State* (Tex. Crim. App.) 53 S. W. 618.

On a trial for murder the facts that the accused went to the scene of the homicide in company with the person who actually did the killing, and of his being present at the time, and what he did there, having been proved by posi-

tive evidence; and all that remains to be found is the intent which accompanied the act of the accused, which may be inferred from the circumstances accompanying the act,—the rule as to the necessity of charging the jury as to the law of circumstantial evidence does not apply. *Alexander v. State* (Tex. Crim. App.) 49 S. W. 229.

If, on a prosecution for theft, the taking of the property (cattle) appears from the defense of the accused to be an admitted fact, as where he claims that he took the cattle under a purchase from one who claimed to sell them as the property of the owner, it is no reason for requiring the court to charge upon the law of circumstantial evidence that the state proposed to prove the intent by that character of evidence. *Houston v. State* (Tex. Crim. App.) 47 S. W. 468.

On a trial for larceny, where the accused confessed the taking, but insisted that he did not take with a fraudulent intent, but under a claim of right, this evidence removed the case from the realm of circumstantial evidence, the only issue being as to the intent; and where such is the case a refusal to make a special charge on circumstantial evidence is not error. *Roberts v. State*, 44 Tex. Crim. Rep. 267, 70 S. W. 423.

XI. Miscellaneous cases.

In instructing the jury as to reasonable doubt in criminal cases the better practice is to follow as nearly as possible the language of the Criminal Code. The jury in a criminal case having been instructed that it was their duty to consider the entire evidence in the case, it would have been not only needless, but probably misleading, to have instructed them as to the particular character and effect of circumstantial evidence. *Weatherford v. Com.* 7 Ky. L. Rep. 827.

The case is reported only in the abstract which is given above, and what the particular circumstances were to which it related does not appear.

In *People v. Murray*, 72 Mich. 10, 40 N. W. 29, the court said that undue prominence is often given to unimportant testimony by the course pursued by the court; and that much care should be observed in this regard by the trial judge; and that the charge in the case before them had this infirmity, as, for instance, it stated that the accused fled, without stating his testimony upon that subject; and officers were sworn who arrested him, and allowed to give evidence of what was said, but no charge was given of the rule applicable in such cases; and that the presumptions of the law in favor of the accused were entirely omitted in the charge. The case was one where the accused had been sentenced to imprisonment for the term of fifty years, which the court held was more than his life could be expected to last in prison, and the circumstances of the case were peculiar, rendering it a hardship; and the court held that it reversed the judgment by a departure from its rules, which it would not ordinarily do, but that this was a case where, under the general superintending power and direction over all inferior courts, it felt it the imperative duty of the court, with or without objection, and exceptions by the counsel for the accused, to set aside the proceedings and order a new trial.

In *State v. Roe*, 12 Vt. 93, the court, in af-

firming a conviction for arson, alluded to the claim of the accused that the court neglected to instruct the jury about the rules concerning weighing circumstantial or presumptive evidence, and after stating that there are among elementary writers ingenious, but extremely fanciful, dissertations on this species of proof; and that, as the human mind, in search of truth, is extremely anxious to reduce moral truths to mathematical certainty,—some of the writers have attempted to resolve presumptive evidence into arithmetical proportions and algebraic equations. But that all this is merely fanciful, and no adjudged case has settled any such rules. That some rules for weighing evidence are laid down in the books, and the judge may, and perhaps ought, in cases proper, in his estimation, to aid the jury, in his discretion, by instructing them in those practical rules. But that this rests in his own discretion, depending on his views of the nature of the case and occasion. But no adjudged case can be found where it has been held as error that the court did not instruct the jury in the most approved elementary rules on the best and safest mode of weighing circumstantial evidence which the case would have justified or perhaps called for. And that there probably never was a case of circumstantial evidence tried where the judge

gave the jury all the instructions the law would have sustained, but, unless he gave them wrong instructions, it was no error. That the want of full instruction might, in some courts, have been considered ground for a new trial; never was it assigned for error.

It will be noticed that a large proportion of the cases in the note are decisions of the appellate courts of Texas, and particularly the cases in *supra*, VII., where the questions considered are, the necessity of the request for instruction on the subject of circumstantial evidence; and also the necessity of an exception to the neglect or refusal of the court to charge upon that subject; there being in that division only two cases cited from Georgia and one from Utah, other than the Texas cases. This preponderance of cases from that state in the note is readily accounted for when an examination is made of article 715 of the Code of Criminal Procedure of Texas, which provides: "After the argument of any criminal cause has been concluded, the judge shall deliver to the jury a written charge, in which he shall distinctly set forth the law applicable to the case; but he shall not express any opinion as to the weight of evidence; nor shall he sum up the testimony. This charge shall be given in all cases of felony, whether asked or not." P. H. V.

ARKANSAS SUPREME COURT.

ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, *Appt.*,

v.

Anna McFALL, Admr., etc., of W. O. McFall, Deceased.

(.....Ark.....)

Negligence of a locomotive engineer, which results in a collision, is not imputable to the conductor in charge of his train, so as to prevent a recovery for injuries thereby caused to the latter, where the conductor could not have controlled the action of the engineer at the time of the accident, or have prevented its occurrence.

(April 8, 1905.)

APPEAL by defendant from a judgment of the Circuit Court for Craighead County in favor of plaintiff in an action brought to recover damages for the alleged negligent killing of plaintiff's intestate. *Affirmed.*

Statement by Battle, J.:

"On the 16th day of February, 1902, and for some time prior thereto, W. O. McFall was employed" by the St. Louis & San Fran-

cisco Railroad Company as a conductor, and on that day had charge of fast freight train 25,201, with William Adams as his engineer, and was running from Thayer, Missouri, to Memphis, Tennessee. This train left Thayer, Missouri, between 4 and 5 A. M., as second section of 201, with orders to run forty-five minutes behind first 201, which was a regular passenger train. At Hardy, the first water station, some 18 miles east of Thayer, McFall's train stopped, and then received orders to meet freight train 252, in charge of conductor Shirk and engineer Morehead, at Ravenden station, about 15 miles further east. McFall's train was a first-class train, and was entitled to the main line at the meeting point, while Shirk's train was a third-class train, and was required to take the siding at this meeting point.

Shirk's train arrived at Ravenden, the meeting point, from five to ten minutes ahead of McFall's train, and, instead of taking the siding, stopped on the main line, at the switch for this siding. The engineer cut the engine off, and ran it up to the water tank on the main line, took water, and

NOTE.—For a case in this series holding that the negligence of the driver of a fire engine in colliding with a street car is not imputable to a fireman riding on the engine, see McKernan v. Detroit Citizens' Street R. Co. 68 L. R. A. 347.

As to imputing negligence of driver of vehicle generally to person injured while driving 60 L. R. A.

with him, see Nisbet v. Garner, 1 L. R. A. 152. and note; Becke v. Missouri P. R. Co. 9 L. R. A. 157, and note; Union P. R. Co. v. Lapsley, 16 L. R. A. 800; Mullen v. Owosso, 23 L. R. A. 693; Illinois C. R. Co. v. McLeod, 52 L. R. A. 954; Kopflits v. St. Paul, 58 L. R. A. 74; and Duval v. Atlantic Coast Line R. Co. 65 L. R. A. 722.

returned to his train. McFall's train approached from the west, without stopping at the station, and ran into Shirk's train. No one was hurt on either train, except conductor McFall, who at the time of the collision was looking out at the side door of his caboose. The sudden stopping of the train caused the side door, which was a sliding door, to close, striking McFall about the head or neck, killing him.

It also appears that neither train had any rights over the other at the point of collision. McFall's train, as against Shirk's train, had the superior right to the main line up to the clearance post, a few feet west of the east switches at this station. Shirk's train had superior rights to the side tracks, and had the right to the main line east of the switch. The territory between the east switch stands and the clearance posts is called "neutral territory," and this is where Shirk's engine was when McFall's engine struck it.

Anna McFall, as administrator of W. O. McFall, deceased, brought this action against the railroad company to recover damages, caused by the death of her intestate, for the benefit of the widow and children of the deceased, alleging that she was his widow, and Leoho McFall, fourteen years of age, Gladdis McFall, thirteen years of age, and Nadine McFall, eight years of age, were his children. She alleged in her complaint that McFall's death was caused by the negligence of his own engineer, Adams, in that the latter approached Ravenden station, the meeting point, without reducing the speed of his train and without having his train under control; and by the negligence of Shirk and his engineer in not having their train on the siding on the arrival of McFall's train.

The defendant answered, and admitted that McFall's engineer, Adams, was negligent, and alleged that the combined negligence of Adams and the contributory negligence of McFall caused the collision and McFall's death.

There is no contention here that McFall and the engineer on his train and the employees on Shirk's train were fellow servants, and that he had assumed the risk of their negligence. It is virtually conceded that they were not. The only questions presented for our consideration on this appeal are: (1) Is the negligence of the engineer, Adams, to be imputed to McFall; and, (2) if not, was McFall guilty of negligence which contributed to his death?

The facts we have stated were proved in the trial of the issues in this case; also the following rules:

"(352) Engineers, when on the road, are under the direction of the train conductor, 69 L. R. A.

whose orders they will obey, unless his orders may endanger the safety of the train or require a violation of the rules, in which event the engineer becomes equally responsible with the conductor."

"(505) No train will leave a station without sufficient brakes, air or hand, to handle it with safety to the next stopping point."

"(508) Enginemen and conductors will both be held responsible for the test being made as provided in rule 502," which provides how the air brakes shall be tested.

Evidence was adduced tending to prove the following facts: When McFall's train was about to leave Thayer, Missouri, as before stated, Adams, his engineer, undertook to test the air brakes, when McFall said to him, "Let's not wait for you to pump up the air; let's go on, and you can try the air down the road the first time we have to stop;" and they moved on without making the test of the air brakes. At Hardy, a station 18 miles from Thayer, they stopped to receive orders, and, in doing so, applied the air, and the air brakes worked well. They received orders to meet train No. 252, Shirk's train, at Ravenden, about 15 miles distant, and then ran on to that place. Adams, relating what then followed, says: "There was a slow bridge about 2½ miles west of Ravenden, and I think we had an order there to reduce speed at that bridge; and in coming there it was awfully cold, and I had been using the engine pretty hard, and it was not steaming good, and I shut off way the other side of the bridge and let the train roll over the bridge and did not use the air, and after we rolled over the bridge I put the steam on again, and kept it on until we got to the mile board at Ravenden. I whistled for the road crossing there and for the mile board, and rolled on down, and then whistled for the meeting order, one long and one short blast, and we came on down, and there is a reverse curve there, and when I got in the curve I looked over about the tank and saw smoke and steam arising, and I said to my fireman, 'Those fellows are here, and we won't be delayed any,' and we rolled on down, and about 50 yards north of the pump house I applied the air, and I felt the train budge like it was working all right, and I rolled on down there expecting 252 to be on the side track, and when we got down a little farther I looked on the passing track and did not see anything of them. Well, I was pulling Mr. McFall, and Shirk's train was No. 252, and I expected to see Shirk's train on the siding, but I did not see them, and I thought probably they were doubling over another track, and by that time I was getting up near the tank, and I watched for them and did not see them, and

I put the air on, and then looked at the order board and saw it was all right, and just as I passed the order board I came around the depot and struck straight track, and I saw their engine right ahead of me, and it looked to me like they were about 150 yards ahead of me, or not so far, and that scared me, and I put on the air and reversed the engine, and that did not seem to do any good at all, and we run on down and struck them."

He further testified that his train was running about 25 miles an hour as it passed the mile board, "and had been for a mile back," and about 8 or 10 miles an hour when it struck Shirk's train, and thinks that he could have stopped his train and avoided the collision if the air which set the brakes had "worked all right." It "worked all right" at Hardy, and until he "got in sight" of Shirk's train, and then failed, and the collision followed.

As his train approached Ravenen, McFall was in the caboose with no end doors or platform and no cupola, and had side doors on rollers. Adams testified: "McFall being in the caboose, there was nothing he could have done in the way of signaling me after it became apparent that something was wrong. I could not have seen him from the mile board. The track is all curves, first one way, then the other. In the curve at Ravenen, with the short train we had, I do not think McFall could have seen the engine, because the water tank and depot were in the way." He could have set the brakes by turning the air cock, for the purpose of checking the train, but that he was doing, and could do more effectually than McFall could have done.

At the time of the collision McFall was looking out of the side door of his caboose, when the sudden stopping of the train, caused by the collision, caused the door to close with great force and kill him, striking him on the head.

The jury returned a verdict in favor of the plaintiff for \$6,000. Judgment was rendered in her favor for that amount, and the defendant appealed.

Messrs. L. F. Parker and W. J. Orr, for appellant:

The negligence of the engineer is imputed to the conductor.

Moore v. Jones, 15 Tex. Civ. App. 391, 39 S. W. 593; *Minster v. Citizens' R. Co.* 53 Mo. App. 276; *Evans v. Atlantic & P. R. Co.* 62 Mo. 49; *St. Louis, I. M. & S. R. Co. v. Morgart*, 45 Ark. 318; *Pine Bluff Water & Light Co. v. Schneider*, 62 Ark. 109, 33 L. R. A. 366, 34 S. W. 547; *Little v. Hackett*, 116 U. S. 366, 29 L. ed. 652, 6 Sup. Ct. Rep. 391; *Thorogood v. Bryan*, 8 C. B. 115; *Maes v.* 69 L. R. A.

Texas & N. O. R. Co. (Tex. Civ. App.) 23 S. W. 725; *Hot Springs Street R. Co. v. Hildreth*, 72 Ark. 572, 82 S. W. 245; *Callahan v. Sharp*, 27 Hun, 85; *New York, L. E. & W. R. Co. v. Steinbrenner*, 47 N. J. L. 161, 54 Am. Rep. 126.

Messrs. J. F. Gantney and N. F. Lamb for appellee.

Battle, J., delivered the opinion of the court:

Assuming that the collision was caused by the negligence of Adams, the engineer, was such imputable to McFall? In *Little v. Hackett*, 116 U. S. 366, 29 L. ed. 652, 6 Sup. Ct. Rep. 391, Mr. Justice Field, delivering the opinion of the court, said: "That one cannot recover damages for an injury to the commission of which he has directly contributed, is a rule of established law and a principle of common justice. And it matters not whether contribution consists in his participation in the direct cause of the injury, or in his omission of duties which, if performed, would have prevented it." In that case the court held: "A person who hires a public hack, and gives the driver directions as to the place to which he wishes to be conveyed, but exercises no other control over the conduct of the driver, is not responsible for his acts or negligence, or prevented from recovering against a railroad company for injuries suffered from a collision of its train with the hack, caused by the negligence of both the managers of the train and of the driver." The court, after a review of many cases upon the subject, said: "Those on a hack do not become responsible for the negligence of the driver, if they exercise no control over him further than to indicate the route they wish to travel or the places to which they wish to go. If he is their agent so that his negligence can be imputed to them to prevent their recovery against a third party, he must be their agent in all other respects, so far as the management of the carriage is concerned; and responsibility to third parties would attach to them for injuries caused by his negligence in the course of his employment. But, as we have already stated, responsibility cannot, within any recognized rules of law, be fastened upon one who has in no way interfered with and controlled in the matter, causing the injury. From the simple fact of hiring the carriage or riding in it no such liability can arise. The party hiring or riding must in some way have co-operated in producing the injury complained of before he incurs any liability for it."

In *New York, L. E. & W. R. Co. v. Steinbrenner*, 47 N. J. L. 161, 54 Am. Rep. 126, a leading case, in which there is a long review

of authorities, the following rule is laid down: "A passenger in a hired coach may, by words or conduct at the time, so sanction or encourage a special act of rash or careless driving as to commit an act of negligence which will debar him from a suit against a third person for an injury resulting from the co-operating negligence of both parties. But for whatever purpose the negligence is invoked—whether as a cause of action for an injury done by the driver, or as contributory negligence to bar an action by the passenger against a third person for an injury sustained—the negligence, to be imputed to the passenger, must be such as arises in some manner from his own conduct. The negligence of the driver, without some co-operating negligence on his part, cannot be imputed to the passenger in virtue of the simple act of hiring."

Mr. Beach, in his work on Contributory Negligence, says: "The general rule is that, when the plaintiff's own want of ordinary care is a proximate cause of the injury he sustains, he cannot recover damages from another therefor. But, under certain exceptional conditions, . . . a plaintiff may be legally chargeable with the negligence of some third person, which is imputed to him as though it were his own. In this particular the law of negligence is analogous to the general principles of the law as to liability, under which one is primarily responsible for his own acts, and only secondarily for the acts of others, as *e. g.*, those of his servant or agent. The rule upon this branch of our subject is that the contributory negligence of third persons constitutes a valid defense to the plaintiff's action only when that negligence is legally imputable to the plaintiff. There must, in order to create this imputability, be some connection, which the law recognizes, between the plaintiff and the third person, from which the legal responsibility may arise. The negligence of the third person and its legal imputability must concur. It is clear that there is no justification for the negligent misconduct of

the defendant in that some third person, a stranger, was also in the wrong. When the defendant pleads the negligence of a party other than the plaintiff in bar of the action, it must appear, not only that such third person was in fault, but that the plaintiff ought to be charged with that fault." Page 142, § 100.

It follows, then, that, in cases where the injured and negligent do not sustain to each other the relations of master and servant, or principal and agent, or other relation by which alone one is responsible for the act of the other, the contributory negligence of a third person will not be imputed to the party thereby affected, unless he was at the time subject to the control of the injured person, and the wrong—the negligence—was committed at a time when it was within the power of such person to prevent it, and it was his duty to do so, and under circumstances which indicated that he assented to or acquiesced in the wrong by his failure to interfere, or directed it to be done; and that, when the conditions are reversed, the reverse is true,—it will be imputed.

The engineer of a railroad train is presumed to have been selected on account of his fitness for the position he fills. Being qualified, it is not the duty of the conductor to keep him under his constant supervision. In the discharge of his duties the engineer must be left to a large extent to the exercise of his own judgment. There was no evidence in this case tending to prove that Engineer Adams was not, before the collision of his train at Ravenden, careful and competent for the discharge of his duties, or that McFall, his conductor, had reason to believe that he was not.

The jury, in returning a verdict in favor of the plaintiff, necessarily found that the negligence of Adams was not imputable to McFall, and that McFall was not guilty of contributory negligence. The evidence was sufficient to sustain their findings.

Judgment affirmed.

IDAHO SUPREME COURT,

Charles A. McDONALD, Sheriff of Clark County,

v.

Edwin DOUST.

(.....Idaho.....)

*1. Section 1 of article 18 of the Constitution recognizes the counties organized and existing at the date of its adoption, and

*Headnotes by AILSHI, J.

NOTE.—As to power of legislature to divide counties or towns, and erect new counties or towns, see, in this series, *People ex rel. Henderson v. Westchester County*, 30 L. R. A. 74.

As to power of legislature to change county

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it is not within the power of the legislature to destroy or abolish such governmental organizations.

2. Acts inconsistent with the spirit of the Constitution are as much prohibited by its terms as are acts specifically enumerated and forbidden therein.

3. Act of the legislature approved February 28, 1905, entitled "An Act to Abolish the County of Kootenai with

from one judicial circuit to another, see *McCulley v. Tennessee*, 46 L. R. A. 567.

As to constitutionality of special act changing location of county seat, see *Edmunds v. Herbrandson*, 14 L. R. A. 725.

In the State of Idaho, and Create and Organize the Counties of Lewis and Clark within Said State, Define the Boundaries Thereof, and Locate the County Seats of Lewis and Clark Counties, Apportion the Debt of Kootenai County, between Lewis and Clark Counties, and to Provide for the Appointment of Officers in Said Lewis and Clark Counties, and for Transcribing a Portion of the Records of Clark County, and to Constitute Said Counties of Lewis and Clark a Part of the First Judicial District of the State of Idaho,"—is unconstitutional and void, in that it attempts to abolish and destroy an organized county of the state.

(May 12, 1905.)

APPPLICATION for a writ of mandamus to compel defendant to deliver to plaintiff the office records and property in defendant's possession as former sheriff of Kootenai County. *Alternative writ quashed.*

The facts are stated in the opinion.

Messrs. Edwin McBea, Ezra Whitla, C. W. Beale, Herman H. Taylor, and McGlear & Burgan for petitioner.

On rehearing, Messrs. Henry Z. Johnson and W. E. Borah also for petitioner.

Messrs. Fremont Wood, Edgar Wilson, and Charles L. Heitman, for defendant:

The legislature cannot abolish a county or a county government.

The constitutional recognition of the counties in existence at the time that the state was admitted into the Union precludes the right of the legislature thereafter to abolish them.

Idaho Const. art. 18, § 1; *People ex rel. Lincoln County v. George*, 3 Idaho, 72, 28 Pac. 983; *James County v. Hamilton County*, 89 Tenn. 237, 14 S. W. 601.

The legislature cannot remove the county seat from Rathdrum to Cœur d'Alene, as provided in this act, without a compliance with the requirements of § 2 of art. 18 of the state Constitution.

People ex rel. Stephenson v. Marshall, 12 Ill. 391; *Craig v. Missouri*, 4 Pet. 410, 7 L. ed. 903; *James County v. Hamilton County*, 89 Tenn. 237, 14 S. W. 601.

In considering and expounding provisions extending to constitutional guaranties, the courts have never considered the extent of the infringement, the only question being whether or not there was any infringement, even the slightest.

Spring Valley Waterworks v. San Francisco, 124 Fed. 601; *Boyd v. United States*, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524; *Monongahela Nav. Co. v. United States*, 148 U. S. 329, 37 L. ed. 469, 13 Sup. Ct. Rep. 622.

Allshie, J., delivered the opinion of the court:

This is an original application by the
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plaintiff, praying for the issuance of a writ of mandate. The plaintiff alleges that at the general election held in November, 1904, the defendant, Edwin Doust, was duly elected sheriff of the county of Kootenai, and thereafter qualified and entered upon the discharge of his duties as such sheriff; that thereafter the legislature passed an act abolishing the county of Kootenai, and creating the counties of Lewis and Clark, and that by the provisions of the act the governor was authorized and directed to appoint county officers for each of the new counties, and that, in accordance therewith, he appointed the plaintiff as sheriff of the county of Clark, and that plaintiff immediately entered upon the discharge of his duties as such sheriff, and demanded of the defendant, as the former sheriff of Kootenai county, that he deliver over to plaintiff the records, money, property, and prisoners within his care and custody, belonging to the county of Clark; and that the defendant refuses so to do. The defendant demurred to the petition, and at the same time answered, and under both his demurrer and answer urges that the act abolishing Kootenai county and creating the counties of Lewis and Clark is unconstitutional and void. The act in question was approved on the 28th day of February, 1905, and is entitled "An Act to Abolish the County of Kootenai within the State of Idaho, and Create and Organize the Counties of Lewis and Clark within Said State, Define the Boundaries Thereof, and Locate the County Seats of Lewis and Clark Counties, Apportion the Debt of Kootenai County, between Lewis and Clark Counties, and to Provide for the Appointment of Officers in Said Lewis and Clark Counties, and for Transcribing a Portion of the Records of Clark County, and to Constitute said Counties of Lewis and Clark a Part of the First Judicial District of the State of Idaho." Section 1 of the act is as follows: "The county of Kootenai in the state of Idaho, shall be and is hereby abolished, and the county of Lewis and the county of Clark in said state are hereby created, and said counties of Lewis and Clark shall embrace all the territory heretofore included within the boundary of said Kootenai county." By the further provisions of the act, the territory comprising Kootenai county is divided between the two new counties, and the county seat of Lewis county is established at Sandpoint, and that of Clark at Cœur d'Alene city. It contains an emergency clause whereby the act goes into effect immediately upon its approval, and the governor is directed to appoint officers for the two counties within ten days after the approval of the act; but there is no provision in the bill for the continuation or carrying on of county government from the

time the act goes into effect until the new officers qualify. By § 1 of this act the county of Kootenai is abolished, and from the identical territory formerly constituting and comprising that county two counties are created, to be known as Lewis and Clark, respectively. To my mind the controlling, and in fact the only serious, question in this case is the power of the legislature to abolish and destroy a county existing at the time of the adoption of the Constitution. If this question be resolved in favor of the exercise of such power, then, in my judgment, the act under consideration must stand. If such power does not exist, then the act is unconstitutional and void.

Article 18 of the Constitution is entitled "County Organization." Section 1 of that article reads: "The several counties of the territory of Idaho, as they now exist, are hereby recognized as legal subdivisions of this state." Section 2 of the same article provides that "no county seat shall be removed unless upon petition of a majority of the qualified electors of the county, and unless two thirds of the qualified electors of the county, voting on the proposition at a general election, shall vote in favor of such removal." Section 3 of the same article provides that no county shall be divided, and the portion cut off be attached to another county, without first submitting the question to a vote of the people in the portion to be detached. By § 4 it is provided that "no new county shall be established which shall reduce any county to an area of less than 400 square miles. . . . Nor shall any new county be formed, which shall have an area of less than 400 square miles." The only instance in which these provisions of the Constitution have been directly under consideration by this court was in *People ex rel. Lincoln County v. George*, 3 Idaho, 72, 26 Pac. 983. In that case three separate opinions were filed by the justices of this court. Mr. Justice Huston, in his concurring opinion, held that the legislature was without the power or authority, under the Constitution, to abolish a county. Mr. Justice Morgan, who filed the principal majority opinion, held that the act of the legislature creating and establishing the counties of Alta and Lincoln from the identical territory formerly constituting Alturas and Logan was a palpable evasion of the Constitution, by doing in an indirect manner that which the Constitution forbids being done directly; and that the evasion consisted in the attempt to cut off a portion of one county and attach it to another county without submitting the question to a vote of the people affected thereby. Chief Justice Sullivan, dissenting from the views announced by the majority of the court, expressed the opinion 69 L. R. A.

that the legislature had plenary power in both the abolition and creation of counties. It is true that several cases have been before our court involving acts abolishing old and creating new counties, but in none of those cases has the question here involved been directly in issue or squarely passed upon by our court. In *Doan v. Logan County*, 3 Idaho, 38, 26 Pac. 167, it was held that § 2 art. 18, of the Constitution, does not apply to the location of a county seat consequent upon the creation of a new county. In *Wright v. Kelley*, 4 Idaho, 624, 43 Pac. 565, the court declined to pass upon the constitutionality of an act of the legislature creating Blaine county on the ground that such question could not be raised upon application for writ of mandate by a private party. In *Bellevue Water Co. v. Stockslager*, 4 Idaho, 636, 43 Pac. 568, it was held that the constitutionality of an act creating Blaine county could not be tested upon application of a private party for a writ of prohibition. In *Blaine County v. Heard*, 5 Idaho, 6, 45 Pac. 890, it was held that the court could not examine the legislative journals for the purpose of ascertaining the motives of the legislature for the passage of an act. The opinion in that case concludes by saying that the act establishing Blaine county is constitutional, but that expression seems to have followed from the court's conclusion that it could not examine into the legislative motive, rather than from any other point considered. It is evident from that opinion that the court did not consider or pass upon the constitutional authority of the legislature to abolish a county. This is clearly apparent when we remember that the writer of this latter opinion had stated his position in *People ex rel. Lincoln County v. George* that a county could not be abolished by legislative act. In *People ex rel. Atty. Gen. v. Alturas County*, 6 Idaho, 418, 44 L. R. A. 122, 55 Pac. 1067, the constitutionality of the act establishing Blaine county was sustained by reason of the application of the doctrine of estoppel, and no other point was passed upon in the case. From the foregoing it is fair to say that in this state there is no expression which has the approval of a majority of the court, as constituted at the time, upon the identical question under consideration. The nearest approach, as above stated, was in the *George Case*; and there we have one of the learned justices saying the legislature could not abolish a county, and the other saying that it could do so, and the third holding that that particular question was not material to the determination of the case under consideration. In this state of opinion as heretofore expressed by this court, I have felt at liberty, as well as im-

pelled by duty, to make an independent examination of this question, and, in the light of our Constitution, to determine, if possible, the purposes of the framers of the Constitution, and the people in its adoption, with reference to the creation, organization, dissolution, and destruction of counties.

At the outset there are a few propositions which are conceded, and the statement of which will simplify the question and limit our research. Under the foregoing provisions of the Constitution, we find: (1) No county seat can be removed except upon a vote of the people and two thirds of the qualified electors voting in favor of the removal; (2) no part of any county can be cut off and attached to another county without a majority of the people in the territory to be cut off voting in favor thereof; (3) no new county can be established which will reduce an old county to an area of less than 400 square miles; (4) no new county can be created which shall have an area of less than 400 square miles; (5) the legislature may create new counties. The act under consideration, if it is valid legislation, abolished the county of Kootenai, destroyed all county government therein, and, of course, abolished the seat of county government. The same act and same section created two new counties out of the same territory, and gave them two new names, *viz.*, Lewis and Clark. The object to be attained was to have two counties where one formerly existed. There is no one questions in this case but that the legislature had the power to create the county of Lewis, and establish the county seat thereof at Sandpoint, had they left the remainder of the territory organized as Kootenai county, with the county seat at Rathdrum, as it had previously existed. It is also admitted that, had they not abolished Kootenai county, and reorganized the county containing the old county seat, the legislature would have been powerless, under the Constitution, art. 18, § 2, to establish the county seat at Cœur d'Alene for the same county in which the old county seat, Rathdrum, was located. Now, then, is it possible, by saying they abolished the county, and by the same act reorganized the territory containing the old county seat under a new name, with the county seat at another town, they could accomplish the ends forbidden by the Constitution, and thereby circumvent its operation? The purpose of creating and organizing counties is to obtain for the people local and county government. That government is as effective and operative, we take it, under one county name as another. The Constitution was adopted for the establishment and in aid and furtherance of government, and not for the disorganization and abolition of government. The

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supreme court of Tennessee, in *James County v. Hamilton County*, 89 Tenn. 237, 14 S. W. 601, in discussing somewhat similar provisions of the Tennessee Constitution to those of our Constitution with reference to the creation and organization of counties and the removal of county seats, said: "From it [the Constitution], it is clearly manifest, the authority, and only authority, conferred, is to build up, and not to pull down. It is equally apparent that it never occurred to the framers that a county could be destroyed or dissolved by an arbitrary act of the legislature. The expression of the one thing is the exclusion of the other. If the Constitution is so careful of the rights of old counties in taking from them fractions to form new counties,—if it is so watchful of the rights of citizens in county seats,—it follows that it is also jealous of any power that might utterly destroy old counties," as the passage of the act before us.

We are cited to § 2, art. 1, of the Constitution, where it is recited that "no special privileges or immunities shall ever be granted that may not be altered, revoked, or repealed by the legislature," as authority for the legislature abolishing a county. Now, it must be apparent at once that a county organization or county government is neither a special privilege nor special immunity. On the other hand, it is a fundamental governmental right, recognized and adopted by the Constitution (§ 1, art. 1), and rests with the people (§ 2, art. 1), and cannot be abrogated or alienated by legislative act. It is true, the manner of organization and exercise of that power are the subjects of legislative control (§ 5, art. 18), but the dissolution of government does not, under our Constitution, rest with the legislature. At the time of the adoption of the Constitution, all the territory of the state, comprising over 84,000 square miles, was then organized into 18 counties, and those counties were recognized as legal subdivisions of the state (§ 1, art. 18); and by the very terms of that document it was made possible to increase the then existing number of counties, as the population and wealth of the state might increase, to the maximum number of 212 counties. This would indicate that the Constitution contemplated growth, and not dissolution. The Constitution was framed and adopted as the organic law on which to build a commonwealth, and not as a sanction for the destruction of what we already had. The thoughts and hopes of the people who adopted that document were centered on a future filled with the progress and development time is bringing us. Not a thought was entertained of ever giving up what we then

had, and destroying the local county governments that were recognized by § 1 of article 18.

There is no middle ground on this proposition. The legislature either can or cannot abolish a county. If they can do so at all, they can do so unconditionally and without limitation, except as controlled by § 4, art. 18. The power vested in the legislature to create counties may be exercised, or not, as they see fit. There exists no authority by which they can be compelled to exercise such power. If the power to abolish counties exists at all, it exists freed from all conditions, and independent of the power to create counties. If these respective powers each exist, they are absolute and independent of each other, and the legislature might abolish any one or all of the counties of the state without creating any county or counties to take their place, and, thereby leave the people without any local or county government at all. The mere statement of this proposition refutes the assumption on which it rests. No such thing can be done.

It seems to me that the authority granted by the Constitution to create "new counties" does not mean to reorganize an old county under a new name. It must mean a new county, an additional county, and not a reorganization, rebounding, or renaming of an old county. This is the view entertained by Justice Morgan in the *George Case*, where he said: "I think the creation of a new county under the proviso in this section must be held to be the creation of an additional county, which the legislature may do out of any territory it may see fit, and without a vote of the people." What could be the necessity for creating a new county, where the people already have a county and county government, unless it be the creation of an additional county out of territory taken from one or more old counties? No advantage can be derived to the people by the reorganization or re-creation of an old county, for the reason that by § 5, art. 18, county government must be uniform throughout the state, and therefore no advantage can be acquired to the people by wiping from the map one county, and replacing the same county and county government by another county exercising the same powers and authority as the old. The Constitution never contemplated any vain or useless thing. Acts inconsistent with the spirit of that document are as much prohibited by its terms as are acts directly enumerated and forbidden therein. Is it possible that the framers of the Constitution, and the people in its adoption, meant to prohibit the removal of a county seat without a two-thirds vote of the people, and to prohibit the cutting off of territory with-

out a vote of the people in the territory to be cut off, and to prohibit the reduction of a county below 400 square miles, and yet intended that a county might be entirely destroyed and blotted out at the legislative will? I am convinced that no such proposition was ever intended or contemplated by either the framers of the Constitution, or the people in its adoption. If the Constitution recognized the counties in the state as they existed at the time of our admission, and then prohibited any of the acts enumerated above, and so guarded the organization and integrity of a county, is it possible that they still meant that by a single act of the legislature a county might be wiped out of existence? Suppose some county should so far forget itself as to elect a set of officers distasteful to the powers that dictate political fortunes, and the legislature should suddenly conclude that the county ought, as a matter of political expediency, to be abolished, and a new county organized from the same territory, and new officers appointed, who would conform to their ideas of government, with the county seat in a neighboring town; is it possible that such an act would be within the purview of the Constitution? I think not.

The counties created and recognized by the Constitution find the authority for their existence in a higher power than the legislature. That authority comes directly from the people,—from the same power that makes legislatures. A strange anomaly would exist, anyway, if we recognized the power of the legislature, under our Constitution, to abolish counties. Senators and representatives are elected by counties. The people of a county may be entitled to a half dozen representatives and a senator, which they elect and send to the legislature to represent their county, not to destroy it; but as soon as they arrive they get a bill through, carrying an emergency clause, abolishing the county they represent. What county will they represent thereafter? Can they legislate their county out of representation? Or can they by legislative *dictum* constitute themselves the representatives of the new counties? Or suppose they abolish their county, and create none in its stead; where will they be? Who will they thereafter represent? These are questions which present themselves as soon as we enter this field of inquiry. And, indeed, they pass beyond the mere speculative and become actualities the moment it is admitted that the power to abolish counties exists at all.

Aside from the cases I have reviewed from our own court, I have been unable to find any decision passing upon similar constitutional provisions and a similar state of facts to those involved in the case at bar,

except *People ex rel. Stephenson v. Marshall*, 12 Ill. 391, and *James County v. Hamilton County*, 89 Tenn. 237, 14 S. W. 601. These two cases pass upon very similar facts and constitutional provisions to those under consideration in the case at bar, and sustain the conclusion at which we have arrived. *Re Division of Howard County*, 15 Kan. 194. *State ex rel. Bradford v. Hamilton*, 40 Kan. 323, 19 Pac. 723, *State ex rel. Robb v. Kiowa County*, 41 Kan. 630, 21 Pac. 601, and *Portwood v. Montgomery County*, 52 Miss. 523, cited by petitioner, are not in point in this case. Neither Kansas nor Mississippi have constitutional provisions at all similar to those sections of our article 18, which recognize the counties existing at the time of the adoption of the Constitution, and the further provisions relating to the creation of new counties, division of counties, and change of county seats. It will be further observed, from an examination of those authorities, that what is there said with reference to the power of the legislature to abolish a county consists principally in the mere statements of the court that such power exists, without giving any reason therefor, as found within the constitutional provisions of those states.

I have considered this question somewhat at length, for the reason that, as I view the matter, our determination of this case may have a far-reaching effect upon the future organization of counties in this state. There is still enough territory in the state for the creation of 190 new counties of the constitutional area. This question must necessarily agitate every succeeding legislature, and I believe the lawmakers and the people have a right to know the opinion of the court upon these various provisions of the Constitution with reference to the creation of counties. A right determination of this question is of vast importance to the people of the state and future legislation which may be had on this subject. It is always with great reluctance that the courts hold an act of the legislature void, but the Constitution is neither the production of the legislature nor the courts, and is as mandatory upon the one as the other. It emanated directly from the people, and its mandates are supreme, and must be obeyed by every branch of the state government. We must apply it as we find it, and not as it might have been.

It follows from what has been said that I consider the act under consideration in violation of the Constitution. It is so held, and the writ will be quashed and the proceeding dismissed.

Sullivan, J., concurs.

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Stockslager, Ch. J., dissenting:

The authority of the legislature to create two new counties out of the territory comprising one county is the constitutional question before this court for determination. There was no attempt on the part of the legislature, in the act under consideration, to cover up or conceal the purpose of the act. After weeks of patient work in the committees, the act creating Lewis and Clark counties out of the territory then comprising Kootenai county was reported favorably, passed both houses by a large majority vote, and was promptly signed by the chief executive of the state. It is a matter of public history, shown by the map of the state, that Kootenai county is larger in square miles than some of the New England states. It is also shown by the records of the state that Kootenai county has the wealth, square miles, and population out of which two counties may be created, with more wealth, area, and population than many of the counties of the state as they now exist. It is also true that Rathdrum, the county seat of Kootenai county, is located near the western line of the county, and very inconvenient to a large majority of the taxpayers of the county. It is also true that the county buildings and property at Rathdrum are not permanent or valuable, and that the loss to the taxpayers by reason of the removal of the county seat from Rathdrum, or its location, elsewhere, would be trifling. All these questions were before the lawmaking power of the state, and ably presented by learned counsel for both factions to the controversy. It is evident from the act passed that the legislature believed that the better interests of all the people of Kootenai county would be best served by the division of the county, and location of the county seat of Lewis county at Sandpoint, and that of Clark county at Cœur d'Alene city.

Unless the legislature has exceeded its powers in the passage of this act, it should stand as the law of the state, and this seems to be the only question in the case. It must be conceded that the Constitution of this state, as well as that of every state in the union, vests large discriminating powers in the legislature; and, unless there is a direct and positive prohibition in the Constitution, the acts of the legislature should be upheld by the courts. As I view the Constitution, there is nothing that prohibits the legislature from doing just what is shown by this act; and, as I read the decisions of this court in the numerous cases that have been before it since the adoption of our Constitution, directly bearing on the constitutionality of an act creating new counties, I am unable to find any of

them that would not have upheld a law similar to the one under consideration. I cannot see the force of the plea of sacredness in the name of "Kootenai county," or "Rathdrum" as its county seat. The same plea was entered for old Alturas county, and Hailey as the county seat, in *People ex rel. Lincoln County v. George*, referred to in the majority opinion; and whilst the writer of this opinion was a resident of Hailey, Alturas county, at the time of the litigation above referred to, he has never changed his residence. He now lives at Hailey, Blaine county. Alturas county was cut up and parceled out to Elmore and Logan counties, and one portion left, with the name of "Blaine county," with Hailey as the county seat. Yet my associates say that this court has never passed upon the question now before the court. If the entire importance of the question before us is involved in the location of the county seat, then *People ex rel. Lincoln County v. George* gives us no light, as less than half of the territory formerly belonging to Alturas county remains in Blaine, with Hailey as the county seat. I do not attach so much importance to the sacredness of the name for a county seat, nor do I believe that any town has a vested right to remain the county seat of a county when conditions have so changed that the interests of a large majority of the people demand a change. I also believe that it was the intention of the framers of the Constitution to vest the legislature with power to meet and provide the people with such changes as might seem best for their interests.

Taking up and discussing the questions in the order followed by my associates, we find first article 18 of the Constitution referred to. Section 1 provides that the several counties as they now exist are recognized as legal subdivisions of the state. Section 2 provides that no county seat shall be removed, unless, upon petition of a majority of the qualified electors of the county and unless two thirds of the qualified electors of the county voting on the proposition at a general election shall vote in favor of such removal. Section 3 provides that no county shall be divided, and the portion cut off attached to another county, without first submitting the question to a vote of the people in the portion to be detached. By § 4 it is provided that "no new counties shall be established which shall reduce any county to an area of less than 400 square miles. . . . Nor shall any new county be formed which shall have an area of less than 400 square miles." Section 1 needs neither comment nor construction. It only disposes of the counties of the state or territory as they existed at the time of the adoption of the

Constitution. Section 2 has no bearing on the question before us, for the reason that the act does not attempt to remove a county seat of one of the organized counties of the state to which the Constitution refers without a "petition of the majority of the qualified electors of the county, and unless two thirds of the qualified electors of the county voting on the proposition at a general election shall vote in favor of such removal."

If the legislature had attempted to remove the county seat of Kootenai county to Sandpoint, Cœur d'Alene city, or any other town in that county, then § 2, above referred to, would be directly applicable. The law does no violence to § 3, as there is nothing contained in any of the provisions of the enactment that in any way attempts to cut off any portion of Kootenai county and attach it to any other county of the state, "without first submitting the question to a vote of the people in the portion to be attached." Section 4 is not violated, as there is no contention that each of the new counties created by the act have not within their boundaries all the requirements of the Constitution. Nor is there any attempt to reduce any county of the state to an area of less than 400 square miles. The attempt was to abolish, destroy, or wipe from the map of the state Kootenai county, and create out of the territory comprising that county the counties of Lewis and Clark; no attempt to do indirectly that which was prohibited from being done directly; no attempt to take territory from one county and add it to another without submitting the question to a vote of the people in the territory affected. All this being true, the language of Mr. Justice Morgan in *People ex rel. Lincoln County v. George* has no application to the facts in this case. A statement of the facts in *People ex rel. Lincoln County v. George* will readily disclose the reasons for the language of Justice Morgan, quoted in the majority opinion. It follows: "On the 3d of March, 1891, the legislature passed an act entitled 'An Act to Create and Organize the Counties of Alta and Lincoln, to Locate the County Seats of Said Counties, and to Apportion the Debt of Logan County.' The first section establishes the county of Alta, composed of the territory of Alturas county as it then existed, and about half of the contiguous territory of Logan. Section 2 establishes the county of Lincoln from the residue of the territory theretofore belonging to Logan." After this statement of the facts, Mr. Justice Morgan says: "The question that must determine this case is, Can a portion of the territory of one county be cut off and attached to another, without a vote of the people residing in the segregated portion consenting thereto

in the manner adopted in this act?" He further says: "It is evident that the whole intent and object of the act were to cut this body of territory from the county of Logan and attach it to the county of Alturas. In fact, I understand the counsel did not deny that this was the sole object." Mr. Justice Huston, in his concurring opinion in the *George Case*, says: "The obvious intent, purpose, and effect of the act in question were to cut off or segregate a portion of Logan county, and attach the same to Alturas county, not for the purpose of creating a new county in the sense that term is evidently used in § 3, but solely, entirely, and exclusively for the purpose of enlarging the area of Alturas county." Mr. Chief Justice Sullivan, who dissented in the *George Case*, quoted a number of authorities in support of his views; and, whilst the facts in the case at bar differ very materially from the *George Case*, yet some quotations from his opinion will not be inappropriate. A careful reading of the three opinions in the *George Case* discloses that Mr. Justice Morgan declined to pass upon the question of the right of the legislature to abolish a county, asserting it was not necessary to determine that question; Mr. Justice Huston holding that no such power was given to the legislature by the Constitution; whilst Mr. Chief Justice Sullivan took the broad, and I think more liberal, view, that after the adoption of the Constitution the creation of new counties and abolishment of old ones was entirely within the legislative power of the state. I do not wish to be understood as agreeing entirely with the views expressed by Mr. Chief Justice Sullivan in the *George Case*. I am more inclined to agree with the position of Mr. Justice Morgan; that is, that the legislature attempted to do something indirectly which was prohibited by the Constitution from being done directly. In other words, when they attempted to take half of the territory of Logan county and give it to Alturas county by merely changing the name of Alturas to Alta, and Logan to Lincoln, and without submitting the question to a vote of the people affected by the change, it was an infringement upon the constitutional rights of the people residing within the boundaries of such territory. No such condition arises in the case at bar. It is purely and simply an attempt to make two counties out of one, evidently, in the view of the legislature, to better accommodate the people of the territory comprising Kootenai county. In the *George Case* Mr. Chief Justice Sullivan says: "It is also a well-established rule that an express power to make laws is not necessary to enable the legislature to make them. The court is called up-

on in this case to declare a solemn legislative enactment unconstitutional and void." Then, quoting from Judge Cooley in his work on Constitutional Limitations, p. 192, he says: "The power to declare a legislative enactment void is one which the judge, conscious of the fallibility of human judgment, will shrink from exercising in any case where he can conscientiously and with due regard to duty and official oath decline the responsibility." Quoting further from the opinion: "Courts have not the power to declare acts of the legislature void simply because, in the opinion of the court, such acts are repugnant to natural justice and expediency."

When the Constitution of Idaho was framed it was known that the legislature had exercised the power of changing the boundaries of counties and creating new ones, and that certain consequences resulted therefrom. The framers of the Constitution saw fit to prohibit the legislature from striking off a part of one county, and attaching it to a county then in existence, without submitting the question to a vote of the people residing in the part to be stricken off; but expressly provided that such inhibition shall not apply to the creation of new counties. From a careful reading of the act under consideration, and the three opinions filed in *People ex rel. Lincoln County v. George*, it occurs to me that the author had carefully studied the three opinions, and attempted to so draft the bill that it would be free from objections of at least one, if not both, of the majority opinions. I am thoroughly convinced that, with the same state of facts before the court in *People ex rel. Lincoln County v. George* as we have before us in this record, if a dissenting opinion had been written, it would have been by Mr. Justice Huston, instead of Mr. Chief Justice Sullivan.

My associates attempt to explain *Doan v. Logan County*, 3 Idaho, 38, 26 Pac. 167; *Wright v. Kelley*, 4 Idaho, 624, 43 Pac. 565; *Bellevue Water Co. v. Stockslager*, 4 Idaho, 636, 43 Pac. 568; *Blaine County v. Heard*, 5 Idaho, 6, 45 Pac. 890; *People ex rel. Atty. Gen. v. Alturas County*, 6 Idaho, 418, 44 L. R. A. 122, 55 Pac. 1067,—by saying none of them have passed directly upon the question before us. Be that as it may, the fact exists that two counties that were upon the map of our state at the time of the adoption of our Constitution have been abolished, destroyed, blotted from the map of the state. To wit, Alturas and Logan, and we have in their stead Blaine and Lincoln. Every step looking toward the destruction of these two counties was vigorously resisted, and learned counsel from Salt Lake, Boise, and elsewhere were employed to guard the inter-

ests and existence of the two old counties. But history speaks for itself. This court did uphold the legislature, and the two counties were abolished.

The majority opinion says: "The purpose of creating and organizing counties is to obtain for the people local and county government. . . . The Constitution was adopted for the establishment and in aid and furtherance of government, and not for the disorganization and abolition of government." Certainly no one will dispute that proposition. But is it not true that the bill provided for the immediate organization of government for both of the counties created out of the territory of Kootenai? And is it not also true that the governor, in compliance with the provisions of the law, appointed officers for both counties, who qualified and entered upon the discharge of their several duties? In *James County v. Hamilton County*, 89 Tenn. 237, 14 S. W. 601, cited in the majority opinion, the legislature attempted to take all the territory of one county and parcel it out to the neighboring counties; thus entirely abolishing a county and leaving nothing in its place. Instead of dividing James county, and from a portion of its territory creating a new county, and leaving the remaining territory in the name of James county, or giving it a new name, the entire territory was given to other counties. This the Tennessee court said could not be done, and I see no objection to the decision.

It is said in the majority opinion: "Suppose some county should so far forget itself as to elect a set of officers distasteful to the powers that dictate political fortunes, and the legislature should suddenly conclude that the county ought, as a matter of political expediency, to be abolished, and a new county organized from the same territory," etc. Of course not. The supposition is violent. Legislatures are not supposed to do vain, useless, or vicious things. Their acts are entitled to full faith and credit in all things. They are elected by the people, and are responsible to the people for their every act.

Section 2 of article 1 of our Constitution says: "All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform, or abolish the same whenever they may deem it necessary; and no special privileges or immunities shall ever be granted that may not be altered, revoked, or repealed by the legislature." It occurs to me that the framers of the Constitution intended to clothe the legislature with large discretionary powers in the future upbuilding of the state. What government may be altered, reformed, or

abolished by the legislature? Does it mean state government, or does it mean state and county government? Alturas and Logan counties answered, by the action of the legislature, and afterward by the decisions of this court, that it meant county government, at least. I might prolong this discussion, but it seems unnecessary. The importance of the question to the people of the state in its future legislation warned me that I should not pass the question by without recording my views. It is well known to every resident of our great and growing state that we must soon meet the demands of the people for better accommodations in our large counties, some of which are empires in area, and rapidly filling up with population sufficient for two or more counties. It seems that one of the great objections to the law is that it attempts to remove the county seat from Rathdrum without a vote of the people. There is no force in this position, as I view it; but, if so, why could not that part of the law have been declared unconstitutional, and that part creating Lewis county, with the county seat at Sandpoint, been permitted to stand?

I am entirely satisfied that none of the provisions of the act do violence to any of the provisions of the Constitution, and the petition should have been granted.

A petition for rehearing having been filed, **Sullivan, J.**, on May 26, 1905, handed down the following additional opinion:

This is an original proceeding brought in this court to test the constitutionality of a certain act of the legislature, whereby it attempted to abolish the county of Kootenai, and to create out of its territory the counties of Lewis and Clark. The case was argued at the March, 1905, Lewiston term of this court, and the court held said act unconstitutional. A petition for rehearing has been filed herein, and counsel for the defendant have filed their objections to the consideration of said petition by this court, and state three reasons therefor: The first is that this cause is an original proceeding, and that the rules of this court do not contemplate or provide for a rehearing in an original proceeding; second, that on the 27th day of March, 1905, this court entered its decision in the above-entitled case, and the alternative writ of mandate was quashed, and that the petition for a rehearing was not filed within twenty days thereafter, as required by rule 22 of the rules of this court; and, third, that the questions raised in the petition for rehearing were all argued at length when the cause was heard, and no new question is suggested by the petition.

In support of the first contention, the defendant cites the decision of this court in

Washington County Abstract Co. v. Stewart (Idaho) 74 Pac. 955. In that case it was held by this court that it was not the practice in this court to consider petitions for rehearing in original proceedings, but, owing to the peculiar position taken in this case, the court concluded to pass upon that application. In *Hill v. Morgan* (Idaho) 76 Pac. 323, a petition for a rehearing was filed, and in disposing of that petition it is said that the provisions of rule 22 of the rules of this court do not apply to cases of original jurisdiction in this court, for, if they did, a writ could not be issued until the time had expired for filing such petition, and thus the very purpose of the writ would often be defeated by such delay. Under the second point above suggested, we would say that rule 22 of this court provides that all applications for rehearing shall be upon petition, and shall be presented within twenty days after the judgment or order made by the court shall be placed on file; and it is contended that, as the order was made in open court on March 27, 1905, the time for filing a petition for rehearing expired on April 17, 1905, and the petition was not filed until May 1, 1905, long after the expiration of the twenty-day period. The fact is, counsel for the petitioner were informed by some of the members of this court that they could have twenty days after the opinion in this case was filed in which to present their petition for rehearing, provided they desired to file one, and for that reason the second point made by defendant is not well taken. The third point suggested is that all of the questions suggested in the petition for rehearing were argued at length when the cause was first heard, and that no new question is suggested in the petition. That contention is correct, and nothing new is suggested, except that one authority is cited that was not cited on the original hearing, which we will refer to hereafter. While it is true the rules of this court do not authorize a rehearing, or an application therefor, in original proceedings in this court, yet, owing to the importance of this case, we have gone carefully through the petition, and shall proceed to make a few observations on the questions suggested or raised by it.

Counsel, in their petition, first contend that that part of the act creating Lewis county is constitutional, and may be segregated from that part of the act which abolishes Kootenai county and creates Clark county, and be permitted to stand, and contend that where a statute attempts to accomplish two or more objects, and is void in one, it may still in every respect be complete and valid as to the other, and in support of that contention quote from Cooley's *Constitutional Limitations*, 6th ed. p. 210; 69 L. R. A.

Id. 7th ed. p. 246, as follows: "Where, therefore, a part of a statute is unconstitutional, that fact does not authorize the courts to declare the remainder void, also, unless all the provisions are connected in subject-matter, depending on each other, operating together for the same purpose, or otherwise so connected together in meaning that it cannot be presumed that the legislature would have passed the one without the other. The constitutional and unconstitutional provisions may even be contained in the same section, and yet be perfectly distinct and separable, so that the first may stand, though the last fall. The point is not whether they are contained in the same section, for the distribution into sections is purely artificial, but whether they are essentially and inseparably connected in substance. If, when the unconstitutional portion is stricken out, that which remains is complete in itself, and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which was rejected, it must be sustained." We recognize the principle there laid down by Judge Cooley as a correct rule of law. The author, at page 247, further states as follows: "The difficulty is in determining whether the good and bad parts of the statute are capable of being separated, within the meaning of this rule. . . . And if they are so mutually connected with and dependent on each other, as conditions, considerations, or compensations for each other, as to warrant the belief that the legislature intended them as a whole, and if all could not be carried into effect the legislature would not pass the residue independently, then, if some parts are unconstitutional, all the provisions which are thus dependent, conditional, or connected must fall with them." It was held in *Allen v. Louisiana*, 103 U. S. 80, 26 L. ed. 318, that "where unconstitutional provisions [of an act] are so connected with the general scope of the law as to make it impossible, if they are stricken out, to give effect to what appears to have been the intent of the legislature, the whole law is invalid;" and in *Redell v. Moores*, 63 Neb. 219, 55 L. R. A. 740, 93 Am. St. Rep. 431, 88 N. W. 243, that, where it is apparent that the unconstitutional part of an act was an inducement to the adoption of the remainder, the whole act must fail.

When measured by the well-settled rule above stated, the question arises, Can that part of the act which creates Lewis county be permitted to stand? We will here make a short analysis of the bill. The first section of said act abolishes the county of Kootenai, and provides that the counties of Lewis and Clark shall be created out of the territory included within the boundary lines

of said Kootenai county. Section 2 describes the boundaries of Lewis county. Section 3 describes the boundaries of Clark county. By section 4 the governor is authorized and directed, within ten days after the act shall become a law, to appoint county officers for each of said counties (designating them); and it also provides that such officers shall qualify within ten days from the date of their appointment. Section 5 establishes the county seat of Lewis county at the town of Sandpoint, and also provides that the question of the permanent location of the county seat of said county shall be submitted to the voters of said county at the next general election. Section 6 of said act establishes the county seat of Clark county at Cœur d'Alene city, and provides that the question of the permanent location of the county seat of said county shall be submitted to the voters of said county at the next general election. The 7th section provides that all of the personal property, county records, books, papers, money, credits, furniture, and fixtures belonging to the former county of Kootenai shall become the property of Clark county, and further provides that, after the proper officers of Clark county shall have been appointed and qualified, all such books, papers, etc., belonging to the former Kootenai county, shall, by the custodian of the same, be immediately delivered to the proper officers of Clark county; and provides that the county commissioners of Clark county shall provide suitable officers within the corporate limits of Cœur d'Alene city for the accommodation of such records and the county officers of said Clark county. The 8th section provides that the indebtedness of Kootenai county at the date this act takes effect shall be apportioned between the counties of Lewis and Clark, and goes into detail of the way in which such indebtedness shall be apportioned between said counties, and also provides the manner that all property belonging to Kootenai county shall be divided between said Lewis and Clark counties. Section 9 provides for the appointment of competent accountants to ascertain the amount of indebtedness of the former Kootenai county, and directs such accountants to proceed and ascertain from the books and records of the auditor's and recorder's and treasurer's offices the whole amount of the indebtedness of Kootenai county, and to compute from the assessment roll for the year 1904 the total taxable property of each of the counties of Lewis and Clark, and directs them to make a list of all county property, and report the same in writing to the judge of the district court of the first judicial district, which judge is directed to fix the reasonable cash value of such property, and apportion

said indebtedness according to § 6 of said act, and to ascertain other things not necessary to mention here. Section 10 directs the recorder of Clark county within ninety days after the establishment of such counties to transcribe all matters of record from the record books of Clark county that should be recorded in Lewis county, and deliver the same to the recorder of Lewis county. Section 11 provides for a disposition of the school money in the hands of the treasurer of Clark county. Section 12 provides that said counties of Lewis and Clark shall form a part of the first judicial district of the state, and provides for the holding of terms of court in such counties. Section 13 provides that the judge of the probate court of Clark county shall proceed at once to transfer all civil and criminal actions and unsettled estates of deceased persons, and all other business required to be transferred, to the probate court of Lewis county. Section 14 provides that the county commissioners of said Clark and Lewis counties shall, within five days after receiving notice of their appointment, meet at their respective county seats, and organize for the transaction of county business, and shall establish precincts in their respective counties, and appoint precinct officers thereof. Section 15 provides that said counties of Lewis and Clark shall constitute the thirteenth senatorial district, and that each of said counties shall elect one member of the house of representatives. Section 16 provides that all laws of a general nature applicable to the several counties of this state and the officers thereof are made applicable to said counties. Section 17 repeals all acts and parts of acts inconsistent with said act. Section 18 declares that an emergency exists therefor, and that this act shall take effect and be in force from and after its passage and approval. Said act was approved on the 28th day of February, 1905.

From the various provisions of said act, it is clear to me that all of the provisions thereof in regard to the creation of Clark county, and the establishment of the county seat at Cœur d'Alene city, were the main inducement for the adoption of the remaining part of said act. The very first section of said act abolishes Kootenai county, and the abolishment of that county was no doubt an inducement for the passage of said act. That being true, the part of said act creating Lewis county cannot stand when tested by the rule above laid down by Judge Cooley, the Supreme Court of the United States, and the supreme court of Nebraska. This act is so connected and so related in substance, as I view it, as to preclude the supposition that the legislature would have created Lewis county without having creat-

ed Clark. The act is so drawn, and the section so constructed, and the provisions so interdependent, as to clearly indicate that the legislature intended the act to operate as a whole, and that it would not have created Lewis county alone. That being true, the entire act must be held invalid. If you would cut out of this act all of the provisions except those applicable to Lewis county, the remaining part would be unintelligible—would in part, at least, be a jumble of words without meaning, "sound without sense." In considering this question, I think the unconstitutional part of said act was an inducement to the legislature for a passage of the other portions. It may be insisted that this question must be determined solely by an inspection of the act itself. We concede that proposition, with a slight qualification, however, which qualification is referred to in *Sibley v. Smith*, 2 Mich. 486, where the court said: "Courts are authorized to collect the intention of the legislature from the occasion and necessity of the law,—from the mischief felt and the objects and remedy in view."

The Supreme Court of the United States, in *United States v. Union P. R. Co.* 91 U. S. 72, 23 L. ed. 224, said: "Courts, in construing a statute, may with propriety recur to the history of the times when it was passed; and this is frequently necessary in order to ascertain the reason as well as the meaning of particular provisions in it." In *Stout v. Grant County*, 107 Ind. 343, 8 N. E. 222, it was held that the history of a country, its topography and general conditions, are elements which enter into the construction of the laws made to govern it, and are matters of which the court will take judicial notice; and it has been held that the general state of opinion, public, judicial, and legislative, at the time of an enactment of a measure, may be considered by the courts in construing it. See *Redell v. Moores*, 63 Neb. 219, 55 L. R. A. 740, 93 Am. St. Rep. 431, 88 N. W. 243, and authorities there cited. It is a part of the legislative history of this state that a bill was introduced in the legislature for the creation of Lewis county out of substantially the same portion of Kootenai county that the Lewis county referred to in this act contains, and that said bill failed to become a law because of supported the present act. And the inducement opposition of members who afterward ment in said act to such members was, no doubt, the creation of Clark county, and the removal of the county seat from Rathdrum to the city of Cœur d'Alene. Those facts are matters of common knowledge. One of the chief inducements to the passage of said act was the abolishment of Kootenai county, and the creation of Clark county, with the re-

moval of the county seat. That feature of the bill was the main inducement for its passage.

The act under consideration was approved by the governor on the 28th day of February, 1905, and contained the emergency clause, and hence became a law, if ever, on that day. As the 1st section abolished Kootenai county, if the act is valid the people of that county were without county government from the 28th day of February to the 7th day of March, 1905, when the officers appointed by the governor qualified. Said act did not provide that the officers of Kootenai county should continue in office until their successors were appointed and qualified, and, if the act be held valid, the people of that county were without county government for a number of days. The legislature cannot deprive the people of any county of such local or self government as the several counties of the state are entitled to under the Constitution. If they can deprive a people of local government for six days, they may do so for six months or six years. The legislature is prohibited from depriving the people of any county of local self-government. Article 18 of our Constitution, which is in regard to county organization, requires the legislature to establish a system of county governments which shall be uniform throughout the state, and prohibits the legislature from depriving the people of any county of such government. In *People ex rel. Bolton v. Albertson*, 55 N. Y. 50, the court held that this right of self-government lies at the foundation of our institutions. Section 2 of article 18 of the Constitution is as follows: "No county seat shall be removed unless upon petition of a majority of the qualified electors of the county, and unless two thirds of the qualified electors of the county, voting on the proposition at a general election, shall vote in favor of such removal. A proposition of removal of the county seat shall not be submitted in the same county more than once in six years, except as provided by existing laws. No person shall vote at any county-seat election who has not resided in the county six months, and in the precinct ninety days." By the provisions of that section the legislature is prohibited from changing a county seat, and the people themselves are prohibited from changing it, except on a two-thirds vote of the qualified electors; and under those provisions the legislature will not be permitted to change a county seat under the guise or pretense of creating a new county. They will not be permitted to do thus indirectly what they are prohibited from doing directly. In this case, under the pretense of creating a new county the legislature has removed a county seat. They attempted to abolish Kootenai county,

and attempted to create a new county out of the northern part thereof, and in the same act changed the name of the southern part of Kootenai county, and changed the county seat from Rathdrum to Cœur d'Alene city. Judge Cooley, in his work on Constitutional Limitations, 7th ed. p. 244, says: "There is no difficulty in saying that any such act, which, under pretense of exercising one power, is usurping another, is opposed to the Constitution and void."

The case of *People ex rel. Bolton v. Albertson*, 55 N. Y. 50, is a remarkable one of the intention of the legislature to avoid and evade the provisions of the Constitution, and still keep within its terms. I think the principle laid down there is applicable to the case at bar. It is there held that a legislative enactment evading the terms and frustrating the general and clearly expressed or necessarily implied purposes of the Constitution is as clearly void as if in express terms forbidden. And in *Taylor v. Ross County*, 23 Ohio St. 22, the supreme court of Ohio found itself under the necessity of declaring that that which was forbidden by the Constitution could no more be done indirectly than directly, which has now become a well-recognized rule of law.

Knowing the bitterness and strife engendered in county-seat fights, the framers of the Constitution provided stringent provisions in regard to the removal of county seats, and prohibited such removal except on a two-thirds vote of the qualified electors, and also prohibited the submission of such questions to the voters oftener than once in six years. Is it possible that the framers of the Constitution intended to permit the legislature to change the county seats of every county in the state at each session of the legislature thereof, by simply giving the county a new name, and changing the county seat under the guise and pretense of creating a new county? I think not.

Counsel for the petitioner, in their original arguments in this case, contend that, under the provisions of the Constitution, the legislature could abolish a county and create a new one out of identically the same territory, and change the county seat. If that contention be true, the county seat of

every county in the state could be changed as often as the legislature held a session. That certainly would leave the location of the county seat of the several counties of the state to the "mutatious whims" of the legislature, while by the terms of the Constitution the people themselves are prohibited from removing their county seat oftener than once in six years. I am not in accord with that contention, and, in my view of the matter, the creation of a "new county," as contemplated by our Constitution, requires something more than the change of the name of a county and the change of its county seat. Under the pretense of exercising the power to create a new county, the legislature has usurped the power reserved by the people to change a county seat.

In *People ex rel. Lincoln County v. George*, 3 Idaho, 72, 26 Pac. 983, in a dissenting opinion, I held that the legislature had a right to abolish a county in the creation of new counties; but, upon a further investigation of this question, I am not satisfied that my views in that opinion on that point were correct. However, that case was not decided upon that point.

In addition to the cases cited on the original hearing, counsel for petitioner cited *Frost v. Pfeiffer*, 26 Colo. 338, 58 Pac. 147. That involved the constitutionality of an act of the general assembly of Colorado creating the county of Teller out of portions of the counties of El Paso and Fremont. By that act no county was abolished, and no county seat removed. The act, after creating Teller county, left the counties of El Paso and Fremont simply with reduced areas. We are unable to see wherein the decision in that case has any application whatever to the questions under consideration in the case at bar.

I therefore hold that if this court had the authority, under the law or its rules, to grant a rehearing in a case originally brought in this court, the showing made by the petition for a rehearing in this case is not sufficient to warrant a rehearing. A rehearing is denied.

Ailshie, J., concurs. **Stockslager, Ch. J.**, dissents from the conclusion reached.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

Joseph A. WILLIAMS *et al.*, *Appts.*,

v.

Richard M. NEELY *et al.*

(87 C. C. A. 171, 134 Fed. 1.)

*1. Any fact which renders it against

*Headnotes by SANBORN, Circuit Judge.

NOTE.—As to equitable jurisdiction to enjoin judgments, see *note* to *Jarrett v. Goodnow*, 32 L. R. A. 321.
69 L. R. A.

conscience to enter or execute a judgment at law, and which was not available to the defendant at law, confers jurisdiction upon a court of equity to enjoin the proposed entry or execution.

2. A sound reason, inhering in the same transaction from which a promissory note springs, why the holder ought not, in equity and good conscience, to recover its face value, is a good equitable

- defense to it, although this defense constitutes neither an offset, a counterclaim, nor an affirmative cause of action against the holder of the note.
2. A partial failure of consideration which results from a defect of title is a good defense *pro tanto* to an action by the vendor upon a promissory note given for the purchase price of land which the vendor has conveyed with covenants of warranty and against encumbrances.
 4. An injunction should issue to stay an action at law upon a promissory note for the purchase price of land until this equitable defense of reduction is allowed whenever the remedy at law is less certain, prompt, and efficient to attain the ends of justice, either because the interests of the parties require that the title to the land should be perfected, that their rights should be adjudicated, and that the litigation should be closed,—a result which no remedy at law is adequate to accomplish,—or because it entails circuity of action, or because there is imminent danger of unjustifiable loss or injury to the payee of the note, which a court of equity may, and a court of law cannot, prevent.
 5. The adequate remedy at law which will deprive a court of equity of jurisdiction must be a remedy as certain, complete, prompt, and efficient to attain the ends of justice as the remedy in equity.
 6. The assignee of a chose in action takes it subject to all the defenses which could have been set up against it in the hands of the assignor at the time of the assignment.
 7. One who purchases for value of a creditor the obligation of his debtor, and obtains the latter's promissory note, payable to himself, as evidence of his obligation, with full knowledge of the consideration thereof, and of the facts which condition the inception of the original obligation, takes the note subject to all the defenses which existed against it in the hands of the original creditor.
 8. The basis of waiver is estoppel, and where there is no estoppel there is no waiver.
 9. The defense of reduction or recoupment, which arises out of the same transaction as the promissory note or claim, survives as long as a cause of action upon the promissory note or claim exists, although an affirmative action upon the subject of the defense may be barred by the statute of limitations.
 10. The doctrine of laches is that courts of equity are not bound by, but usually act in analogy to, the statute of limitations governing actions at law of like character. Under ordinary circumstances a suit in equity will not be stayed for laches before, and will be stayed after, the time fixed by the analogous statute of limitations at law; but, if unusual conditions or extraordinary circumstances make it inequitable to allow the prosecution of a suit after a briefer, or to forbid its maintenance after a longer, period than that fixed by the statute, the chancellor will not be bound by the statute, but will determine the extraordinary case in accordance with the equities which condition it.
 11. It is not culpable laches for one who has an equitable defense of reduction to a promissory note, which has been and is the subject of pending litigation in another court, and which, if available at law, would survive as long as the cause of action upon the note existed, to wait until an affirmative action at law upon the subject of the defense is barred, and until the equitable defense is rejected in an action at law upon the note, before invoking the aid of a court of equity to enjoin the prosecution of the latter action until his equitable defense is allowed.
 12. The court which first acquires jurisdiction of specific property by the issue and service of process in a suit to enforce a lien upon it, in which it may be necessary to take possession or control of it, retains jurisdiction until the end, free from the interference of any court of co-ordinate jurisdiction.
 13. A subsequent suit involving rights in the same property in a court of co-ordinate jurisdiction should not be dismissed, but, before a seizure of the property under it, should be stayed until the proceedings in the earlier suit are terminated, or ample time for their termination has elapsed.

(Hook, Circuit Judge, dissents.)

(November 18, 1904.)

A PPEAL by complainants from a decree of the Circuit Court of the United States for the District of Nebraska dismissing a bill to enjoin the prosecution of an action at law to enforce payment of a promissory note. *Reversed.*

Statement by **Sanborn**, Circuit Judge:

This is an appeal from a decree which dismissed a bill in equity exhibited by the complainants below, Joseph A. Williams and Annie Williams, to enjoin the prosecution of an action at law which the defendant Richard M. Neely had brought against them in the court below to enforce the payment of their promissory note for \$3,500, dated March 1, 1893, and due March 1, 1898, and to obtain a decree adjudicating the claims of the defendants in this suit to three quarter sections of land in the state of Nebraska. The material facts disclosed at the final hearing were these: Under the will of Richard S. Malony, Sr., Richard S. Malony, Jr., and Annie H. Neely owned three quarter sections of land, subject to the liens of two legacies which were charged upon the lands by the will,—one of \$200 per year payable to the defendant Hannah Blake, and one of \$100 per year payable to the defendant Sarah Foss. They sold one of these tracts to the defendant Stanley B. Wilson, another to the defendant Wenzel Herdlichtka, and the third to the

complainant Joseph A. Williams. Before the sale of the third tract, Richard S. Malony had conveyed his share in it to Annie H. Neely, who made the contract of sale and the deed to the complainants. Each sale was made for \$6,000, the full value of a title to each tract free from all encumbrances, and Wilson and Herdlichtka have paid for their quarters in full. The facts and conclusions which have been recited are *res judicata* between the parties to this suit by virtue of a decree of the district court of Richardson county, in the state of Nebraska, in a suit to which they were parties; and that suit is still pending under an order of the supreme court of that state to the district court to ascertain the amount owing by the complainant Joseph A. Williams herein on account of the purchase of his tract, to take control thereof, and, in case the law and the facts should be found to justify that course, to apply that amount in payment of the amounts due to the annuitants, Hannah Blake and Sarah Foss.

On February 6, 1902, Annie H. Neely and Richard S. Malony, Jr., as principals, and the defendant Richard M. Neely and others as sureties, executed a bond in the penal sum of \$1,000 to the county judge of Richardson county, conditioned, among other things, that they should pay and discharge all legacies chargeable upon the estate of Richard S. Malony, Sr., or such dividends thereon as should be decreed by the county court. The defendant Richard M. Neely was the agent of his mother, Annie H. Neely, to sell the quarter section of land which was purchased by the complainant Joseph A. Williams. In October, 1892, he made and signed a written contract, as the agent of his mother, to sell and convey this land to Williams for \$6,000, \$500 of which was then paid, and the remainder was to be paid \$2,000 on March 1, 1893, and \$3,500 on March 1, 1898. About March 1, 1893, in performance of this contract, Williams paid this \$2,000, and he and his wife made a note and a mortgage upon the property for \$3,500, and Annie H. Neely executed a warranty deed of it to him. These instruments were prepared by Annie H. Neely, or by one of her agents, and the note and mortgage were made payable to Richard M. Neely; but the only consideration for them was the land the complainants purchased. Richard M. Neely never paid them anything for the note or mortgage. What amount, if anything, he paid his mother for them, is left in grave doubt by the 69 L. R. A.

evidence, and, in our view of the case is not material.

On April 18, 1902, Richard M. Neely brought an action at law against the complainants on the note, and they answered the facts which have been recited. The court held at the trial of that action that these facts constituted no defense to the note at law, and this suit was instituted, and the action at law was stayed to abide its determination. The same court has now held that these facts present no reason for relief in equity, and this conclusion is challenged by the appeal.

Argued before *Sanborn, Van Devanter* and *Hook*, Circuit Judges.

Mr. J. H. Broady, for appellants:

Before complainants had anything to do with the land or the estate, respondent Neely, in the executors' bond, promised to pay said legacies, and thereby enabled said executors to get hold of said land and sell and convert the same to their own use, leaving the legacies thereon unpaid. The general doctrine of equity jurisprudence is to avoid circuity of actions, and bring in all the parties and do justice between them. In such cases as this the doctrine of equitable set-off comes in. That bond obligation is such.

Blount v. Windley, 95 U. S. 177, 24 L. ed. 428; *Ferris v. Burton*, 1 Vt. 439; *Foot v. Ketchum*, 15 Vt. 258, 40 Am. Dec. 678; *Hooper v. Armstrong*, 69 Ala. 343; *North Chicago Rolling Mill Co. v. St. Louis Ore & Steel Co.* 152 U. S. 615, 617, 38 L. ed. 571, 572, 14 Sup. Ct. Rep. 710.

The equity court, in a proper case, will go above the penal sum of the bond.

Burnside v. Wand, 170 Mo. 531, 62 L. R. A. 427, 71 S. W. 337.

In equity, the note in the hands of the payee, the respondent herein, is subject to defenses the same as if he had made the covenants of warranty in the deed.

Vorce v. Rosenberg, 12 Neb. 448, 11 N. W. 879.

It is a legal impossibility that Richard M. Neely can be an innocent purchaser of the note.

Chariton Plow Co. v. Davidson, 16 Neb. 374, 20 N. W. 256; *Camp v. Sturdevant*, 16 Neb. 698, 21 N. W. 449.

Where different instruments are executed as evidences of different parts of one transaction, they are to be construed as constituting but one single contract.

Wilson v. Roots, 119 Ill. 386, 10 N. E. 204; *Keith v. Miller*, 174 Ill. 73, 51 N. E. 151; *Breuer v. Penn. Mut. L. Ins. Co.* 36 C. C. A. 289, 94 Fed. 347; *Low v. Black-*

ford, 31 C. C. A. 15, 58 U. S. App. 737, 87 Fed. 395; *South Baptist Soc. v. Clapp*, 18 Barb. 35; *Abele v. McGuigan*, 78 Mich. 415, 44 N. W. 393; *Lamb v. Davenport*, 1 Sawy. 609, Fed. Cas. No. 8,015.

The respondents cannot invoke the doctrine of novation.

Murphy v. Hanrahan, 50 Wis. 489, 7 N. W. 436.

The transaction here can be considered in no other light than as a convenient form of assignment by Mrs. Neely to her son of a chose in action, or as a promise of Williams for her benefit and at her instance and request.

21 Am. & Eng. Enc. Law, 2d ed. p. 662; 2 Am. & Eng. Enc. Law, 2d ed. pp. 1079, 1080; *Allen v. Rundle*, 45 Conn. 528; *Gaston v. Owen*, 43 Wis. 103; *Clark v. Billings*, 59 Ind. 508; *Shamp v. Meyer*, 20 Neb. 225, 29 N. W. 379.

The right of action on the one instrument may be used as a defense against an action on the other.

Rawle, Covenants, § 350; 3 Sedgw. Damages, 8th ed. § 1053; 2 Sutherland, Damages, § 632-640; *Schuchmann v. Knoebel*, 27 Ill. 175; *Scantlin v. Allison*, 12 Kan. 85; *Cross v. Noble*, 67 Pa. 78; *Beecher v. Baldwin*, 55 Conn. 428, 3 Am. St. Rep. 57, 12 Atl. 401; *Avery v. Brown*, 31 Conn. 403.

Breaches of covenants in the deed, in transactions of which the note is a part, are good defenses and counterclaims against the note.

The vendee does not have to pay off the encumbrances in order to get substantial relief, but he can hold the security in his hand as a protection.

Jaques v. Esler, 4 N. J. Eq. 463; *Union Nat. Bank v. Pinner*, 25 N. J. Eq. 495; *White v. Stretch*, 22 N. J. Eq. 76; *Coy v. Downie*, 14 Fla. 544; *Lowry v. Hurd*, 7 Minn. 356, Gil. 285; *Walker v. Wilson*, 13 Wis. 523; *Wamsley v. Hunter*, 29 La. Ann. 628; *Applegarth v. Robertson*, 65 Md. 493, 4 Atl. 896; *Wilber v. Buchanan*, 85 Ind. 42; *Mondel v. Steel*, 8 Mees. & W. 858; 13 Am. & Eng. Enc. Law, 2d ed. pp. 806, 807.

The cause of action for breach of covenants in this case is not barred by the statute of limitations, because the whole contract is up and concurrent, and the obligations are mutual, the one part being consideration for the other, and, as between the parties thereto, equity will hold that one part is not barred as a counterclaim against the other so long as the other is not barred.

Avery v. Brown, 31 Conn. 405; *Beecher v. Baldwin*, 55 Conn. 428, 3 Am. St. Rep. 69 L. R. A.

57, 12 Atl. 401; *Angell, Limitations of Actions*, § 75; *Wood, Limitation of Actions*, 3d ed. § 282; *White v. Stretch*, 22 N. J. Eq. 76.

Messrs. Wharton, Baird, & Sons, for appellees:

The alleged defense of total failure of consideration is not maintainable.

Saddler v. White, 14 La. Ann. 173; *Glascok v. Rand*, 14 Mo. 550.

The alleged defense of set-off or counterclaim cannot be maintained in favor of appellants and against appellees.

Stannus v. Stannus, 30 Iowa, 448; *Van Buskirk v. Day*, 32 Ill. 260; *Steadwell v. Morris*, 61 Ga. 97; *Brashear v. West*, 7 Pet. 606, 8 L. ed. 801; *Simpson v. Jennings*, 15 Neb. 671, 19 N. W. 473; *Spencer v. Johnston*, 58 Neb. 44, 78 N. W. 482; *Fuller v. Steiglitz*, 27 Ohio St. 355, 22 Am. Rep. 312; *Thompson v. Emery*, 27 N. H. 269; *Frick v. White*, 57 N. Y. 103; *Graham v. Tilford*, 1 Met. (Ky.) 112; *Computing Scale Co. v. Churchill*, 109 Wis. 303, 85 N. W. 337.

In no view of this case would the court be justified in granting the injunction prayed.

Scott v. Neely, 140 U. S. 106, 35 L. ed. 358, 11 Sup. Ct. Rep. 712; *Marine Ins. Co. v. Hodgson*, 7 Cranch, 332, 3 L. ed. 362; *Truly v. Wanser*, 5 How. 141, 12 L. ed. 88; *Buchanan v. Alvoell*, 27 Tenn. 516; *Wimberg v. Schwoegeman*, 97 Ind. 528; *Miller v. Avery*, 2 Barb. Ch. 582; *Wilkins v. Hogue*, 55 N. C. (2 Jones, Eq.) 479; *Vick v. Percy*, 7 Smedes & M. 256, 45 Am. Dec. 303; *Patton v. Taylor*, 7 How. 133, 12 L. ed. 638; *Refeld v. Woodfolk*, 22 How. 318, 16 L. ed. 370; *Senter v. Hill*, 5 Sneed, 505; *Elliott v. Thompson*, 4 Humph. 99, 40 Am. Dec. 630; *Gayle v. Fattle*, 14 Md. 69; *Titcomb v. Potter*, 11 Me. 218; *Mutter v. Hamilton*, Brun. Col. Cas. 27, Fed. Cas. No. 9,974.

On petition for rehearing.

From counsel's own statement it is clear that he intended to present in his bill the same defense which he pleaded in the law action, which was that of counterclaim, and not equitable recoupment.

The opinion as rendered was based upon an issue which was not before the trial court, and for that reason should be modified.

Dermott v. Jones, 23 How. 235, 16 L. ed. 448.

Recoupment as a defense is available only when there are mutual obligations between the plaintiff and defendant growing out of the same transaction.

Winthrop Sav. Bank v. Jackson, 67 Me. 570, 24 Am. Rep. 56; *Hill v. Parsons*, 110

Ill. 107; *Widrig v. Taggart*, 51 Mich. 103, 16 N. W. 251; *Blair v. Reid*, 20 Tex. 311.

Sanborn, Circuit Judge, delivered the opinion of the court:

This is a suit in chancery. The theory upon which counsel for the complainants seeks to maintain it is this: In equity and good conscience, Richard M. Neely ought not to be permitted to recover upon the complainants' note the full amount of the unpaid purchase price of the land which they bought of his mother, Mrs. Annie H. Neely, through him as her agent: but the amount of his recovery should be reduced by the diminution of the value of the title which resulted from the liens upon the land which they bought. The purchase price which the complainants agreed to pay was the full value of a perfect title to the property, free from all encumbrances. The vendor agreed to give them such a title. They have not received it, but have obtained one of much less value, since the encumbrances upon it are about equal to the unpaid purchase price evidenced by their note. Neely, the payee of this note, knew of these encumbrances before he took or paid for the note. He knew that his mother, in performance of her agreement of sale, gave to the complainants a covenant against encumbrances upon the title to the land, and that the note evidenced the unpaid part of the purchase price. He knew—for he cannot escape knowledge of the law—that against his mother, and against all who took the note with knowledge of its consideration and of the facts and circumstances under which it was made, the obligation of the complainants to pay it was conditioned by the faithful performance by the vendor of her obligation to vest in them a title free from encumbrances. She has failed to comply with her agreement, and the complainants invoke the aid of this court to reduce the amount to be paid upon their note by the damages which they must sustain by the failure of the vendor to comply with the conditions subsequent of the complainants' obligation to pay,—her contract to furnish them a perfect title free from encumbrances. This theory of counsel for the complainants does not at first blush appear to be irrational; nor does the relief they seek seem to be either unjust or inequitable.

The purpose of the bill is to present and enforce an equitable defense to the action for payment of complainants' note. That defense is not, as counsel for the defendants seem to suppose, either a set-off or a counterclaim. Hence neither an independent cause of action in the defendant to re-

cover damages of the complainant, nor a claim for liquidated damages, is an indispensable element of it. The defense is simply an equitable reason why the amount which the defendant should recover upon his note should be reduced below the amount which appears to be due upon its face. It springs out of and is a part of the same transaction from which the note arises. It is reduction or equitable recoupment, for it is analogous to the defense of recoupment at law. That defense crept from courts of chancery into the practice at law to enable courts of law to avoid the expense of suits in equity, to prevent circuity of action, and to obtain its benefit. *Reab v. McAllister*, 8 Wend. 109; *Nashville Trust Co. v. Fourth Nat. Bank*, 91 Tenn. 336, 15 L. R. A. 710, 714, 18 S. W. 822.

In *Wheat v. Dotson*, 12 Ark. 699, 711. Mr. Justice Scott, in an exhaustive and learned opinion, shows that recoupment is, in its nature and essence, an equity; that it was derived from the civil law; that it is now uniformly applied where one brings an action for a breach of a contract, and the defendant can show that some stipulation in the same contract was made by the plaintiff, which he has violated; and that under the modern practice at law a defendant in an action upon any contract to pay the purchase price of land, the title to which was warranted to him, may reduce the recovery by way of recoupment by proof of a partial failure of consideration which has resulted from a diminution in the quantity or quality of the land conveyed, but that a partial defect in the title to the land is inadmissible at law for this purpose, because equity has exclusive and peculiar jurisdiction over the title to real estate, and has the power to perfect it, because, in general, the vendee sustains no injury by a defect of title so long as he retains the possession and use of the land, and because courts of law lack the peculiar jurisdiction to cause defective titles to be perfected, and are unable to do final and complete justice between the parties, and to terminate all possible litigation over the controversy.

Recoupment is the keeping back of something that is due because there is an equitable reason for holding it. *Ives v. Van Epps*, 22 Wend. 155, 156. As the defense in this suit is not based upon a set-off or a counterclaim, but upon an equitable reason, inhering in the transaction out of which the note springs, why the claim of Neely ought, in equity and good conscience, to be reduced, and,

as it presents no affirmative cause of action for a recovery against Neely, the authorities cited by his counsel relative to the essential attributes of set-offs and counterclaims (*Simpson v. Jennings*, 15 Neb. 671, 19 N. W. 473; *Spencer v. Johnston*, 58 Neb. 44, 78 N. W. 482; *Fuller v. Steiglitz*, 27 Ohio St. 355, 22 Am. Rep. 312; *Frick v. White*, 57 N. Y. 103; *Graham v. Tilford*, 1 Met. [Ky.] 112; *Brashear v. West*, 7 Pet. 608, 616, 8 L. ed. 801, 804; and *Computing Scale Co. v. Churchill*, 109 Wis. 303, 85 N. W. 337) have no relevancy to the issues presented in this case, and they will not be farther noticed.

Bearing in mind the nature of this suit, and the ground of the equitable defense it seeks to present, let us consider the questions which condition its maintenance.

In an action by the vendor upon a promissory note for the unpaid purchase price of real estate which he has conveyed to the vendee by a deed with covenants of warranty and against encumbrances, the latter may reduce the amount of the recovery by proof of a partial failure of consideration which has resulted from a defect of title. 3 Sedgw. Damages, § 1053; *Sutherland*, Damages, § 641; *Davis v. Bean*, 114 Mass. 358; *Schuchmann v. Knoebel*, 27 Ill. 175; *Jaques v. Esler*, 4 N. J. Eq. 461, 462; *Union Nat. Bank v. Pinner*, 25 N. J. Eq. 495; *White v. Stretch*, 22 N. J. Eq. 76, 80; *Johnson v. Gere*, 2 Johns. Ch. 546; *Walker v. Wilson*, 13 Wis. 522; *Wilson v. Cochran*, 46 Pa. 229, 231; *Clarke v. Hardgrove*, 7 Gratt. 399, 407; *Soanlin v. Allison*, 12 Kan. 85; *Cross v. Noble*, 67 Pa. 74, 78; *Beecher v. Baldwin*, 55 Conn. 419, 431, 3 Am. St. Rep. 57, 12 Atl. 401; *Avery v. Brown*, 31 Conn. 398, 402; *Coy v. Donnie*, 14 Fla. 544, 562; *Lovry v. Hurd*, 7 Minn. 356, Gil. 282, 285; *Wamsley v. Hunter*, 29 La. Ann. 628, 629; *Youngman v. Linn*, 52 Pa. 413, 416; *Crenshaw v. Smith*, 5 Munf. 415, 417. The reason for this rule is that the covenants in the deed and the promise in the note are mutual covenants, and the performance of each is the consideration of and the condition of the obligor's promise to perform the other. This is an evident proposition so long as the contract of sale is executory, and the covenant to vest good title and the promise to pay the purchase price are embodied in a single written instrument, which is signed by both the parties. Partial failure of the plaintiff to perform is always a good defense *pro tanto* to an action for damages for the defendant's failure to keep his agreement, or to a suit to enforce its

specific performance. The reason for the rule, and its appropriate application to a covenant against encumbrances and a promissory note for the purchase price, would be equally obvious if these mutual covenants which accompany the transfer of title were embodied in a single written agreement which was signed by the parties. A moment's reflection will, however, convince that it can make no difference in the rights of the parties to the sale, or in the legal effect of the transaction, that the covenant of the vendor is in one writing, and the promise of the vendee is in another. The performance of the one is still the consideration and the condition subsequent of the other, and a partial failure to perform one ought to be, and is still, a defense *pro tanto* to an action or suit upon the other. Hence it is that in *Davis v. Bean*, 114 Mass. 358; *Schuchmann v. Knoebel*, 27 Ill. 175; *Jaques v. Esler*, 4 N. J. Eq. 461, 462; *Union Nat. Bank v. Pinner*, 25 N. J. Eq. 495; *White v. Stretch*, 22 N. J. Eq. 76, 80; and *Wilson v. Cochran*, 46 Pa. 229, 231,—the courts held, in actions by vendors upon promissory notes for portions of the purchase price of land which the vendors had conveyed to the defendants with covenants against encumbrances, that the vendees might reduce the amounts of the recoveries by the amounts of the encumbrances upon the titles. And, on the other hand, in *Beecher v. Baldwin*, 55 Conn. 419, 3 Am. St. Rep. 57, 12 Atl. 401, the supreme court of Connecticut decided that, in an action by a vendee upon a covenant against encumbrances, his recovery could be reduced by the amount of his unpaid notes for a part of the purchase price.

Upon a breach of a covenant of warranty or of a covenant against encumbrances, the obligee has a choice of remedies. He may pay the purchase price and bring his action on the covenant, or he may reduce the vendor's recovery for the purchase price by the amount of the diminution of the value of the title on account of the defect in it. He may do this upon the ground that his obligation to pay the price was subject to the condition that the vendor would perform his obligation to furnish a title free from encumbrances, and that he has violated that condition, and upon the further ground that the performance of that condition was a part of the consideration of his agreement. *Lyon v. Bertram*, 20 How. 149, 154, 15 L. ed. 847, 849; *Dorr v. Fisher*, 1 Cush. 271, 273, 274. The general rule upon this subject is stated in these words by the Supreme Court in *Winder v. Caldwell*, 14

How. 434, 443; 14 L. ed. 487, 491, an action on a building contract, to which the defense of delay, poor materials, and poor workmanship was interposed: "For, although it is true, as a general rule, that unliquidated damages cannot be the subject of set-off, yet it is well settled that a total or partial failure of consideration, acts of nonfeasance or misfeasance, immediately connected with the cause of action, or any equitable defense arising out of the same transaction, may be given in evidence in mitigation of damages or recouped, not strictly by way of defalcation or set-off, but for the purpose of defeating the plaintiff's action, in whole or in part, and to avoid circuity of action." *Withers v. Greene*, 9 How. 214, 13 L. ed. 109; *Van Buren v. Digges*, 11 How. 461, 13 L. ed. 771.

The application of this rule to an action on a note or a bond for the purchase price of land, in which the defense of a breach of a covenant through a defect of title is interposed, is perhaps nowhere better shown than by the supreme court of Pennsylvania (a state under whose system of jurisprudence legal and equitable rights are enforced in the same action) in *Wilson v. Cochran*, 46 Pa. 229, 231 (an action on bonds for the purchase price of land, in which the defendant, who held a warranty deed, was permitted to reduce the recovery by the diminution in the value of the title which resulted from the encumbrance of a right of way, of which both parties had constructive notice from the records at the time of the sale). That court said: "The detention of purchase money on account of breaches of the vendor's covenant is a mode of defense that is peculiar to our Pennsylvania jurisprudence, but the principle is well settled with us that, where a vendor has conveyed with covenants on which he would be liable to the vendee in damages for a defect of title, the vendee may detain purchase money, to the extent to which he would be entitled to recover damages upon the covenant, and he is not obliged to restore possession to his vendor before or at the time of availing himself of such a defense. Where there is a known defect, but no covenant or fraud, the vendee can avail himself of nothing; being presumed to have been compensated for the risk in the collateral advantages of the bargain. But where there is a covenant against a known defect, he shall not detain purchase money unless the covenant has been broken. If the covenant be for seisin or against encumbrances, it is broken as soon as made, if a defect of title or an encumbrance exist; but, if it be a covenant of warranty, it binds the grantor to de-

fend the possession against every claimant of it by right, and is consequently a covenant against rightful eviction."

The broken covenant in the case in hand is a covenant against encumbrances, and it was broken as soon as it was made.

The later case of *Cross v. Noble*, 67 Pa. 74, 78, demonstrates the fact that it was not the intention of the Pennsylvania court in the case last cited to hold that the defense of a partial failure of consideration arising from a defect of title is not available in the absence of a covenant, for Mr. Justice Sharwood there says: "Mr. Justice Kennedy, in *Roland v. Miller*, 3 Watts & S. 390, has stated the rule as it has always been understood and acted upon in this state: 'The doctrine of *Steinhauer v. Witman*, 1 Serg. & R. 438, is that, if the consideration money has not been paid, the purchaser, unless it plainly appear that he has agreed to run the risk of the title, may defend himself in an action for the purchase money by showing that the title was defective, either in whole or in part, whether there was a covenant of general warranty or of right to convey or of quiet enjoyment by the vendor, or not, and whether the vendor has executed a deed of conveyance for the premises, or not.' *Lloyd v. Farrell*, 48 Pa. 73, 86 Am. Dec. 563; *Weakland v. Hoffman*, 50 Pa. 513, 88 Am. Dec. 560; *Herrod v. Blackburn*, 56 Pa. 103, 94 Am. Dec. 49; *Dankel v. Hunter*, 61 Pa. 382, 100 Am. Dec. 651." *Grand Lodge of Masons v. Knox*, 20 Mo. 433; *Ives v. Van Epps*, 22 Wend. 155; *M'Allister v. Reab*, 4 Wend. 485.

These authorities perhaps sufficiently illustrate the general rule that a partial failure of consideration wrought by a defect of title is a good defense *pro tanto* to an action upon a promissory note for the purchase price of land conveyed by a warranty deed.

The next question for consideration is, When is this defense available at law, and when in equity? There is much diversity of opinion in the courts of the states upon the question when a partial defect of title is available to reduce a recovery in an action at law for the purchase price. A review of many of the decisions upon this subject may be found in 2 Sutherland on Damages, §§ 632-641. Naturally the use of the equitable remedy of an injunction against the prosecution of an action at law for the purchase price varies in the different states with the different rules which they have adopted for the admission of this defense at law. But the power to

protect purchasers is more ample, and is more freely exercised in courts of equity than in courts of law; and, where the remedy at law is not clearly adequate, their jurisdiction is never invoked in vain. The Supreme Court has repeatedly declared that "a court of chancery regards the transfer of real property in a contract of sale and the payment of the price as correlative obligations. The one is the consideration of the other, and the one failing leaves the other without a cause." *Refeld v. Woodfolk*, 22 How. 318, 327, 16 L. ed. 370, 375; *Slide & S. Gold Mines v. Seymour*, 153 U. S. 509, 517, 38 L. ed. 802, 805, 14 Sup. Ct. Rep. 842.

And the general rule upon this subject may be safely stated in these words: A court of equity should issue an injunction to stay an action at law upon a promissory note for the purchase price until the defense of reduction arising out of the same transaction is allowed whenever the remedy at law is less certain, prompt, and efficient to attain the ends of justice, either because the interests of the parties require that the title to the land should be perfected, that their rights should be adjudicated, and that the litigation over it should be closed,—a result which no remedy at law is adequate to accomplish,—or because it entails circuity of action, or because there is serious danger of unjustifiable loss or injury to the vendee, which a court of equity may, but a court of law cannot, prevent. *Jaques v. Esler*, 4 N. J. Eq. 461, 462; *Johnson v. Gere*, 2 Johns. Ch. 546; *Koger v. Kane*, 5 Leigh, 606, 607; *Clarke v. Hardgrove*, 7 Gratt. 399, 407; *Union Nat. Bank v. Pinner*, 25 N. J. Eq. 495; *White v. Stretok*, 22 N. J. Eq. 76; *Coy v. Downie*, 14 Fla. 544; *Walker v. Wilson*, 13 Wis. 523.

The case at bar falls well within this rule. The liens of the annuities have been fastened upon the land of the complainants by the decree of the state court, and they cannot escape their payment. A court of law has not the power to determine their amounts, to require their present payment and release, or to perfect the title to the land, in the action for the purchase price, or in an action on the covenant against encumbrances, because that court cannot grant relief of that nature. On the other hand, a court of equity has plenary jurisdiction to render a decree in this suit which will determine the amounts of the liens and the parties who must pay them, which will perfect the title to the land, and put an end to the litigation concerning it. Moreover, if, as counsel for Richard M. Neely contend, the action upon the covenant against Annie H. Neely is barred by the 69 L. R. A.

statute of limitations, the complainants have no remedy at law by an action upon that covenant; and, if it is not barred, she is not a resident of the state of Nebraska, and an action at law in another jurisdiction is not as prompt and efficient a remedy as a suit in equity to determine the rights of the parties in the jurisdiction which Neely has invoked. *North Chicago Rolling Mill Co. v. St. Louis Ore & Steel Co.* 152 U. S. 596, 617, 38 L. ed. 565, 572, 14 Sup. Ct. 710; *Quick v. Lemon*, 105 Ill. 578; *Taylor v. Stowell*, 4 Met. (Ky.) 175; *Forbes v. Cooper*, 88 Ky. 285, 11 S. W. 24; *Robbins v. Holley*, 1 T. B. Mon. 191; *Edminson v. Baxter*, 4 Hayw. (Tenn.) 112, 9 Am. Dec. 751; *Davis v. Milburn*, 3 Iowa, 163; *Green v. Campbell*, 55 N. C. (2 Jones, Eq.) 446.

The cases presented in opposition to this conclusion do not rule the issue which this case presents. A class of authorities is cited to the effect that a partial or total failure of the title conveyed by a warranty deed presents no defense in equity to the payment of the purchase price, unless the vendee has been evicted from, or has surrendered possession of, the land, because until that time there is no breach of the covenant against rightful claims for title and possession. *Patton v. Taylor*, 7 How. 133, 159, 12 L. ed. 638, 649; *Elliott v. Thompson*, 4 Humph. 99, 40 Am. Dec. 630; *Buchanan v. Alucell*, 8 Humph. 516, 518; *Wimberg v. Schwegegan*, 97 Ind. 529, 530; *Wilkins v. Hogue*, 55 N. C. (2 Jones, Eq.) 479, 481; *Vick v. Percy*, 7 Smedes & M. 256, 45 Am. Dec. 303. These decisions seem to adopt the ancient rule of the common law that a partial failure of consideration is no defense to a promissory note. That rule has long since been abolished, both at law and in equity; and an application of the modern rule evidenced by the decisions cited in the earlier part of this opinion leads logically to a different conclusion from that announced in these opinions. If, however, we concede their correctness, they go no farther than to hold that until the covenant against rightful claims to the title and possession, which was under consideration in those cases, is completely broken, and all the possible damage from the breach has accrued, equity will grant no relief. The relief sought in those cases was denied because the covenant against lawful claims to title and possession was not broken, and the damage from it had not accrued, so long as the vendee enjoyed the undisturbed possession and use of the land, and because an action upon that covenant, when broken, would furnish a complete remedy to the vendee. The facts of this case do not bring it within this rule. The covenant in ques-

tion here is not the covenant against rightful claims to title and possession, but the covenant against encumbrances. That covenant was broken when it was made. The decree of the state court judicially established the paramount liens of the encumbrances. It judicially determined that the breach of the covenant against them, and the damages therefrom, had arisen when the covenant was made. It as effectually demonstrated the complete breach of the covenant against encumbrances at the time it was made as a judgment at law, and eviction thereunder, would have established a breach of the covenant against rightful claims to the title and possession. *Boyd v. Bartlett*, 36 Vt. 9, 15; *Turner v. Goodrich*, 26 Vt. 707. In this way the complete breach of the covenant against encumbrances is established by the record before us, and an action upon it will furnish the complainants no adequate remedy, because it will not settle the claims to, or perfect the title to, the land, because it is probably barred by the statute, and, if it is not, it presents a more dilatory, circuitous, and doubtful remedy than the pending suit.

The cases of *Miller v. Avery*, 2 Barb. Ch. 582; *Senter v. Hill*, 5 Sneed, 505, and *Gayle v. Fattle*, 14 Md. 69, cited for Neely, rest upon the conceded proposition that averment or proof of an adverse action by a third party, without allegation or evidence that it is founded on a superior lien or title, is insufficient to invoke the aid of a court of equity. Nor does the decision in *Refeld v. Woodfolk*, 22 How. 318, 327, 16 L. ed. 370, 375, that a vendee who has completed the payment of the purchase price is not entitled to a decree that the vendor shall perfect the title, have any relevancy to the question under consideration in the case at bar. The equity of a vendee who has voluntarily paid the purchase price differs radically from that of one who resists its payment. There is no opinion of any court in these authorities cited for Neely inconsistent with the view that a court of equity has jurisdiction to grant the relief which the complainants in this case seek. In *Davis v. Wakelee*, 156 U. S. 680, 688, 39 L. ed. 578, 584, 15 Sup. Ct. Rep. 555, we find these words: "It is a settled principle of equity jurisprudence that, if the remedy at law be doubtful, a court of equity will not decline cognizance of the suit. . . . Where equity can give relief, plaintiff ought not to be compelled to speculate upon the chance of his obtaining relief at law."

The adequate remedy at law which will deprive a court of equity of jurisdiction is a remedy as certain, complete, prompt, and efficient to attain the ends of justice 69 L. R. A.

as the remedy in equity. *Boyce v. Grundy*, 3 Pet. 210, 215, 7 L. ed. 655, 657; *Springfield Mill. Co. v. Barnard & L. Mfg. Co.* 26 C. C. A. 389, 393, 49 U. S. App. 438, 81 Fed. 261, 265; *Brown v. Arnold*, 67 C. C. A. 125, 131 Fed. 723. The complainants have no such remedy at law. A court of equity alone has the power to grant them adequate relief, and its jurisdiction of this suit is complete.

But counsel for Richard M. Neely insist that, while an assignee of a chose in action takes its subject to all the defenses that could at the time of the assignment be presented against it in the hands of the assignor, yet he is exempt from these defenses because he is the payee of the note. They say that the complainants waived the defense which they now present by signing the note payable to Neely. But the essence of waiver is estoppel. Where there is no estoppel, there is no waiver. *Globe Mut. L. Ins. Co. v. Wolff*, 95 U. S. 326, 332, 24 L. ed. 387, 389; *Northern Assur. Co. v. Grand View Bldg. Assn.* 183 U. S. 308, 357, 46 L. ed. 213, 233, 22 Sup. Ct. Rep. 133; *Equitable Life Assur. Soc. v. McElroy*, 28 C. C. A. 365, 372, 49 U. S. App. 548, 83 Fed. 631, 640; *Rice v. Fidelity & D. Co.* 43 C. C. A. 270, 278, 103 Fed. 427, 435; *United Firemen's Ins. Co. v. Thomas*, 47 L. R. A. 450, 27 C. C. A. 42, 45, 53 U. S. App. 517, 82 Fed. 406, 408; *Unsell v. Hartford Life & Annuity Ins. Co.* 32 Fed. 443, 445; *Warren v. Crane*, 50 Mich. 300, 301, 15 N. W. 465. The indispensable elements of an estoppel are ignorance of the party who invokes the estoppel, a representation by the party estopped which misleads, and an innocent and deleterious change of position in reliance upon that representation. There were none of these elements in the case at bar. Neely was not ignorant. He knew that the covenant of his mother against encumbrances and the covenant of the complainants to pay the note were mutual covenants, that each was a part of the consideration of the other, and that the violation of one was a defense to the other. He knew that the covenant against encumbrances was broken when he took the note, for these encumbrances rested upon the title to the land, and he must have known the law. The complainants made no misrepresentations. They did not declare that the note was good and that they would pay it, as did the defendant in *Thompson v. Emery*, 27 N. H. 269, cited by counsel for Neely. Neely never loaned to the complainants, or paid to them, any consideration whatever for the note. Conceding that he paid to his mother its full value,

he was but her assignee of the complainants' obligation to pay the purchase price of the land, with full knowledge of all the equities between the original parties to the sale, and he took the note which evidenced that obligation subject to every defense which could have been asserted against it in the hands of the vendor. The legal presumption is that the payee of a promissory note knows its consideration and the facts which condition its execution. The fact that Neely was the payee here, and not the indorsee, instead of strengthening his position, adds this legal presumption to the conclusive proof of his actual knowledge which the record presents. One who buys of a creditor, for value, the obligation of his debtor, and takes the latter's promissory note, payable to himself, as evidence thereof, with full knowledge of its consideration and of the facts which conditioned the inception of the original obligation, takes the note subject to all the defenses which existed against the claim in the hands of the original creditor. *Vorce v. Rosenberg*, 12 Neb. 448, 451, 11 N. W. 879; *Chariton Plow Co. v. Davidson*, 16 Neb. 374, 377, 20 N. W. 256; *Camp v. Sturdevant*, 16 Neb. 693, 698. 21 N. W. 449; *Knapp v. Lee*, 3 Pick. 452, 460.

The authorities cited by counsel for Neely in opposition to this conclusion are not relevant to the facts of this case, and they fail to convince. *Saddler v. White*, 14 La. Ann. 173, 174, was a case in which the purchaser, who was not the payee of the note, which was given by a tenant for rent, was aware when he bought it that defenses to it might arise, although none had then arisen. The court held that this notice was not sufficient to subject him to a defense of partial failure of consideration which subsequently resulted from the ouster of the tenant by a paramount title before his term had expired. The court, however, remarked that the result would have been different if the defense had existed and the purchaser had been aware of it when he bought the note. In the case at bar the covenant against encumbrances was broken, the defense to the note existed, and Neely knew it when he purchased the note. In *Glascok v. Rand*, 14 Mo. 550, and *Van Buskirk v. Day*, 32 Ill. 260, 267, 268, all that is said upon this question is *obiter dictum*, and it goes no farther than to express a supposition and a doubt. The only question decided in the former case was that an affidavit for continuance did not disclose diligence to procure testimony, and the only issue

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determined in the latter case was decided by the jury, which found that there was no fraud in procuring the note, and hence no defense to it in the hands of anyone. In *Steadwell v. Morris*, 61 Ga. 97, a husband gave to his wife the note of his partners in payment of a debt which he owed to her. She accepted it without notice that it was founded in a mistake in the accounting between the partners, and the court held that this mistake would not defeat an action on the note in her behalf. It is evident from the opinion, however, that if she had obtained actual knowledge of the defense to the note before she received it, as Neely did in the case at bar, she would not have been permitted to recover. In *Thompson v. Emery*, 27 N. H. 269, Simpson, the plaintiff in interest, took the note of the defendant as collateral security to the obligation of another. Before or when he obtained it he asked the defendant if it was good, and he replied that it was, and that he would pay it. Simpson knew of no defense to it, and there was none. When action upon it was brought, no defense was interposed, except that the note was not properly indorsed to Simpson. Of course the plaintiff recovered. There is nothing in these cases in conflict with our conclusion that Richard M. Neely, the payee of the note, who had knowledge when he obtained it of its consideration, and of all the facts which conditioned the obligation which it evidenced, took it subject to every defense which could have been urged against the obligation to pay the purchase price of the land in the hands of the vendor. He stood in the shoes of his mother.

There is another defense to this note, to the extent of \$1,000, available to the complainants. It is that Richard M. Neely, as surety for Annie H. Neely, executed the bond to pay the legacies which constitute the encumbrances upon the title to this land. That bond is an obligation which he has never discharged, and which, in equity and good conscience, he ought to fulfil,—an obligation which a court of equity may and should permit the complainants to set off against the amount owing upon their note. But, as their defense to the full amount of the damage which they have sustained from the encumbrances upon their title is complete by way of equitable recoupment, it is unnecessary and would be useless to consider farther the defense *pro tanto* by way of the bond.

The next contention is that the defense to the note by way of equitable reduction is unavailable to the complainants be-

cause the cause of action upon the covenant against encumbrances is barred by the statute of limitations. Conceding, without deciding, that the bar of the statute had fallen upon the action on this covenant before this suit was instituted, that fact is not fatal to the defense of the complainants, nor to this suit to enforce it. That defense, as we have seen, is not set-off or counterclaim, but an equitable reason why the amount payable by the terms of the note should be reduced. It is reduction. It is that because the consideration of the note failed in part, and because the condition subsequent that the covenant against encumbrances should be kept was not fulfilled, the full amount of the note ought not to be paid. This defense attaches to and inheres in the note itself, and while the cause of action upon that obligation survives, the defense lives and runs with it. The defense of reduction or recoupment which arises out of the same transaction as the note or claim survives as long as the cause of action upon the note or claim exists, although an affirmative action upon the subject of it may be barred by the statute of limitations. *Ord v. Ruspini*, 2 Esp. 569; *Beecher v. Baldwin*, 55 Conn. 419, 432, 3 Am. St. Rep. 57, 12 Atl. 401; *C. Aultman & Co. v. Torrey*, 55 Minn. 492, 57 N. W. 211; Wood, Limitation of Actions, 3d ed. § 282; *Conner v. Smith*, 88 Ala. 300, 7 So. 150; 25 Am. & Eng. Enc. Law, p. 561, ¶ 9.

Finally it is insisted that the complainants have been guilty of such laches that they are entitled to no relief. In the application of the doctrine of laches the settled rule is that courts of equity are not bound by, but that they usually act or refuse to act in analogy to, the statute of limitations relating to actions at law of like character. *Rugan v. Nabin*, 3 C. C. A. 578, 582, 10 U. S. App. 519, 53 Fed. 415, 420; *Billings v. Aspen Min. & Smelting Co.* 2 C. C. A. 252, 262, 263, 10 U. S. App. 1, 51 Fed. 338, 349; *Bogan v. Edinburgh American Land Mortg. Co.* 11 C. C. A. 128, 135, 27 U. S. App. 348, 63 Fed. 192, 199; *Kinne v. Webb*, 4 C. C. A. 170, 177, 12 U. S. App. 137, 54 Fed. 34, 40; *Scheftel v. Hays*, 7 C. C. A. 308, 312, 19 U. S. App. 220, 58 Fed. 457, 460; *Wagner v. Baird*, 7 How. 234, 258, 12 L. ed. 681, 691; *Godden v. Kimmell*, 99 U. S. 201, 210, 25 L. ed. 431, 434; *Wood v. Carpenter*, 101 U. S. 135, 139, 25 L. ed. 807, 808. The meaning of this rule is that, under ordinary circumstances, a suit in equity will not be stayed for laches before, and will be stayed after, the time fixed by the analogous statute of limitations at law;

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but if unusual conditions or extraordinary circumstances make it inequitable to allow the prosecution of a suit after a briefer, or to forbid its maintenance after a longer, period than that fixed by the statute, the chancellor will not be bound by the statute, but will determine the extraordinary case in accordance with the equities which condition it. *Kelley v. Boettcher*, 29 C. C. A. 14, 21, 56 U. S. App. 363, 85 Fed. 55, 62. This defense of equitable recoupment or reduction, if it were available at law, would have survived as long as the cause of action upon the note was available. If the holder of the note had invoked the aid of a court of equity to foreclose the mortgage which secured it, this defense would have conditioned his recovery there. *Farmers' Loan & T. Co. v. Denver, L. & G. R. Co.* 60 C. C. A. 588, 593, 126 Fed. 46, 51. By analogy with these rules, the complainants are not guilty of culpable laches in enforcing their defense as long as the action on the note survives. Indeed, they were not fairly chargeable with any laches as long as no action upon the note was commenced, because they might well rest in the belief that no action would be taken by Neely to collect it until his bond and the covenant of the vendor had been fulfilled, and the encumbrances upon the title and the defense to the note had been alike removed. Moreover, there are unusual conditions and extraordinary circumstances in this case which would appeal with compelling force to the conscience of a chancellor to allow the prosecution of this suit, even if the analogous limitation at law had expired. The complainants have long been involved in a tedious litigation in the courts of the state of Nebraska, where they doubtless hoped and expected that the rights of all the parties to this controversy would be judicially determined. That litigation alone furnishes ample excuse for their failure to invoke earlier the aid of other courts. The fact that they interposed their defense in the action at law upon the note, and pressed it until it was disallowed there, is not evidence of fatal laches, but rather of reasonable diligence. The facts that the same judge presided at law and in equity in the court below, and that his decision must determine in the first instance the somewhat vexed question whether their defense should be made at law or in equity, relieve their action below of any just criticism or of any legitimate charge of unreasonable delay.

It is not culpable laches for one who has an equitable defense of reduction to a promissory note, which has become the subject of pending litigation in another

court, and which, if available at law, would survive as long as the cause upon the note, to wait until an affirmative action at law upon the subject of the defense is barred, and until his defense is overruled in an action at law upon the note, before he invokes the aid of a court of equity to enjoin the prosecution of the latter action until his defense is allowed.

The result is that the court below has tried the action at law, and is about to enter a judgment against the complainants for the full amount of their note,—an amount which, in equity and good conscience, they ought not to pay. The power was vested in the court of equity below, and the duty was imposed upon it, to enjoin the prosecution of this action at law until the amount of damages which the complainants have suffered from the encumbrances upon their title can be ascertained and applied in reduction of the recovery there sought, and to adjudicate the claims to the land in question and close this litigation, and in that way to prevent a rank injustice which the court at law was powerless to avoid. Any fact which renders it against conscience to enter or execute a judgment at law, and which was not available to the defendant in a court of law, confers jurisdiction upon a court of equity to enjoin the proposed entry or execution of the judgment. *Marine Ins. Co. v. Hodgson*, 7 Cranch, 332, 336, 3 L. ed. 362, 363; *National Surety Co. v. State Bank*, 61 L. R. A. 394, 56 C. C. A. 657, 120 Fed. 593.

The court below, sitting in equity, may and it should proceed to ascertain the present values of the annuities which constitute the encumbrances upon the title of the complainants, and to require the annuitants, upon the payment of those values, to release the three quarter sections of land from those liens, and to perfect the title thereto. In case it shall appear, as counsel have intimated, that since the final hearing below the complainants have paid and secured releases of these liens, the court should reduce the amount of the recovery in the action at law upon the note by the amount, not exceeding the value of the annuities at the time such payments were made, which the complainants have necessarily expended in paying the liens of the annuities upon their land and in defending their title against them. That court undoubtedly has jurisdiction to adjudicate the rights and interests of all the parties to this suit in the three quarter sections of land to which the liens attach, and to put an end to this litigation.

The only question determined by the court below, and which this appeal was

taken to review, was, Were the complainants entitled to any relief? The circuit court answered that question in the negative. It has now been answered in the affirmative. Issues of law and fact may arise in view of this decision which are not fairly presented by this record, and which have not received the attention of court or counsel. It is unwise and inopportune to suggest or discuss them now.

There is, however, one other question which must not be overlooked. The district court of Richardson county, in the state of Nebraska, acquired jurisdiction of the real estate in controversy in this suit long before either the action at law or the suit in equity in the circuit court was instituted. The suit in the state court was commenced by the annuitants for the purpose of subjecting the three quarter sections of land to the payment of their annuities, and they obtained a decree that the liens of their legacies were paramount to the titles of the purchasers from the residuary legatees of Malony, and that the land should be sold to pay them. This portion of the decree was affirmed by the supreme court of the state, and it remains unassailed and unmodified. That suit, however, is still pending under an instruction from the supreme court to the court below to determine whether or not the complainant Joseph A. Williams may lawfully be required to pay the amount owing upon his note to Neely to the complainants in that suit. The court which first acquires jurisdiction of specific property by the issue and service of process in a suit to enforce a lien upon it, where in the subsequent proceedings it may find it necessary or convenient to take possession or control of it, is entitled to retain that jurisdiction to the end, without interference by any court of co-ordinate power. *Gates v. Bucki*, 4 C. C. A. 116, 128, 129, 12 U. S. App. 69, 53 Fed. 961, 969; *Memphis Sav. Bank v. Houchens*, 52 C. C. A. 176, 190, 191, 115 Fed. 96, 110. Where a subsequent suit involving the rights of the parties to the same property is commenced in a court of co-ordinate jurisdiction, that suit should not be dismissed, but, before a seizure of the property is made therein, it should be stayed until the proceedings in the court which first obtained jurisdiction are concluded, or ample time for their termination has elapsed. *Zimmerman v. So Relle*, 25 C. C. A. 518, 521, 49 U. S. App. 387, 80 Fed. 417, 420.

The decree below is reversed, and the case is remanded to the Circuit Court, with directions to enjoin or stay the farther prosecution of the action at law upon the promissory note signed by the complainants

until the amount of the reduction to which the complainants are equitably entitled shall be ascertained and allowed, to permit the parties to file a supplemental bill and answers presenting material events which have occurred since the former hearing, and to take farther testimony, and, when this shall have been done, to take further proceedings in accordance with the views expressed in this opinion.

Hook, Circuit Judge, dissenting:

The facts in this case—some admitted, and the others established by the overwhelming weight of the evidence—are as follows: Through the will of her father and a deed from a codevisee, Annie H. Neely became the owner of a tract of land, subject to a mortgage given by the testator in his lifetime, and to two annuities which he bequeathed. The mortgage was the prior lien. Mrs. Neely was an executrix of the will. Richard M. Neely an appellee herein, is her son. Acting as the agent of his mother, he made a contract with Williams for the sale of the land for \$6,000, \$500 of which was paid at the time, \$2,000 was to be paid when the sale was consummated, and the remaining \$3,500 was to be evidenced by a note secured by a mortgage upon the property. There is no pretense that he practised any deception upon Williams; that he made any covenant against encumbrances, or personally obligated himself in any way or to any degree whatsoever. He was professedly acting for his mother in the making of the contract of sale, and Williams so understood it. The existence of the mortgage and the annuities were equally apparent from the public records. The contract of sale was susceptible of exact performance. It could have been fully carried out, and all of the liens against the land could have been discharged. Between four and five months afterwards the sale was consummated. Williams received a deed from Mrs. Neely containing covenants of warranty and against encumbrances. He paid the \$2,000, and executed his note and mortgage for the remaining \$3,500. But Richard M. Neely was not present at the time. He prepared none of the instruments, and did not in any manner participate in the closing of the transaction. For some reason not disclosed in the record Williams did not require the release or satisfaction of the annuities when he took the deed, paid the money, and gave his note and mortgage. Whether this arose from mistake of fact or of law does not clearly appear, but there is not even the slightest ground for attributing it to Richard M. Neely. He was not 69 L. R. A.

there, and was wholly innocent in fact and intent. The note and mortgage for the balance of the purchase price were made by Williams direct to Richard M. Neely, instead of to his mother, for the reason that he paid to her and for her benefit the full sum of \$3,500 for such securities. Nearly \$2,500 of this amount was applied by Mrs. Neely's agent, who attended to the consummation of the sale, towards the discharge of the old mortgage which it is conceded was a first lien on the property. There is no reasonable doubt that the full value of the new securities was paid from the funds of Richard M. Neely to his mother, or for her benefit, in the clearing of the title to the property, and the record shows that counsel for Williams assisted materially in proving this fact. The sources from whence the money was obtained were fully and conclusively shown. Williams knew that his note and mortgage were not made to Mrs. Neely, the vendor, but were made to the absent Richard M. Neely. And now, many years after the consummation of the transaction, when Richard M. Neely seeks payment of that which he bought and paid for innocently and in good faith there is set up against his demand a breach of the covenant against encumbrances arising from the existence of the lien of the annuities. The majority of the court hold in the foregoing opinion that this may be done, but I am unable to bring myself to the conclusion that any just application of legal or equitable principles can accomplish that result.

In *Glascock v. Rand*, 14 Mo. 550, it was held: "If a purchaser of land executes a negotiable note for the purchase money to an apparent stranger to the title, and fails to secure himself by a proper penal covenant, he has no one to blame but himself, and cannot set up as a defense to the note the failure of the parties in interest to execute proper conveyances to him."

In *Cagle v. Lane*, 49 Ark. 465, 5 S. W. 790, a similar rule was announced. Cagle purchased from Cummings an interest in a patent right, for which he was to give his note. At Cummings's direction, Cagle made the note direct to Lane, the plaintiff, who paid Cummings a consideration therefor. The patented invention proved to be worthless, and Cagle refused to pay the note; claiming *inter alia* a failure of consideration, and that the plaintiff was not a bona fide purchaser. The court held that the transaction was the same, in substance, as if the note had been drawn in favor of Cummings, and by him indorsed to the plaintiff, and that the defense was not maintainable.

In *South Boston Iron Co. v. Brown*, 63

Me. 139, the court said: "Where, at the request of the party with whom he deals, one makes his promissory note (which is to be a partial payment for a piece of work to be done for him), payable to a third party, who is a creditor of the party with whom he contracts for the work, and it is credited by the payee to such party in good faith, the maker cannot set up a failure of consideration, as between himself and the party with whom he deals, in defense of a suit upon such note in the name of the payee."

The English rule is the same. *Munroe v. Bordier*, 8 C. B. 862; *Poirier v. Morris*, 2 El. & Bl. 89.

Moreover, it is common doctrine, no longer open to debate, that knowledge of the conditions surrounding the consideration of a promissory note, without knowledge of a breach, will not affect the rights of a purchaser. *Miller v. Ottaway*, 81 Mich. 196, 8 L. R. A. 428, 21 Am. St. Rep. 513, 45 N. W. 665; *Rublee v. Davis*, 33 Neb. 779, 29 Am. St. Rep. 509, 51 N. W. 135.

In *United States Nat. Bank v. Floss*, 38 Or. 68, 84 Am. St. Rep. 752, 62 Pac. 751, it was held that knowledge in the purchaser of a note that it was given in consideration of a good title to land does not affect his right to recover, in case of a breach of the contract to convey, unless he knew the breach had already occurred.

In *Parsons on Notes & Bills* it is said that knowledge on the part of the holder, at the time he took the note, that it was not to be paid on a specified contingency, is not sufficient to defeat his right to recover, although the contingency had then happened, if he was ignorant of the fact. Vol. 1, p. 261.

In *Tiedeman on Commercial Paper* it is said: "The authorities generally hold that the purchaser of commercial paper is not burdened with the requirement to see to the execution and full performance of the consideration merely because he knows what it is." § 300.

Under the settled rule of the Supreme Court, a much stronger case could be assumed against Richard M. Neely than the record justifies, and yet not impair his right to recover from Williams. That rule is that bad faith alone will defeat the right of the purchaser, but a suspicion of a defect or knowledge of circumstances that might excite such suspicion in the mind of a cautious person, or even gross negligence at the time, is insufficient. *Hotchkiss v. National Shoe & Leather Bank*, 21 Wall. 354, 359, 22 L. ed. 645, 649; *Murray v. Lordner*, 2 Wall. 110, 17 L. ed. 857.

With these principles in mind, I am unable to find any support for the reversal 69 L. R. A.

of the decree of the circuit court. It is not asserted in the foregoing opinion that Richard M. Neely personally obligated himself in respect of existing encumbrances, nor that he was guilty of bad faith, nor, except by suggestion or inference, that he was aware, or even had any suspicion, that his mother had failed to lift or make satisfactory provision concerning the annuities during the months succeeding his sole connection with the transaction. Nor is the result rested on a contention that he did not pay his mother full value for the note and mortgage.

It is said in the foregoing opinion that the deed, note, and mortgage "were prepared by Annie H. Neely, or by one of her agents." A cursory reading of the opinion would convey the inference that Richard M. Neely may have been the agent, or may have been present. But the record shows, without dispute, that he was not present, did not prepare any of the instruments, and did not in any manner participate in the closing of the sale. And it does not appear that he was aware of any default of his mother when the deed was delivered. It is also said in the foregoing opinion that what amount, if any, he paid his mother for the note and mortgage, was "left in grave doubt by the evidence;" and while this is said to be immaterial, in the view of the case which is adopted, its tendency is to support an inference that, after all, a just result was attained by the opinion of the court. I have already observed that it was overwhelmingly shown that the consideration was paid, and where it came from, and that counsel for Williams assisted in showing it. The greater portion of it came from the payment for another tract of land, which belonged to Richard M. Neely and a brother, and in which their mother had no interest whatever. Again, the fact is referred to in the foregoing opinion that Richard M. Neely was one of the sureties upon the bond of his mother as executrix. It is true that he was, but I am at a loss to perceive why that fact was referred to as even remotely justifying the conclusion which was reached. The suit was not one directly or indirectly to reach Richard M. Neely's responsibility as a surety. Moreover, the maximum of his liability as a surety was limited by the bond to \$1,000, and that is not the limit which the court in the foregoing opinion has placed upon his liability to respond for the breach of his mother's covenant against encumbrances. On the contrary, it is expressly said that the undischarged encumbrances are about equal to the amount of the note, which is now several times the penal sum of the bond of

the executrix. The case of Williams is solely supported by a number of unrelated facts and circumstances which are consistent with his own mistake, negligence, or voluntary acquiescence when the sale was consummated, but which neither singly nor in combination show bad faith on the part of Richard M. Neely, or knowledge of the failure of consideration for the note and mort-

gage, or absence of consideration for his purchase of them.

For these reasons, I am of the opinion that the decree of the circuit court should be affirmed.

Petition for rehearing denied February 10, 1905.

KANSAS SUPREME COURT.

Charles N. STEPHENSON, *Plff. in Err.*,
v.

Terra CORDER, by Next Friend.

(.....Kan.....)

*A farmer had driven a team of eleven-year-old horses 17 miles to a wagon loaded with about a ton's weight; had hitched one of them, as he had been frequently in the habit of doing, to a hitching rail in front of a store; was engaged in unloading his wagon, going back and forth for this purpose but a short distance. The halter with which the horse was hitched was apparently in good condition, and no defect therein was shown. While the team was standing quietly, a boy, in turning over the hitching rail near the head of the team, struck the nose of the one hitched with his foot, which frightened the team and caused them to break loose, by breaking the halter, and run away, causing damage. *Held*, that the striking of the horse by the boy was the proximate cause of the accident.

(May, 6, 1905.)

ERROR to the District Court for Sumner County to review a judgment in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Reversed*.

The facts are stated in the opinion.

Messrs. Herriek & Herriek and Ivan D. Rogers, for plaintiff in error:

It was the duty of the court to determine what was the proximate cause of the injury to the plaintiff, and any determination of the question, made by the jury, is not binding or conclusive on the court.

Missouri P. R. Co. v. Columbia, 65 Kan. 390, 58 L. R. A. 399, 69 Pac. 338.

In order to warrant a finding that negli-

*Headnote by CUNNINGHAM, J.

gence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances.

Milwaukee & St. P. R. Co. v. Kellogg, 94 U. S. 460, 24 L. ed. 256; *Oleghorn v. Thompson*, 62 Kan. 727, 54 L. R. A. 402, 64 Pac. 605.

Mr. C. E. Elliott, for defendant in error: Leaving a horse or team unhitched, or negligently hitched, renders the owner liable to any and all damages that may occur by reason of a runaway.

Phillips v. Devoald, 79 Ga. 732, 11 Am. St. Rep. 458, 7 S. E. 151; *Pierce v. Connors*, 20 Colo. 178, 46 Am. St. Rep. 279, 37 Pac. 721; *Griffiths v. Olift*, 4 Utah, 462, 11 Pac. 609.

If the jury found that Stephenson was negligent, that was their province.

Union P. R. Co. v. Rollins, 5 Kan. 167; *Caulkins v. Mathews*, 5 Kan. 191; *Chicago, K. & W. R. Co. v. Prouty*, 55 Kan. 503, 40 Pac. 909; *Atchison, T. & S. F. R. Co. v. Rowan*, 55 Kan. 270, 39 Pac. 1010; *Kinchlow v. Midland Elevator Co.* 57 Kan. 374, 46 Pac. 703.

A defendant is not liable in negligence where no injurious consequences could reasonably have been contemplated as a result of the act or omission complained of, but is liable where injuries might have been anticipated or foreseen.

21 Am. & Eng. Enc. Law, 2d ed. p. 486; *Martin v. Levagood*, 47 Kan. 36, 27 Am. St. Rep. 277, 27 Pac. 122.

It is immaterial that a boy frightened the horse, causing him to run, where the defendant was negligent in leaving him.

McCahill v. Kipp, 2 E. D. Smith, 413; 21 Am. & Eng. Enc. Law, 2d ed. p. 487.

NOTE.—On the question of proximate cause as affected by intervening agency, see also, in this series, notes to *Smith v. County Court*, 8 L. R. A. 82, and *Smithwick v. Hall & U. Co.* 12 L. R. A. 279; also the later cases of *Pennsylvania R. Co. v. Hammill*, 24 L. R. A. 531; 69 L. R. A.

Goodlander Mill Co. v. Standard Oil Co. 27 L. R. A. 583; *Stone v. Boston & A. R. Co.* 41 L. R. A. 794; *Southern R. Co. v. Webb* 59 L. R. A. 109; *Cole v. German Sav. & L. Soc.* 63 L. R. A. 416; and *Nelson v. Narragansett Electric Lighting Co.* 67 L. R. A. 116.

The question of proximate cause is a matter for the jury.

21 Am. & Eng. Enc. Law, 2d ed. p. 508; *Missouri, K. & T. R. Co. v. Byrne*, 40 C. C. A. 402, 100 Fed. 359; *Central Branch Union P. R. Co. v. Hotham*, 22 Kan. 41; *Atchison, T. & S. F. R. Co. v. McCandless*, 33 Kan. 374, 6 Pac. 587; *Southern Kansas R. Co. v. Sanford*, 45 Kan. 372, 11 L. R. A. 432, 25 S. W. 891; *Missouri P. R. Co. v. Hildebrand*, 52 Kan. 284, 34 Pac. 738.

Cunningham, J., delivered the opinion of the court:

This is the action of Terra Corder to recover for her personal injuries. There is no material conflict of the evidence as to the facts of the case.

Mr. Stephenson was a market gardener living about 17 miles from the city of Wellington, to which city, during the season for marketing fruit and vegetables, extending about four months through the summer, during the term of over twelve years, he drove two or three times a week with his loads of produce. For four years of this time prior to August 5, 1901, he drove the same team that he did upon that day. It consisted of a horse and a mare, each eleven years old. They had been raised and broken by Mr. Stephenson, and used upon his farm and for road purposes. His young daughters were accustomed to drive the team, and it was considered safe and trustworthy by him. On one occasion, two years prior to the date above named, a team consisting of the mare in question and another horse, while standing unhitched in a field, became frightened, at the sudden appearance through a nearby hedge, of Mr. Stephenson's young daughter, and ran off with a plow to which they were attached. On another occasion the same mare, with another horse, becoming unhitched in some unknown way in the town of Belle Plain, ran about a block and a half. No other instances of misconduct or viciousness by this team or either of them was shown. They were well broken and quiet, and had never been known to pull at the halter when hitched. On August 5, 1901, Mr. Stephenson, in accordance with his custom, having driven to Wellington from his home, 17 miles away, late in the afternoon, with a load weighing from 1,800 to 2,200 pounds, stopped his team in front of a grocery store in order to unload his produce. He drove up in an angling direction toward the hitching rail, so that the mare being on the inside, and nearest the rail, he hitched her only. The headstall of the halter with which she was hitched was made of 1¼-inch leather; the hitching part was a rope ½ inch or more in diameter. It was a halter which he had been in the habit of using, but for

how long does not appear, but it was apparently in a fair condition. When he drove up he noticed some boys standing around. They not infrequently came to him to get such damaged fruit or melons as he might wish to give them, and for that purpose frequently climbed upon the hind part of the wagon. After hitching the team, he proceeded to unload his produce, passing back and forth from the wagon to the grocery. While he was passing into, or while in, the grocery on one of these trips, a boy, in turning over the hitch rail, or, as the witness termed it, making a "flip-flop," struck the mare on the nose with his foot, frightening the team, and causing them to rear back with such force as to break the chin strap of the halter with which the mare was hitched, so that the team became loosened, ran down the street and collided with a buggy in which Miss Corder was riding, threw her out and very severely injured her. Before the boy struck the mare with his foot the team had been standing quietly. It was accustomed to being hitched in this manner and place. A verdict was returned in favor of the plaintiff below, and judgment entered thereon.

Many errors are assigned, some of which might serve to reverse and remand for a new trial. We prefer, upon the plain facts of the case, to address ourselves to vital questions, rather than mere matters of practice.

The basis of defendant's liability, of course, was his alleged negligence. This was in his leaving his team standing insecurely hitched or fastened. The only delinquency in this respect which can be claimed for the evidence is that the chin strap of the halter was not sufficient, and the only evidence to support such a claim is that it broke. It may well be questioned whether, under the evidence in this case, the fact of its breaking draws with it any presumption that it was defective so as to make its use under ordinary circumstances negligence. In *Missouri & K. Teleph. Co. v. Vandervort* (Kan.) 79 Pac. 1068, where a neck-yoke strap was broken by the sidewise plunge of a frightened team, this court said: "There is no evidence from which the jury might have found that the harness was defective; the only evidence being that of the plaintiff himself, where he said: 'My harness had been used about five months, or scarcely that.'" There was little, if anything, more shown in the case at bar.

Ordinary care is all that was required of the defendant, and ordinary care does not require that all possible means for avoiding accident should be availed of. Quite true. The accident would not have occurred had the horses been hitched to an unbreakable

rack with an unbreakable chain. Neither would it have occurred had not the defendant driven to the city on that day, but ordinary care does not require the use of such precautions; if it did, it would, in the language of this court in *Cleghorn v. Thompson*, 62 Kan. 727, 54 L. R. A. 402, 64 Pac. 605, "paralyze human effort and action on all lines." What the defendant was doing at the time was what he had done many times before without injury, and apparently what he or any reasonably prudent man would have done under the circumstances. It is suggested that the fact that he saw boys about there ought to have warned him that some of them might do the thing that the boy in question did. We hardly think this suggestion can be seriously urged; certainly it cannot be seriously entertained. Neither do we see anything in the character of the team which warrants any extraordinary precaution in the matter of fastening them. Whatever of dereliction was shown was not because of their breaking loose when tied, but because the mare had run away on two separate occasions upon sufficient provocation or otherwise. Ordinarily the team was roadworthy, being well broken and quiet, and it is shown that neither of them had ever been known to pull at the halter when hitched.

Did affirmance rest upon a sufficient showing of defendant's negligence, we should greatly hesitate to affirm. The further question of the proximate cause of the injury, however, demands our attention, and we pass to its consideration.

The jury, in answer to one of the special questions, and, as we think, in exact accordance with the evidence, found that the horses were caused to become frightened and to run away because the boy struck the one that was tied, on the nose, with his foot. So, granting that the team was not tied as securely as ordinary care would have required, we are confronted with the fact that this neglect did not cause the accident, and it is well settled that it is the proximate cause of an injury which must bear the burden of the result. Many law-writers and courts have attempted to give us a definition of proximate cause, fairly intelligible, which should be of such flexibility as to be adapted to general application. They have but indifferently succeeded; neither will they in the future succeed any better. A definition from one of the most recent authors, and, perhaps, from all considerations, one of the fairest, is the following: "Negligence is the failure to exercise the ordinary care of prudent men under all the attending circumstances. It follows that the negligence of a person cannot be the proximate cause of a harm to another following it, unless, under

all the attending circumstances, ordinary prudence would have admonished the person sought to be charged with the negligence that his act or omission would probably result in injury to someone. The general test as to whether negligence is the proximate cause of an accident is therefore said to be whether it is such that a person of ordinary intelligence should have foreseen that an accident was liable to be produced thereby. Proximate cause is therefore probable cause, and remote cause is improbable cause." 1 Thomp. Neg. § 50. This court early attempted to analyze the philosophy and make a definition of proximate cause. It said in the case of *Atchison, T. & S. F. R. Co. v. Stanford*, 12 Kan. 377, 15 Am. Rep. 362, in speaking of a wrongdoer: "He is responsible for any number of injurious results consecutively produced by impulsion, one upon another, and constituting distinct and separate events, provided they all necessarily follow from the first wrongful cause. Any number of causes and effects may intervene between the first wrongful cause and the final injurious consequence; and if they are such as might, with reasonable diligence, have been foreseen, the last result, as well as the first and every intermediate result, is to be considered in law as the proximate result of the first wrongful cause. But whenever a new cause intervenes which is not a consequence of the first wrongful cause, which is not under the control of the wrongdoer, which could not have been foreseen by the exercise of reasonable diligence by the wrongdoer, and except for which the final injurious consequence could not have happened, then such injurious consequence must be deemed to be too remote to constitute the basis of a cause of action." The court, in *Wright v. Chicago & N. W. R. Co.* 27 Ill. App. 212, quotes the foregoing with approval, and adds that the words in italics point out the correct distinction. In *Chicago, K. & W. R. Co. v. Bell*, 1 Kan. App. 71, 41 Pac. 209, the law relative to proximate cause is stated as follows: "Before an act of negligence can be made the basis for a recovery of damages, it must appear that such act was the natural and proximate cause of the injury, or directly contributed thereto." In *Cleghorn v. Thompson*, 62 Kan. 727, 54 L. R. A. 402, 64 Pac. 605, the following from *Allegheny v. Zimmerman*, 95 Pa. 295, 40 Am. Rep. 649, was quoted with approval: "One is answerable in damages for the consequences of his faults only so far as they are natural and proximate, and may therefore have been foreseen by ordinary forecast, and not for those arising from a conjunction of his own faults with circumstances of an ex-

traordinary nature." In *Missouri P. R. Co. v. Columbia*, 65 Kan. 390, 58 L. R. A. 399, 69 Pac. 338, this court has given its most recent views upon the question; which case in its ultimate conditions bears a strong analogy to the one at bar. In the syllabus of the case the court announces the law as follows: "In a case where two distinct, successive causes, wholly unrelated in operation, contribute toward the production of an accident resulting in injury and damage, one of such causes must be the proximate, and the other the remote, cause of the injury." "A prior and remote cause cannot be made the basis of an action for the recovery of damages, if such remote cause did nothing more than furnish the condition, or give rise to the occasion, by which the injury was made possible, if there intervened, between such prior or remote cause and the injury, a distinct, successive, unrelated, and efficient cause of the injury." "In a case where it is either admitted, or from the facts as found established, that two distinct, successive causes, unrelated in their operation, conjoined to produce a given injury, the question of remote and proximate cause becomes one of law for the decision of the court, and not of fact for the determination of the jury, and the determination of this question of law by the jury is not binding or conclusive on the court." In the body of the opinion this further discussion was had: "The existence or nonexistence of negligence in any given case wherein the facts are disputed is a question of fact to be determined by the jury. When the facts are undisputed, and only one inference or deduction is to be drawn from them, a question of law is presented for the court. *Dewald v. Kansas City, Ft. S. & G. R. Co.* 44 Kan. 586, 24 Pac. 1101. However, it is not every act of negligence that furnishes a basis for recovery of damages sustained. In the case of *Cleghorn v. Thompson*, 62 Kan. 727, 54 L. R. A. 402, 64 Pac. 605, this court held: 'Negligence, to be actionable, must result in damage to someone, which result, in the absence of wantonness or *malus animus*, might have been reasonably foreseen by a man of ordinary intelligence and prudence, and be the probable result of the initial act. The allegation of negligence is not sustained by evidence of acts resulting in damage to another, which result is not the reasonable and ordinary outcome of such acts, and which would not have been foreseen or anticipated by the exercise of ordinary prudence and foresight under all the circumstances of the case. . . . Negligence is not the proximate cause of an accident, unless, under the circumstances, the accident was a probable as well as natural consequence thereof,—one which might

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reasonably have been foreseen by a man of ordinary intelligence and prudence.' . . . In cases of this character, where two distinct, successive causes, unrelated in operation, to some extent contribute to an injury, it is settled that, where there is an intervening and direct cause, a prior and remote cause cannot be made the basis for recovery of damages, if such prior cause did no more than furnish the condition, or give rise to the occasion, by which the injury was made possible. It seems to be sound in principle, and well settled by authority, that where it is admitted or found that two distinct, successive causes, unrelated in their operation, conjoin to produce a given injury, one of them must be the proximate, and the other the remote, cause of the injury, and the court, in passing on the facts as found or admitted to exist, must regard the proximate as the efficient and consequent cause, and disregard the remote cause."

Now, if we grant that the chin strap of the halter was defective, and that this sufficiently appeared in the evidence, and that Stephenson knew of this defect, can it be said, in view of the law as heretofore laid down by this court, that such defect was the proximate cause of the accident? The injurious result would not have followed had not the new and independent cause intervened. This new cause had no causal connection with the negligence of Stephenson. The hitting of the mare on the nose by the boy was not caused by the defect in the halter, neither was it under the control of Stephenson, neither can it be said with the slightest fairness that it could have been foreseen by the exercise of reasonable diligence on his part. The most that can be said is that the defect in the halter,—if defective,—and the frightening of the team by one of them being struck on the nose by the boy's foot, were two distinct successive causes, wholly unrelated in operation, which contributed to the production of the accident resulting in the injury and damage; and therefore the frightening of the team, being the immediate and probable cause, is the proximate cause, and the defect in the halter, being the secondary and improbable cause, is the remote cause. This being so, the defendant, Stephenson, was not liable for the unfortunate accident, and his request that the jury be so instructed should have been granted.

The judgment will be reversed, and the case remanded for further proceedings.

All the Justices concur.

Petition for rehearing denied.

W. E. SNYDER, *Plff. in Err.*,
v.

Charles N. MILLER *et al.*

(.....Kan.....)

*1. A mortgage securing a series of notes due at intervals of one year provided that nonpayment of any one of them, together with nonpayment of taxes due on the mortgaged premises, should mature the entire debt. None of the notes was paid at maturity. At the date of the maturity of the first note, taxes on the land were due and unpaid, and such default continued until after all the notes were due. A purchaser of the land from the mortgagor, who did not assume payment of the mortgage, then paid the taxes. Subsequent to the payment of taxes, and more than five years from the date of the default upon the first note and taxes, the mortgagee brought suit to foreclose the mortgage. *Held:*

a. The statute of limitations commenced to run at the date of the default upon the first note and taxes.

b. The running of the statute of limitations was not suspended by the payment of taxes.

c. By paying the taxes the landowner did not waive the right to plead the statute of limitations, or estop himself from so doing.

2. The case of *First Nat. Bank v. Peck*, 8 Kan. 663, approved and followed, and the case of *Douthitt v. Farrell*, 60 Kan. 195, 56 Pac. 9, criticised.

(May 6, 1905.)

ERROR to the District Court for Ottawa County to review a judgment in favor of defendants in an action brought to foreclose a mortgage securing certain promissory notes. *Affirmed.*

The facts are stated in the opinion.

Messrs. E. C. Sweet and Garver & Larimer, for plaintiff in error:

Where the condition of the mortgage is that the whole debt shall become due upon the failure to pay "interest and taxes," both conditions must exist.

Lewis v. Lewis, 58 Kan. 563, 50 Pac. 454.

But, even where both such conditions have existed so as to start the running of the statute of limitations, the subsequent payment of the taxes by one interested in their payment suspends the operation of the statute.

Douthitt v. Farrell, 60 Kan. 195, 56 Pac. 9.

A payment by Miller, the subsequent grantee of the land, had the same effect as if such payment had been made by the mortgagor himself.

*Headnotes by BURCH, J.

NOTE.—As to effect of statutory bar of principal debt on right to foreclose a mortgage or deed of trust, see, in this series, *Kulp v. Kulp*, 21 L. R. A. 550.
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Schmucker v. Sibert, 18 Kan. 104, 26 Am. Rep. 765; *Mo Lane v. Allison*, 60 Kan. 441, 56 Pac. 747.

Messrs. Thompson & King, for defendants in error:

When a default matured all the notes, and this default continued until after the time when the notes became due by their terms, the purpose of the conditions had been accomplished, and they were *functus officio*; and the payment of taxes on the mortgaged premises after that time, when the statute of limitations was running on the face of the notes, and not under the conditions in the mortgage, could not affect the operation of the statute.

Lewis v. Lewis, 58 Kan. 564, 50 Pac. 454; *Green v. Goble*, 7 Kan. 301; *Atchison, T. & S. F. R. Co. v. Atchison Grain Co.* 68 Kan. 585, 75 Pac. 1051.

Burch, J., delivered the opinion of the court:

This proceeding in error grows out of an action commenced in the district court of Ottawa county on December 12, 1903. The petition prayed for the foreclosure of a mortgage securing four promissory notes due respectively on February 18, 1890, February 18, 1897, February 18, 1898, and February 18, 1899. The mortgage contained a provision to the effect that, if any one of the notes secured and the taxes upon the mortgaged premises should not be paid when due and payable, the entire mortgage debt should at once mature. The absence of the makers of the notes from the state was pleaded to avoid the running of the statute of limitations. The answer pleaded default in the payment of taxes for the year 1895, resulting in a tax sale of the land in 1896 followed by an indorsement on the tax-sale certificate of taxes paid by the certificate holder for the years 1896, 1897, and 1898. The defendant purchased the land subject to mortgage on November 18, 1897, and was not charged with any personal liability on the notes. Because of the default in the payment of the taxes for the year 1895, and the default in the payment of the note due February 18, 1896, he claimed the entire mortgage debt matured on the date last mentioned, and prayed the benefit of the statute of limitations. The reply pleaded payment of the delinquent taxes by the defendant on August 21, 1899. A demurrer to the reply was sustained, and the correctness of this ruling is the matter now in question.

As long ago as 1871 this court decided that a stipulation in a mortgage of the same character as that under consideration was not a one-sided affair, vesting a mere option in the mortgagee, but that the mortgagor had an equal right with the mortgagee to in-

sist upon it, and to receive whatever advantages it might confer upon him. Mr. Justice Brewer, speaking for the court, said: "This clause is inserted in mortgages usually for the benefit of the mortgagee; but, being a valid stipulation, the mortgagor has equal right to insist upon it, and receive whatever advantage he can from its enforcement. When the payor, at the expiration of six months, failed to pay the note then due, by the terms of the contract all three notes became due. The statute of limitations began to run on all, and a subsequent purchaser purchased after maturity." *First Nat. Bank v. Peck*, 8 Kan, 663. The same rule was announced in England at least as early as 1843. A defendant gave a warrant of attorney to secure a debt payable by instalments; the plaintiff having the right in case of any default to have judgment and execution for the whole, as if all the periods for payment had expired. In an action of assumpsit it was held that the defendant might show, under a plea of the statute of limitations, that the first default was made more than six years before action, and that this was a complete defense, not only as to instalments due more than six years before, but also as to those due within that period. Lord Denman, Ch. J., said: "We are of opinion that the defendant is right, and that the cause of action accrued upon the first default for all that then remained owing of the whole debt. . . . In this case there was a default more than six years ago, and upon that the plaintiff might, if he pleased, have signed judgment, and issued execution for all that remained due, or he might have maintained his action. If he chose to wait till all the instalments became due, no doubt he might do so; but that which was optional on the part of the plaintiff would not affect the right of the defendant, who might well consider the action as accruing from the time that the plaintiff had a right to maintain it. The statute of limitations runs from the time the plaintiff might have brought his action, unless he was subject to any of the disabilities specified in the statute; and, as the plaintiff might have brought his action upon the first default, if he did not choose to enter up judgment we think that the defendant is entitled to the verdict upon the plea of the statute of limitations." *Hemp v. Garland*, 4 Q. B. 519, 523, 524. This case was expressly approved in 1891 by the court of appeal, on appeal from the Queen's bench division, in the case of *Reeves v. Butcher* [1891] 2 Q. B. 509. Lindley, L. J., said: "I am of opinion that we cannot differ from the judgment below without altering the law. The agreement is one reasonably easy to be understood. It provides for a loan for five years, subject to

a provision that, if 'default is made in punctual payment of interest, the principal shall be recoverable at once. Now, the statute of limitations (21 Jac. I. chap. 16) enacts that such actions as therein mentioned, including 'all actions of debt grounded upon any lending or contract without specialty,' shall be brought 'within six years next after the cause of such action or suit, and not after.' This expression, 'cause of action,' has been repeatedly the subject of decision, and it has been held, particularly in *Hemp v. Garland*, decided in 1843, that the cause of action arises at the time when the debt could first have been recovered by action. The right to bring an action may arise on various events, but it has always been held that the statute runs from the earliest time at which an action could be brought." The reason for allowing the debtor to take advantage of the stipulation is well stated by the supreme court of Texas in the case of *Harrison Mach. Works v. Reigor*, 64 Tex. 89, 90, 91, as follows: "The purpose of statutes of limitation is 'to compel the settlement of claims within a reasonable period after their origin, and while the evidence upon which their enforcement or resistance rests is yet fresh in the minds of the parties or their witnesses.' Wood, Limitation of Actions, § 5. If the holder of a note may, at his option, treat the claim as due at a later date than the maker has agreed that it shall mature, and thus prescribe a different date at which it shall be barred, the evidence for its enforcement may be preserved, whilst that for its resistance may be destroyed, and thus the purpose of the statute be wholly defeated. . . . Here no option was left to the creditor. He was forced to treat the debt as due. It is true he was not obliged to bring suit upon it upon default in payment of the first note. Neither is any creditor compelled to sue upon a claim so soon as it becomes due. But the statute was put in motion without consulting his wishes, by the very terms of the contract, which neither party had any right to change without the consent of the other." So in *Noell v. Gaines*, 68 Mo. 649, 656, it is said: "It cannot, with any show of reason, be urged that the notes could, under the terms of the contract, fall due for one purpose and not for another. If they fell due when the contingency happened, and because it happened, and because the parties, upon valid consideration, had thus contracted, it must needs follow that the face of the notes, under the circumstances mentioned, ceased to furnish any guide as to their maturity." And the benefit to be derived by sureties from a contract providing that nonpayment of a part of the debt shall mature the whole is forcefully stated by the Kentucky court of

appeals as follows: "It is easy to conceive that a surety might require such a clause as a condition for his own protection. He might be unwilling to bind himself for five years unconditionally, whereby he might be compelled to pay at the end of that time both the principal and interest, and might very prudently say: 'Insert a clause which requires the interest to be paid quarterly, and which provides that, if not so paid, the debt is to become due, so that, if not paid, I will have the right to pay it or secure myself.'" *Ryan v. Caldwell*, 106 Ky. 543, 50 S. W. 968, 967. The reasoning of these cases applies with peculiar force to the situation of one who has purchased subject to a mortgage which he has not assumed, and especially so if the mortgagors have left the state, and he may be deprived of their aid in making proper defenses to a belated claim. When on the United States circuit bench, Mr. Justice Brewer said: "Now, here, according to the averments of this petition, this mortgage and this deed of trust were executed at the same time, and to secure these notes; they were parts and parcels of one transaction, and are to be construed as one instrument; and if there were but one instrument, and that containing a promise to pay money at three separate times, with a proviso that, upon a failure to pay the first sum at the time named, all should become due, I cannot see how, logically, we can escape the conclusion that the parties have made an absolute, unconditional stipulation, operative under all circumstances and for all purposes. I had occasion when I was on the supreme bench of my own state to consider this matter in two or three cases, and that was the conclusion I then came to, and it is unchanged. I am aware that Judge Hough, in his dissenting opinion, suggests certain contingencies in which the application of this rule, where there are several negotiable promissory notes secured by mortgages or deeds of trust, might work out some embarrassments; but still I do not think that the possibility of such embarrassments can avoid the clear force of the language the parties have used. I do not see why they cannot make such a contract, and if they made it, and its language is clear, I do not see why the courts should not give force and effect to it." *Wheeler & W. Mfg. Co. v. Howard*, 28 Fed. 741. Although the courts of some of the states and some of the Federal courts have taken a different view, the doctrine propounded in *First Nat. Bank v. Peck* has been steadily adhered to by this court. It has been carried to the extent of holding that a tender of delinquent taxes, whose nonpayment constituted the sole breach of the contract, and the payment of

all accrued costs, would not, after suit had been commenced, discharge the default and reinstate the contract as to notes otherwise not due for a long period of time. *Stancil v. Norton*, 11 Kan. 218. The legislature has not seen fit to interfere, and the rule thus early announced is now definitely established as a part of the law of this state. *Darrow v. Scullin*, 19 Kan. 59; *Meyer v. Graeber*, 19 Kan. 165; *Ellwood v. Wolcott*, 32 Kan. 526, 4 Pac. 1056; *Lewis v. Lewis*, 58 Kan. 564, 50 Pac. 454; *Douthitt v. Farrell*, 60 Kan. 195, 56 Pac. 9; *Kennedy v. Gibson*, 68 Kan. 612, 75 Pac. 1044. At a date earlier than that of the decision in *First Nat. Bank v. Peck* this court held: "As a general rule, when a statute begins to run, it continues to run until the demand is barred. This principle is laid down with great uniformity in all the authorities, and may be considered as settled. Undoubtedly the legislature may prescribe differently, and in this state several exceptions are made, but none such as is claimed in this case." *Green v. Goble*, 7 Kan. 297, 301.

By applying the rules recognized in these cases to the facts of the case under consideration, it becomes plain that the demurrer to the reply was properly sustained. But the defendant claims that the court should have been guided by the case of *Douthitt v. Farrell*, 60 Kan. 195, 56 Pac. 9, the syllabus of which reads as follows: "Where a promissory note was given, by the terms of which the principal became due in five years from date, with interest payable semiannually; and a real-estate mortgage securing it was given, which provided that upon default in payment of any of the interest when due, and the taxes on the mortgaged premises when due, the whole indebtedness should mature; and both such defaults occurred; and the statute of limitations thereupon commenced to run against the indebtedness; and the delinquent taxes were thereafter paid by the mortgage debtor,—held, that the running of the statute in his favor was ended by his voluntary correction of the one default; and, although more than five years elapsed from the occurrence of the two defaults mentioned, the cause of action on the note and mortgage was not barred." This decision was based upon the case of *Smalley v. Ranken*, 85 Iowa, 612, 52 N. W. 507. *Smalley v. Ranken* refers, in turn, to *Watts v. Creighton*, 85 Iowa, 154, 52 N. W. 12, and *Watts v. Creighton* discusses and expressly rejects the doctrine of *First Nat. Bank v. Peck*. The argument in the *Smalley Case* is as follows: "What did the parties stipulate that the taxes should be paid by defendant for? To protect the plaintiff from the loss or impairment of his security. At the filing of the amendment every right

of the plaintiff in this respect was fully protected. The object of the condition of the mortgage was to enable the plaintiff to treat the debt as due, and save himself from loss because of the default. After the payment of the taxes, all such liability for loss was at an end. His situation was exactly as if there had been no default, as far as the conditions for forfeiture were concerned. To justify a forfeiture under such circumstances would work an injustice that the court ought not to permit." This reasoning proceeds upon premises wholly incompatible with those employed in the decisions of this court already quoted and cited. Stipulations for the acceleration of the maturity of debts do not provide penalties or forfeitures. "It is therefore settled by the overwhelming weight of authority that if a certain sum is due, and secured by a bond, or bond and mortgage, or other form of obligation, and is made payable at some future day specified, with interest thereon made payable during the interval at fixed times, annually or semiannually or monthly, and a further stipulation provides that, in case default should occur in the prompt payment of any such portion of interest at the time agreed upon, then the entire principal sum of the debt should at once become payable, and payment thereof could be enforced by the creditor, such a stipulation is not in the nature of a penalty, but will be sustained in equity as well as at law. In exactly the same manner, if a certain sum is due, and is secured by any form of instrument, and is made payable in specified instalments, with interest, at fixed, successive days in the future, and a further stipulation provides that, in case of a default in the prompt payment of any such instalment in whole or in part at the time prescribed therefor, then the whole principal sum of the debt should at once become payable, and payment thereof could be enforced by the creditor, such stipulation has nothing in common with a penalty, and is as valid and operative in equity as at the law." 1 Pom. Eq. Jur. 2d ed. § 439. "Provisions such as that under consideration are not in the nature of penalties; nor have they anything in common with forfeitures, but are to be regarded as nothing more than agreements between the parties fixing the time and the conditions upon which the whole debt may become due. Such an agreement may be as advantageous to the payor as to the payee. *Buchanan v. Berkshire L. Ins. Co.* 96 Ind. 510; *Malcolm v. Allen*, 49 N. Y. 448; 1 Pom. Eq. Jur. § 439; 2 Jones, Mortg. § 1186." *Moore v. Sargent*, 112 Ind. 484, 485, 14 N. E. 466. Indeed, the supreme court of Iowa itself, in a later case, has expressly held that such stipulations are not to be regarded as pro-

viding for penalties or forfeitures. *Swearingen v. Lahner*, 93 Iowa, 147, 26 L. R. A. 765, 57 Am. St. Rep. 261, 61 N. W. 431.

But a more fundamental consideration is that the parties made the contract, and the courts cannot make another to take its place. Its language excludes the idea that the creditor may or may not "treat the debt as due." It becomes due in fact. If an election were all that the parties intended, words appropriate to that purpose should have been used. "It is not necessary to assume that the parties to such a contract intended to provide for none but wrongful refusals to pay instalments. It might happen that the debtor, upon good grounds, would afterwards deny his liability upon the contract, and therefore refuse to pay instalments, in which case the provision would serve him a useful purpose, in bringing the question at issue to a prompt test, and not leave it entirely with the creditor to delay until, perhaps, evidence of the defense had been lost. The question at last is one of construction of the language used, and that which makes it mean just what it says is not without reason or good authority to support it. Where the purpose is only to give the option to the creditor, language expressive of it may be easily inserted." *San Antonio Real Estate Bldg. & L. Asso. v. Stewart*, 94 Tex. 441, 86 Am. St. Rep. 864, 868, 61 S. W. 386. This distinction was recognized, and, indeed, controlled the decision, in the very recent case of *Kennedy v. Gibson*, 68 Kan. 612, 75 Pac. 1044. The opinion reads: "The note provided that a default should mature the entire debt, at the option of the holder, while the provision in the mortgage was that a default made the whole debt due, regardless of an election by the holder. Which of these provisions should control? In the absence of an option clause in the note, the stipulation in the mortgage would have operated to mature the whole debt upon a default, and the mortgagors could have taken advantage of the stipulation. *First Nat. Bank v. Peck*, 8 Kan. 660. The stipulation in the note as to default, however, conflicts with that of the mortgage, and, of necessity, the former controls. The note contains the obligations of the mortgagors, and the mortgage, concurrently executed, is an incident to and security for the note. The stipulation in the note must therefore prevail, and, unless the holder exercised the option and elected to declare the whole debt due, the statute would not run earlier than the time originally fixed for the maturity of the note." Such being the established position of this court the *Smalley Case* must be eliminated as a support for the conclusion reached in the *Douthitt Case*. In deciding the *Douthitt*

Case the court in effect declared reciprocal estoppels against the parties. The debtor lost the right to plead that the statute was running on account of his default, and the creditor lost the right to sue on account of the same default. The wound was healed without a scar. The condition in the mortgage that the creditor could, under certain circumstances, insist upon payment of the note before maturity according to its terms, was restored to the status of an unbroken covenant for the future protection of the indebtedness secured, and the indebtedness itself was restored to the status of an unmatured claim. The opinion reads: "We have no doubt but that the voluntary payment of the taxes by the debtor was a waiver by him of the conditions under which the statute of limitations was running in his favor, and was a restoration by him of the plaintiff to the status of a holder of an unmatured indebtedness." Manifestly no such rehabilitation of rights could be accomplished in this case. The last note had matured by its own terms six months before the taxes were paid. The plaintiff could not be reinvested with the rights of a holder of an unmatured indebtedness, and the mutual modification of the legal relations of the parties adverted to in the *Douthitt Case* was impossible. True, the term "voluntary waiver" is used in that decision, but, as already observed, the waiver was of such a character that it necessarily worked a change in the rights of the opposite party. That the conduct of a single party to the contract may have such a far-reaching effect, unless the other party has been influenced in some manner by it, is not conceded by those courts which enforce the rule of peremptory maturity adopted in this state. Thus, in the case of *San Antonio Real Estate Bldg. & L. Asso. v. Stewart*, 94 Tex. 441, 86 Am. St. Rep. 864, 368, 61 S. W. 386, it is said: "It is not in the power of the creditor, by his acts alone, to change the rights of the parties resulting from the maturity of the debt. But both parties, by their joint action, may so alter such rights that the creditor would no longer have the right to demand, nor the debtor to pay, the entire indebtedness. . .

While neither party, by his separate action or nonaction, could impair the rights of the other, each could waive his own rights as they accrued from the default in payment of an instalment so as to estop him from relying upon such default. To accomplish this, it would only be necessary that each should so act as to justify the other in believing, and acting upon the belief, that the effect of the failure to pay an instalment was to be disregarded, and that the contract should stand as if there had been no default." Likewise, in the case of

Moore v. Sargent, 112 Ind. 484, 485, 14 N. E. 466, it is said: "The provision in the mortgage for accelerating the time when the whole debt should become due and collectible did not make the maturity of the debt evidenced by the second note depend upon the election of the mortgagee. The second note became absolutely due upon failure to pay the first note at maturity. According to the terms of the contract, upon the happening of that event the whole debt became as effectually and absolutely due as if further credit had not been, in any contingency, agreed upon. The mortgagor had then the right to pay or tender the whole debt, and by that means suspend the accumulation of interest. The acceptance of a part by the mortgagee did not defeat the right of the mortgagor to pay or tender the balance at once, nor did it, without a new agreement, extend the time or prevent the former from enforcing payment of what remained unpaid. . . . Under a provision which gives the creditor the exclusive right to elect, within a time fixed, whether or not he will treat the whole debt as due in case the debtor makes default in paying interest, it may well be that the unconditional acceptance of interest by the creditor, after the expiration of the time, without notice of the election, would waive the default. 2 Jones, Mortg. § 1186. Or if the default was induced by the fraudulent or inequitable conduct of the creditor, or by any agreement or promise upon which the debtor might rely which operated to mislead or throw the debtor off his guard, a court of equity would interfere to stay proceedings, or the action might be abated upon the facts being properly pleaded."

But under either theory the judgment of the district court in this case was correct, because the condition in the mortgage now in controversy had spent its force when the taxes were paid. No acceleration of the maturity of the notes secured could occur by virtue of it. Failure to comply with it could not start the running of the statute, and a payment of taxes could not stop the statute from running. No rights could be gained or lost on account of the stipulation. On February 18, 1896, a cause of action accrued in plaintiff's favor, and the statute of limitations then commenced to run against it. From February 18, 1896, until the notes matured by their terms, the plaintiff had an indisputable right to bring suit upon them, and during all that time the statute of limitations continued to run. After the notes matured by their terms, the cause of action continued to exist, unimpaired, and the statute continued to run. The payment of taxes on August 21, 1899, could not prevent suit on the notes, and hence could not

suspend the operation of the statute, and it continued to run after that date as before. Such having been the condition of affairs for more than five years before suit was commenced, the right to recover was then barred. The taxes were paid by one who bore no privity to the debt, and owed the mortgagee no duty concerning it. His conduct implied no recognition either of the existence of the notes or of the right to enforce

them. It was entirely independent of, and unrelated to, any cause of action the plaintiff might have. It had and could have no effect whatever upon the conduct or rights of the mortgagee, and waiver cannot be predicated upon it.

The judgment of the District Court is affirmed.

All the Justices concur.

IOWA SUPREME COURT.

Evalyn ALLEN, *Appt.*,

v.

NORTH DES MOINES METHODIST EPISCOPAL CHURCH *et al.*

(.....Iowa.....)

1. In the absence of fraud, a creditor of a religious corporation has no right to enforce his claim against property formerly belonging to it after it has been sold on mortgage foreclosure, the corporation dissolved, a new corporation organized out of the old members and new ones, and the property bought from the purchases at the

foreclosure sale, although the new corporation proceeds to carry on the work of the old one at the old location, and maintains the same relation as the old one to the general religious denomination.

2. A creditor of a religious corporation has no right of action against the individual members of it as such.

3. A religious corporation is not bound by the act of its minister in making use of the membership roll of a former corporation, the title to whose property it acquired through a foreclosure sale, so as to make such act significant upon the question of the identity of the two corporations.

4. Refusal to grant leave to amend the

NOTE.—Liability of member of religious society for its debts.

I. *Scope*, 255.

II. *Early rule in Massachusetts, Connecticut, and Maine*, 255.

III. *Incorporated societies*, 256.

IV. *Unincorporated societies*, 257.

V. *Résumé*, 258.

I. *Scope*.

This note is confined to a consideration of those cases in which the liability of the members of a religious society for its debts as members merely is decided, and does not include cases in which the members whom it is attempted to hold liable acted as officers of the church, or in some representative capacity, as that of deacons, vestrymen, members of building committees, etc.

II. *Early rule in Massachusetts, Connecticut, and Maine.*

The early cases and dicta on this subject in Massachusetts, Connecticut, and Maine have been placed in a division by themselves because of the existence of the parish system in those states, and the peculiar character of these ecclesiastical societies before the adoption of modern constitutions. They were neither private corporations, nor yet mere voluntary, unincorporated associations, but were in fact municipal and public corporations, the parishes being originally coextensive and identical with the several towns, which at first exercised parochial powers; and, when in some instances the parishes became separate communities, they still retained their public and political character. They embraced substantially all the persons residing within their territorial limits, and no act was necessary to constitute member-
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ship. It followed residence within the limits of the parish as a matter of course. To support and maintain religious instruction and worship through the agency of religious societies was a public duty enjoined by law. By immemorial usage the inhabitants of a town had been held liable for its debts; and it is said in *Richardson v. Butterfield*, 6 Cush. 191, that it was probably this strong resemblance between towns and parishes as to the locality of members and the general features of their organization that led to the application of a similar rule to members of parishes. The court in this case added that now the fact of residency within the territorial limits of a parish no longer constitutes membership thereof, and that territorial parishes are now to all intents and purposes, as regards their relation to their members, as much close or exclusive corporations as poll-parishes, or incorporated societies. The law now makes no compulsory provision for the support of ecclesiastical societies, and no person can become a member of such a society until he has voluntarily united with it. These societies, therefore, seem now to differ in no way, so far as the rights and liabilities of their members are concerned, from any other associations or corporations.

In Massachusetts and Connecticut this early rule has been repudiated, but in Maine the question seems not to have come before the courts in recent years.

The property of an individual member of a territorial parish may be taken to satisfy an execution against the parish; but such an execution cannot be levied on the property of one who has ceased to be a member of the parish before the levy, although he was a member when judgment was recovered. *Chase v. Merrimack Bank*, 19 Pick. 564, 31 Am. Dec. 163.

So, execution against a parish for the cost

complaint so as to set up a new issue, after the introduction of the evidence, is not reviewable on appeal.

(March 10, 1905.)

APPEAL by complainant from a decree of the District Court for Polk County dismissing a bill filed to subject certain real estate to the lien of a judgment which complainant held against the Prospect Park Methodist Episcopal Church. *Affirmed.*

The facts are stated in the opinion.

Messrs. William M. Wilcoxon and Bowen & Brockett for appellant.

Messrs. S. F. Prouty, W. L. Smith, and E. D. Samson, for appellees:

The question whether or not a new corpo-

ration has been created, or an old one continued, is a question of intent.

1 Thomp. Corp. 1895 ed. p. 256; *Bellows v. Hallowell & A. Bank*, 2 Mason, 31, Fed. Cas. No. 1,279.

The North Des Moines corporation, being a separate and distinct corporation, cannot be held liable for the debts of the Prospect Park corporation, unless it is pleaded and proved that it received from the older corporation, or from other sources, assets belonging to the Prospect Park corporation.

1 Thomp. Corp. § 263; *Beach, Corp. § 796*; *Austin v. Tecumseh Nat. Bank*, 49 Neb. 412, 35 L. R. A. 444, 59 Am. St. Rep. 543, 68 N. W. 623; *Hopper v. Moore*, 42 Iowa, 565; *Texas State Fair & D. Exposition Assn. v. Caruthers*, 8 Tex. Civ. App. 474, 29 S. W.

of repairs on its meetinghouse cannot be levied on the property of a member who has withdrawn from the parish, but only on the property of those who are members at the time of the rendition of the judgment, or at most at the commencement of the action. *Fernald v. Lewis*, 6 Me. 264. The court refers to the fact that at common law corporators are not answerable in their persons or their private property for the debts or liabilities of the corporation, but says that, "by the usage and practice—for it does not seem to have any other foundation—of Massachusetts and Maine, the case of towns and parishes forms an exception to this principle."

And in 5 Dane's Abridgment, 158, it is said that, to the principle that an individual member of an aggregate corporation is not liable for debts or demands against it, towns or parishes in Massachusetts are, by immemorial usage, an exception, for on an execution against one of them the body or estate of any inhabitant may be taken to satisfy it, and he has his remedy over against the corporation.

Ecclesiastical societies incorporated before the adoption of the Connecticut Constitution stood upon the same footing with respect to the liability of their members for debts as towns, school societies, cities, etc. *Dictum* in *McLoud v. Selby*, 10 Conn. 395, 27 Am. Dec. 689.

It is also said, *obiter*, in *Beardsley v. Smith*, 16 Conn. 368, 41 Am. Dec. 148, that theretofore it had not been doubted that the inhabitants of located ecclesiastical societies were individually liable for debts of the society.

And in a case where the property of the member of an ecclesiastical society was taken by distress for the payment of a tax levied against the society, and in which it was contended that the property of a member could not be taken for the debt of the society, the court said that, if the tax was properly laid, he could not see but that the distress was warranted, reasoning by analogy from the practice of New England to hold the inhabitants of a town liable for the town's debts, which practice also obtained in England. But it was held that the tax was illegal because the society was exempt. *Atwater v. Woodbridge*, 6 Conn. 227, 16 Am. Dec. 46.

III. Incorporated societies.

The members of a religious corporation are 69 L. R. A.

not individually liable, as such, to a creditor of the corporation. *ALLEN v. NORTH DES MOINES M. E. CHURCH.*

The property of a member of an incorporated religious society organized by voluntary association, having no territorial limits, cannot be seized on execution against the society itself for debt. *Richardson v. Butterfield*, 6 Cush. 191.

A debt against a voluntary religious corporation without local limits cannot be enforced by levying an execution against the corporation upon the private property of one of its members. *Jewett v. Thames Bank*, 16 Conn. 510. The court said in this case that, although this society was without a special charter, it was essentially incorporated by virtue of the statute relating to religious societies and congregations.

But persons who were members of a religious corporation at the time of the death of its minister are individually liable to his estate for arrears of salary due him, where at that time there existed a fund which had been raised by the society for the support of the minister, sufficient to pay the indebtedness, and this money passed into the hands of the members, who formed a new society, and, instead of appropriating the fund to the payment of the former minister's salary, as was their duty, permitted it to be wasted or used for other purposes. *Bigelow v. Congregational Soc.* 11 Vt. 283. The court in this case says, however, that the individuals composing the society were not personally liable, unless they had made themselves so by some act or default, and that an execution against the society for the debt could not be levied on the separate property of the individual members. A receiver was appointed to collect whatever might remain of the fund, and apply the same, and the case was referred to a master to ascertain the situation of the fund at the time of the death of the minister, and who were members of the society at that time. The master's report was excepted to, and the matter again came before the chancellor, who overruled the exceptions, and decreed that certain individuals found to have been members of the society at the death of the minister should pay to the clerk the amount found due, with costs, and this decree was affirmed in 15 Vt. 370.

48; *National Foundry & Pipe Works v. Oconto City Water Supply Co.* 105 Wis. 48, 81 N. W. 125.

Weaver, J., delivered the opinion of the court:

Briefly stated, the plaintiff claims that in the year 1887 the defendant was incorporated for religious purposes under the laws of this state, and assumed the name of Prospect Park Methodist Episcopal Church, and that thereafter, by proper proceedings, the name of the corporation was changed to North Des Moines Methodist Episcopal Church. It is further alleged that prior to the beginning of this action plaintiff obtained a judgment against the corporation in the district court of Polk county, Iowa, un-

der the name of Prospect Park Methodist Episcopal Church, which judgment is still unpaid, and that since the change in the name of the organization it has become the owner of certain real estate upon which the plaintiff asks to have the lien of such judgment established and confirmed. By a second count of her petition the plaintiff alleges that the present church organization is identical with the one against which she obtained judgment, and that the change in its name and designation was a fraudulent scheme or device to hinder and delay its creditors. The defendants admit that the North Des Moines Methodist Episcopal Church is a corporation, and owns the real estate above referred to, but deny that said corporation is identical with the Prospect

IV. *Unincorporated societies.*

Members of a voluntary unincorporated religious association are not individually liable for its debts, unless they authorized the incurring of the obligation, or subsequently ratified the same. *First Nat. Bank v. Rector*, 59 Neb. 77, 80 N. W. 269.

And it is said *obiter*, in *Devoss v. Gray*, 22 Ohio St. 159, that a member of an unincorporated religious society cannot be held personally responsible for the debts of the society, unless it be shown that he in some way sanctioned or acquiesced in their creation.

This statement was quoted with approval in *Males v. Murray*, 7 Ohio N. P. 614, Affirmed in 23 Ohio C. C. 396, although the point was not directly involved in the case.

Members of an unincorporated religious society, who participated in a business meeting at which it was agreed to employ a pastor at a certain salary, are not liable to him individually for arrears of his salary; and such contract of employment created at most an obligation, if any, upon such members to pay their apportioned share only of such expense, where the pastor accepted his position with full knowledge that a fund to pay his salary would be raised by voluntary contribution of the members, to which alone he could look for compensation. *Riffe v. Proctor*, 99 Mo. App. 601, 74 S. W. 409.

But members of an unincorporated religious society, who were actively instrumental in incurring liabilities for it, are liable either as principals or agents having no legal principal behind them; members of the society who either authorized or ratified the transactions are also liable, while those who did not are exempt from liability. *Clark v. O'Rourke*, 111 Mich. 108, 66 Am. St. Rep. 389, 69 N. W. 147.

And in *Burton v. Grand Rapids School Furniture Co.* 10 Tex. Civ. App. 271, 31 S. W. 91, it is also said, *obiter*, that in case of a debt against an unincorporated religious society the members who incurred the liability, assented to it, or subsequently ratified it, became personally liable.

So members of an unincorporated religious association, governed in their secular affairs by a priest and trustees having power to incur debts for the association, who, through such agents, stated an account with their priest for money advanced to build a church and for ar-

rears of salary, and who agreed in writing, jointly and severally acting by their trustees and agents, to pay such sum, are individually liable for the indebtedness. *Sheehy v. Blake*, 72 Wis. 411, 39 N. W. 479, Affirmed in 77 Wis. 401, 9 L. R. A. 564, 46 N. W. 537. But the court stated explicitly that this responsibility does not rest upon the mere fact that the defendants were members of the association when the debt was incurred, but upon the ground that they approved of, or participated in, contracting it, and subsequently assumed and agreed to pay it through their authorized agents.

A member of an unincorporated religious society, who purchases an obligation against the society contracted while he was a member, and who is still a member at the time the action is brought, cannot recover a personal judgment against the other members of the society. *German Roman Catholic Church v. Kaus*, 6 Ohio Dec. Reprint, 1028. The court refers to the fact that the supreme court of the state has decided that members of such a society, who personally participate in creating a debt, may be held liable personally therefor. The evidence in this case tended to show that the persons against whom the judgment was sought had participated actively in the borrowing of the money, but, because the party suing on the claim was also a member, it was held that he could not recover. His remedy was held to be in equity against the property of the society.

A member of an unincorporated religious society, who brings an action against the other members of the society on a promissory note which declares on its face that all the property of the church is held for the payment thereof, is not entitled to a personal judgment against the members; but, inasmuch as he was a member of the society, and must have received some part of the benefit arising from the money loaned, there should be an accounting in order to determine who are the members and what proportion of the amount loaned the members other than himself must pay. *Meyer v. Lipski*, 8 Ohio S. & C. P. Dec. 584, 7 Ohio N. P. 366.

In Georgia it has been held that the members of an unincorporated religious society are liable on its contracts as joint promisors or partners. *Thurmond v. Cedar Spring Baptist Church*, 110 Ga. 816, 36 S. E. 221.

And in another Georgia case,—*Wilkins v. St.*

Park Methodist Episcopal Church, or is in any way responsible for the debts of such church. They deny all allegations of fraud. It is also alleged that the organization known as the Prospect Park Church became indebted beyond its ability to pay, and its church property, which is the property now owned by the defendants, was sold under foreclosure of mortgage, and the title wholly lost; that in such condition it was impossible to obtain contributions for the support of the society, or to purchase or erect a new building, and the corporation and society were disbanded. Under these circumstances it is said the North Des Moines Methodist Episcopal Church was organized, and an incorporation effected as a new and independent body having no connection with or responsibility for the debts of the old organization.

From this outline of the issues it will be readily seen that the one question to be considered is whether the reorganized North Des Moines Church is a mere continuation of the old corporation under a new name, or is a new corporation, which is under no legal liability for the debts of its predecessor. That the members, or some of the members, of an insolvent or dormant corporation may organize a new corporation for the promotion of the same purposes to which the old one is dedicated without becoming chargeable with its debts or obligations is too well settled for dispute. On the other hand, it is equally well settled that the mere change in the name of a corporation has no effect upon its legal status, or upon the rights of creditors. Among corporations organized for business purposes it has been, and still is, a matter of most frequent occurrence that in the initial struggle for existence they become hopelessly insolvent. Under such circumstances, the organization of a new corporation to build, if possible, a successful business on the ruins of the old is entirely legitimate, whether considered as a

proposition of law or of morals. The fact that the new organization embraces the old membership is immaterial, and in itself affords no reason why it should be held liable for the debts of the old corporation. True, the courts will watch such reorganization with care, that no fraud be accomplished, and to that end will insist that there shall be a bona fide intention to make a new and independent organization, and that it shall not take over, absorb, or convert to its use, the property or assets of the old corporation to the prejudice of its creditors. There must be something more than a mere succession in business to charge the successor with the debts or delinquencies of the party succeeded. *Hopper v. Moore*, 42 Iowa, 563; *Wyman v. Hollowell & A. Bank*, 14 Mass. 58, 7 Am. Dec. 194; *National Foundry & Pipe Works v. Oconto City Water Supply Co.* 105 Wis. 48, 81 N. W. 125; *Memphis Water Co. v. Magens*, 15 Lea, 37; *Texas State Fair & D. Exposition Assn. v. Caruthers*, 8 Tex. Civ. App. 474, 29 S. W. 48. The legal identity of the new corporation with the old ordinarily depends upon the intention of the incorporators. 1 *Thomp. Corp.* 256; *Miller v. English*, 21 N. J. L. 317; *First Soc. of M. E. Church v. Brownell*, 5 Hun, 464; 2 *Morawetz, Priv. Corp.* § 812.

There can be no doubt in the present case that the incorporators of the North Des Moines Church intended to create a new and independent organization, which should not be chargeable with the debts of the Prospect Park Church. Their legal right to perfect such an organization is also clear. If, then, their organization was in regular statutory form, and no fraud was practised upon the plaintiff as a creditor of the old corporation, the conclusion of the trial court must be upheld as correct. No question has been raised as to the formal or statutory sufficiency of the methods pursued, and we shall therefore confine our inquiry to the question of fraud.

Mark's Church, 52 Ga. 351,—where it was held that a suit against an unincorporated religious association could not be maintained, the court said that, had all its members been served, they might have been charged as joint promisors or partners.

Resumé.

It would seem that the liability of a member of a religious association for its debts should be the same as that of a member of any other corporation or association, and the majority of the decisions, which are not numerous, are decided on this theory. If the society is incorporated, the members cannot be held liable individually. If it is not incorporated, the general rule is that the members can be held liable only when they have in some way been instrumental in creating the debt, or have ratified it afterward. In Georgia, however, the rule seems to be different, as it is there held that the mem-

bers of an unincorporated religious society are liable on its contracts as joint promisors or partners. But it has been frequently declared by the courts that a partnership is an association of persons formed to carry out some undertaking from which it is expected to make a profit, and that any association from which the element of profit is absent cannot be considered a partnership.

In some of the New England states, also, the members of a religious society have been held liable for its debts, but this liability is the result of the peculiar character of such associations, and the peculiar relation of the members to them, as shown in division II. The early cases that declare this liability are now of but little value, aside from their historical interest, since, with the passing of the parish system, the reason for holding individual members liable also passed away.

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The Prospect Park Church was organized and incorporated in the year 1887, and obtained title to the tract of land mentioned in the pleadings. Encouraged by persons interested in the values of residence property in that neighborhood, and relying upon subscriptions and promises which eventually proved valueless, it erected a church building out of proportion to its financial ability, and incurred expenses beyond its power to meet. The property was heavily mortgaged, and this burden, with others incident to the mismanagement or misfortune attending the first years of the society's existence, proved too great to be removed or successfully carried. In the year 1899 the mortgage was foreclosed for something more than \$5,000, and, the property having been sold, and not redeemed, the purchaser took a sheriff's deed. The record discloses no fact or circumstance indicating that the foreclosure was a collusive transaction, or that the corporation had any agreement, express or implied, with the mortgagee, for the repurchase of the property. The loss of the title left the society wholly without assets. Corporations of this character issue no stock, and are wholly without power or authority to levy assessments upon, or enforce contributions from, their members. As is quite sure to be the case in organizations which depend solely upon voluntary good-will offerings for income and support, an excessive indebtedness proved an insurmountable obstacle to prosperity and growth. At the end of some thirteen years' effort, the society found itself without a church building, and without means or ability to obtain another, or to pay its outstanding obligations. Its assets had been wholly eliminated. It had neither property, money, nor franchises which creditors could subject to their claims. There is nothing to indicate that its members had not contributed to the full extent of their ability and duty under the circumstances. Its corporate organization even had ceased to be available for the society's future needs, because the existence of its indebtedness and the discredit attaching to its failures in the past were quite sure to paralyze every effort to enlist the help, support, and sympathy which were essential to success. Under this stress, it was determined to disband the old organization, and from its membership, with such others as could be induced to co-operate, endeavor to create a new one. This was done. The new organization was made up largely from the old members, but with a new list of officials, and incorporated as the North Des Moines Methodist Episcopal Church. The owner of the church property under the sheriff's deed, finding it no doubt an undesirable and profitless asset, consented to

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sell it for less than one half the mortgage debt for which it had been sold, and the new corporation purchased it, and now holds the title. It is against this property that the plaintiff now seeks to enforce her judgment. In none of the circumstances of the case do we discover anything on which a charge of fraud may be justly predicated. It is true, we have said the new church is principally made up from the membership of the old; that it is affiliated with the same conference, acknowledges the same ecclesiastical authority, professes the same faith, occupies the same locality, and pursues the same general policy; but these do not constitute corporate identity. Had the North Des Moines Church taken over any property or valuable thing which the plaintiff was entitled in law or equity to subject to her claim, a different question would arise. But even then her remedy would be confined to a subjection of such property to the payment of her judgment. In other words, the new corporation would not ordinarily be chargeable as her debtor, but as a trustee, liable to account for such assets of the old corporation as it may have received. 2 Morawetz, Priv. Corp. § 811; *Marshall v. Western North Carolina R. Co.* 92 N. C. 322; *Bruffett v. Great Western R. Co.* 25 Ill. 353; *Donnelly v. Hearndon*, 41 W. Va. 519, 23 S. E. 646; 1 Thomp. Corp. § 263. Plaintiff is not the creditor of the members. She has not, and never has had, a right of action against them as such. The only duty owed to her by the individual members was the moral duty to use all reasonable effort by their own contributions, and by such assistance as might properly be obtained from others, to maintain the solvency of the corporation. There is nothing before us to show that this full measure of duty was not performed, while the proved fact that the church struggled with its difficulties for so many years before surrendering to the inevitable affords some presumption that its members were not unmindful of their obligations.

It is suggested in argument that some few articles of furniture and miscellaneous supplies belonging to the old church went into the possession of the appellee. It is true the evidence indicates that a portable organ, which was placed in the church before the foreclosure, has remained there, and that the pastor makes use of the original membership roll. As to the first item, we can only say that, if such property was liable to seizure and sale upon the plaintiff's judgment, it may still be reached in the hands of the appellee; but no such relief is sought in this proceeding. Of the other matter, it may be said that the pastor is not an officer of the corporation, and it is not bound by his act in the premises. Moreover, it ap-

pears that under the rules and regulations of the church a formal dismissal of its members from the old organization and reception into the new one were not essential to a transfer of membership, and under such circumstances the retention and use of the roster is without special significance.

Counsel argue with much earnestness that the new corporation, being devoted to the same purposes and to the same faith as the first one, should be held to be the same legal entity under another name, and bound by law as well as by the principles of common honesty to pay the debts of its predecessor. They further say that, "if a new organization had been effected for the purpose of maintaining the doctrines of the Baptist or any other church, and the membership had allied themselves with it, we should have an entirely different proposition." If, in fact, the membership were legally or morally bound to the plaintiff for the payment of this debt, it is not easy to understand just how a change of denominational lines or a merger into the "Baptist or any other church" would serve to cancel the obligation. Men and women cannot rid themselves of a debt in law or in honor by a change of church relations. Were we to announce otherwise, the title of interchurch migration might soon reach embarrassing proportions. But the truth is that no such obligation as counsel contends for exists. As already suggested, the member of the church is never under any legal obligation for the payment of its corporate debts, and his only moral obligation is to contribute of his means and of his influence to the extent of his ability to meet the just demands upon that organization so long as he is a member of it. When he has done all which his own enlightened conscience indicates to be his duty, or when, for any reason which satisfies himself, he ceases to be a member and refuses further assistance, neither court, creditor, nor counsel is entitled to arraign him as a recreant. He who gives credit to a church organization knows that the only source to which he is entitled to look for payment is the property or assets of which the corporation is owner, and to the voluntary offerings or gifts of the members and friends who may be moved or persuaded to contribute to that purpose. If the people, for any reason, will not contribute to meet his demand, but will help build up another organization, he suffers no legal wrong. In this instance the church property had been lost. The membership was under no obligation to purchase it simply to see it sold on the plaintiff's judgment. They could have abandoned all further effort to maintain a church organization of any kind without incurring any liability or exposing

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themselves to any just demand on part of plaintiff,— a result which doubtless would have followed if the organization of a new church, liable for no obligations except those of its own making, were not allowable.

In short, our conclusion is that the intent to form a new corporation is clearly shown, that in carrying such intent into execution no fraud was committed, and that plaintiff's bill was therefore properly dismissed.

After the introduction of evidence in the court below, the plaintiff asked for and was refused leave to file an amendment to her petition seeking relief on the ground that the old corporation was a mere trustee for the benefit of the membership, and that the new corporation was but the successor in the same trust. Counsel have argued this proposition, but we think the issues are not broad enough to cover it, nor does it seem to have been tried or passed upon by the district court. The granting of leave to amend at that stage of the case, setting up a new and distinct issue, was addressed to the discretion of the court, and the refusal of the request is not an error requiring a reversal.

The conclusion of the District Court upon the merits is right, and is *affirmed*.

C. E. KLEIS

v.

James McGRATH and Wife.

(.....Iowa.....)

1. Giving a note for interest upon a larger note already barred by the statute of limitations, which does not mention or in any way refer to the earlier note, does not revive it under a statute providing that causes of action founded on contract are revived by an admission in writing, signed by the party to be charged, that the debt is unpaid, or by a like new promise to pay the same.
2. A note given for interest on another note which is secured by mortgage is itself so secured, and the mortgage may be foreclosed to satisfy it, although the prior note is barred by the statute of limitations.
3. A note for principal, and one for interest, signed by the same maker and secured by the same mortgage, may be enforced in one action.

(May 6, 1905.)

NOTE.—As to what acknowledgment of debt, or promise to pay, is sufficient to remove bar of statute of limitations, see also, in this series, *note to Opp v. Wack*, 5 L. R. A. 743; and the later cases of *Krueger v. Krueger*, 7 L. R. A. 72; *Kerper v. Wood*, 15 L. R. A. 636; *Bralthwaite v. Harvey*, 27 L. R. A. 101; *Slaughter's Succession*, 58 L. R. A. 408; and cases in *note to Trimble v. Rudy*, 53 L. R. A. 353.

CROSS-APPEALS from a judgment of the District Court for Dubuque County rendered in an action brought to foreclose a mortgage securing payment of certain promissory notes; plaintiff appealing from so much as refused to hold that the principal note was revived by a note given for interest, and defendants appealing from so much as permitted a foreclosure to satisfy the interest note. *Affirmed on both appeals.*

The facts are stated in the opinion.

Messrs. Hurd, Lemchan, & Kiesel, for plaintiff:

The giving of a note to secure the payment of interest accrued on a note previously given is a sufficient acknowledgment of the existence of continued indebtedness upon the latter.

Angell, Limitations of Actions, 5th ed. p. 251; Wood, Limitation of Actions, 2d ed. pp. 271, 272, 301, 302; 19 Am. & Eng. Enc. Law, 2d ed. p. 327, and notes; *Lyman v. Warner*, 51 C. C. A. 73, 113 Fed. 87; *Kelly v. Leachman*, 3 Idaho, 629, 33 Pac. 44; *Pracht v. McNee*, 40 Kan. 1, 18 Pac. 925.

It was competent to establish by parol testimony the identity of the sum embodied in the note given for interest with the interest due upon the pre-existing debt, and that it was given for that debt.

Kelly v. Leachman, 3 Idaho, 629, 33 Pac. 44; *Harrison v. Dayries*, 23 La. Ann. 216; *Tilden v. Morrison*, 33 La. Ann. 1068; *Kincaid v. Archibald*, 73 N. Y. 189; *Miller v. Beardsley*, 81 Iowa, 720, 45 N. W. 756; *First Nat. Bank v. Woodman*, 93 Iowa, 668, 57 Am. St. Rep. 287, 62 N. W. 28; *McConaughy v. Wilsey*, 115 Iowa, 589, 88 N. W. 1101; *Campbell v. Campbell*, 118 Iowa, 132, 91 N. W. 894.

There was no misjoinder of parties or causes of action.

The mortgage securing the original note was not the cause of action. The mortgage was a mere incident of the debt.

Crow v. Vance, 4 Iowa, 434; *Vandercook v. Baker*, 48 Iowa, 199.

The mortgage given to secure the original note became security for the second note as part of the indebtedness.

Port v. Robbins, 35 Iowa, 208; *Fetes v. O'Laughlin*, 62 Iowa, 532, 17 N. W. 764; *Cook v. Gilchrist*, 82 Iowa, 277, 48 N. W. 84.

Messrs. McCarthy, Kenline, & Reedell, for defendants:

The second note is insufficient to constitute a revivor of the first one.

Chambers v. Garland, 3 G. Greene, 322; *Parsons v. Carey*, 28 Iowa, 431; *Oakson v. Beach*, 36 Iowa, 171; *Carpenter v. District Twp.* 58 Iowa, 335, 12 N. W. 280; *Hale v. Wilson*, 70 Iowa, 311, 30 N. W. 739; *Lawrence v. Baker*, 44 Hun, 582; *Davidson v.* 60 L. R. A.

Harrison, 33 Miss. 41; *Stout v. Marshall*, 75 Iowa, 498, 39 N. W. 808; *Stewart v. McFarland*, 84 Iowa, 55, 50 N. W. 221; *Nelson v. Hanson*, 92 Iowa, 359, 54 Am. St. Rep. 568, 60 N. W. 655; *Porter v. Chicago, I. & D. R. Co.* 99 Iowa, 357, 63 N. W. 724.

A statement in writing by a debtor that there is a specific amount due is not such an admission or acknowledgment of the balance of the claim over such amount as will take it out of the statute.

Porter v. Chicago, I. & D. R. Co. 99 Iowa, 357, 63 N. W. 724; *Hale v. Wilson*, 70 Iowa, 311, 30 N. W. 739.

Weaver, J., delivered the opinion of the court:

The petition, which was filed December 9, 1903, declares upon two promissory notes, and seeks the foreclosure of a mortgage, and is stated in two counts. In the first count it is alleged that on June 29, 1888, the defendant James McGrath made and delivered to plaintiff's assignor his promissory note for \$2,250, payable five years after date, with interest at 7 per cent per annum, which note is now owned by the plaintiff, and is due and unpaid. In the same count plaintiff further alleges that on June 30, 1902, the defendant James McGrath made and delivered to plaintiff another promissory note in writing for \$28.75, which note, it is further alleged, was given for interest accrued on the note first described, and the instrument is set out in said first count for the purpose of showing an admission in writing that the principal debt was then unpaid, thus avoiding the plea of the statute of limitations thereon. The second count declares solely upon the note of \$28.75, above mentioned. Judgment is asked for the unpaid balance on both notes, and foreclosure is prayed of a mortgage alleged to have been given by James McGrath and his wife, Ann McGrath, at the date of the first note, to secure its payment. The defendants demurred to each count of the petition on the ground that the allegations thereof show the debt sued upon to be barred by the statute of limitations, and for the further reason that the pleading shows a misjoinder of causes of action and of parties, and because the two counts are inconsistent and contradictory. The district court sustained the demurrer to the first count of the petition, and overruled it as to the second count. Both parties having elected to stand upon the record thus made without further pleading, the court dismissed plaintiff's action upon the first-mentioned promissory note, and entered judgment in his favor for the amount of the smaller note and for a foreclosure of the mortgage. Both parties appeal, but the

plaintiff, being first to serve notice, will be herein denominated the appellant.

The one question presented is whether the making and delivering of the second note, when aided by parol evidence that it was given for unpaid interest on the first note, is such a written admission of the debt evidenced by the latter as will operate to revive the right of action thereon and prevent the interposition of the statute of limitations. The suit was confessedly begun more than ten years after a right of action had accrued upon the first note, and it is therefore barred unless we give the second note the effect claimed for it by the appellant. Code, § 3456, reads as follows: "Causes of action founded on contract are revived by an admission in writing signed by the party to be charged, that the debt is unpaid, or by a like new promise to pay the same." It is manifest that the note for \$28.75 described in the petition is not a promise in writing, signed by the defendant, to pay the note for \$2,250. Can it be construed as a written admission of the continued existence of the debt represented by the larger note? Counsel for appellant have called our attention to several cases decided in other states which give some color of support to their contention that this question must be answered in the affirmative. There is a wide variance, however, among the courts of the several states in the strictness with which statutes as to the revivor of causes of action by written promises or acknowledgments are interpreted and applied. Some cases, especially those of an earlier date, seem to proceed upon the theory that the defense of the statute of limitations is not meritorious and that all doubts are to be solved in favor of the creditor; others have adopted the view that the statute is one of repose, and that the cause of action, once barred, ought not to be revived unless the plaintiff bring this case within the letter and spirit of the provisions permitting such revivor. Moreover, the statutes of the states creating a time limit upon the right to sue, and providing for the revival under some circumstances of a right once barred, are by no means uniform, and the decisions based thereon are ordinarily without decisive value as authority outside of the jurisdiction in which they have been announced. Referring to this statute, this court has already said: "We have found no statute like ours, and the cases in other states therefore give but little aid." *Parsons v. Carey*, 28 Iowa, 436. The prevailing tendency seems to be to permit a revivor by acknowledgment of the debt only where the writing relied upon is clear, explicit, and unequivocal in its terms. Says the Supreme Court of the United States: "If there be no express

promise, but a promise is to be raised by implication of law from the acknowledgment of the party, such acknowledgment ought to contain an unqualified and direct admission of a previous subsisting debt which the party is liable and willing to pay. . . . Any other course would open all the mischiefs against which the statute was intended to guard innocent persons, and expose them to dangers of being entrapped in careless conversations and betrayed by perjuries." See also *Bell v. Morrison*, 1 Pet. 362, 7 L. ed. 179; *Smith v. Fly*, 24 Tex. 353, 76 Am. Dec. 109; *Shepherd v. Thompson*, 122 U. S. 236, 30 L. ed. 1157, 7 Sup. Ct. Rep. 1229; *Kensington Bank v. Patton*, 14 Pa. 481, 53 Am. Dec. 564; *Macrum v. Marshall*, 129 Pa. 506, 15 Am. St. Rep. 730; 18 Atl. 640; *Pierce v. Merrill*, 128 Cal. 473, 79 Am. St. Rep. 63, 61 Pac. 67. It is an accepted doctrine that an acknowledgment of the existence of a debt is allowed to remove the bar of the statute, because such acknowledgment or admission carries with it an implied promise to pay. For that reason the acknowledgment must be express, clear, and direct, for it will not do to infer or imply the acknowledgment, and therefrom imply the promise to pay; thus piling implication upon implication. But this is just what must be done in order to sustain the position taken by the appellant. Moreover, the implication which he asks the court to indulge in cannot be drawn from the writing alone, but from the writing and other alleged facts which he proposes to establish by parol. The note itself contains not a word or suggestion recognizing the existence of any other obligation from the maker to the payee, and this gap it is proposed to bridge by parol proof that the consideration of the written promise was interest earned or accrued on the debt represented by the other note. But when all this has been done the acknowledgment relied upon is still a matter of implication, and is in no sense of the word an acknowledgment in writing of the existence of any debt save the sum of \$28.75, which he promises to pay. If the defendant, in addition to his written promise to pay said sum, had added thereto by way of explanation the words "interest on my note now held by said payee," this would have been an acknowledgment that appellant held an unpaid note against him, and parol testimony would have been competent to point out and identify the note to which reference was made. *Penley v. Waterhouse*, 3 Iowa, 418. By so doing we simply identify the subject-matter to which the acknowledgment or promise applied. We add nothing whatever to enlarge or extend the clear meaning and import of the writing which the defendant has subscribed.

But, as we have already noted, the writing before us in this case is a simple, unequivocal promise to pay to the plaintiff the sum of money therein mentioned. There is no ambiguity or uncertainty requiring the aid of parol testimony for an explanation of the defendant's meaning or to identify the subject-matter of his promise. Such being the case, if we open the door for parol proof of facts and circumstances in no manner suggested by the writing, and from such facts and circumstances find an implied acknowledgment of an existing indebtedness upon another and different instrument, we shall, in effect, by judicial construction abolish the statute by which there can be no revivor of a demand against which the limitation has run except by a written promise or acknowledgment subscribed by the party to be charged.

None of the cases cited by the appellant from this court go farther in recognizing the competency of parol testimony than we have above indicated. In *Miller v. Beardsley*, 81 Iowa, 720, 45 N. W. 756, the defendant wrote to the plaintiff stating that he had paid plaintiff's agent the interest on \$9,000, referred to interest not yet due and to a note or notes which he "had not yet paid." In *McConaughy v. Wilsey*, 115 Iowa, 589, 88 N. W. 1101, the defendant wrote, making express reference to a note, and promising to "try and pay it this fall." The acknowledgment relied upon in *Campbell v. Campbell*, 118 Iowa, 131, 91 N. W. 894, was contained in a letter containing a remittance, of which the writer says, "I think it pays the interest on my note to February, 1892," a date then in the future. In *First Nat. Bank v. Woodman*, 93 Iowa, 671, 57 Am. St. Rep. 287, 62 N. W. 28, the writing was also contained in letters remitting money to "pay interest on notes," and other letters stating that the writer hoped to be "able soon to pay the interest, . . . and, . . . if possible, to pay the principal." In each of these cases it will be readily seen there is a clear and express reference by the defendant, in writing, to the existence of an unpaid indebtedness, the obligation of which is acknowledged by him; and in each case parol evidence was held admissible to identify the particular note or other form of indebtedness thus acknowledged. Beyond this well-established rule, we have never gone, nor can we do so without disregarding the statute. In *Wise v. Adair*, 50 Iowa, 104, we said, with reference to an alleged written acknowledgment: "We should not extend the defendant's liability beyond what he admitted in writing." In other words, it is not competent to add by parol anything or any amount to the liability there admitted. In *Nelson v. Hanson*, 69 L. R. A.

92 Iowa, 356, 54 Am. St. Rep. 568, 60 N. W. 655, we reviewed our earlier cases permitting the identification of the debt by parol evidence, and said: "But in all these cases the language used by the debtor was an unqualified admission of indebtedness either in words or in legal effect." The position of this court is also clearly indicated in *First Nat. Bank v. Woodman*, 93 Iowa, 671, 57 Am. St. Rep. 287, 62 N. W. 28, where, referring to language contained in certain writing or letters as an acknowledgment of the debt, we said: "While the letters relied on as containing the requisite admissions and promises to revive the cause of action are mostly those of remittances, it is not the fact of payment that is relied on, but the statements in the letters signed by the party." See also *Stout v. Marshall*, 75 Iowa, 498, 39 N. W. 808; *Hale v. Wilson*, 70 Iowa, 312, 30 N. W. 739. As bearing to some extent upon the same general proposition here discussed, see also, *Lehman v. Mahier*, 34 La. Ann. 319; *Trainer v. Seymour*, 10 Tex. Civ. App. 674, 32 S. W. 154; *Boothby v. Bennett*, 73 Me. 117; *Eckford v. Evans*, 56 Miss. 18; *Wells v. Hill*, 118 N. C. 900, 24 S. E. 771; *Canton Female Academy v. Gilman*, 55 Miss. 148; *Gartrell v. Linn*, 79 Ga. 700, 4 S. E. 918; *Leonard v. Hughlett*, 41 Md. 380; *Davis v. Davis*, 98 Me. 135, 56 Atl. 588. Under our statute the common-law rule by which the partial payment of a claim operates to set the period of limitation running anew has been abrogated, and this court has never been inclined to indulge in overrefined construction to defeat the legislative will thus expressed. *Parsons v. Carey*, 28 Iowa, 431; *Harrencourt v. Merritt*, 29 Iowa, 71; *Roberts v. Hammon*, 29 Iowa, 128; *Hale v. Wilson*, 70 Iowa, 312, 30 N. W. 739.

If, then, a partial payment is to be no longer construed as an acknowledgment of the debt or promise to pay it, it is difficult to frame the statement of any good reason for giving such effect to a mere promise to make a partial payment. The *Hale Case*, 70 Iowa, 312, 30 N. W. 739, differs but little in principle from the one before us. There the defendant, the maker of a promissory note, made a payment to the holder, and himself wrote and signed an indorsement thereof upon the note as follows: "Paid on the within note forty dollars, John Wilson." This we held not to be an acknowledgment of the debt which would prevent or avoid the defense of the statute of limitations. We said: "The mere payment of an amount of money upon a note is not an admission that no other payments have been made, nor that any other or farther sum than that paid was due. The rule for which plaintiff contends obtained

at a time when it was competent to prove by parol that the payment was but a part of what was admitted to be due. By our statute the rights of the parties are fixed by the writing, and unless, by its terms, a further sum is admitted to be due, or a new promise is made, the operation of the statute is not arrested. The law does not authorize the construction of a writing stating the mere fact of the payment of a sum of money on a note to be in effect, a statement that more is due and unpaid." This principle is clearly applicable to the controversy now under consideration. The demurrer to the first count of the petition was rightfully sustained.

2. There is, in our judgment, no merit in the defendants' appeal. The note there set out was not barred by the statute of limitations. The demurrer admits that it was given for interest earned on the earlier note

which was secured by the mortgage. If this be true, the note thus made was secured by the mortgage, and plaintiff was entitled to a foreclosure to enforce its payment. A mortgage given to secure payment of a debt secures also the payment of the interest accruing thereon, and the mere fact that the debtor has given the mortgagee his note for such interest has no effect as a waiver or release of the lien. *Barbour v. Tompkins*, 31 W. Va. 410, 7 S. E. 17. There was no misjoinder of the parties or causes of action. The defendant James McGrath was the sole maker of both notes. They were both secured by the same mortgage, and it is needless to say that it was entirely proper to make his wife a party to the proceeding.

The judgment of the District Court is, upon both appeals, affirmed.

KENTUCKY COURT OF APPEALS.

UNION CENTRAL LIFE INSURANCE
COMPANY, *Appt.*,

v.

Harry C. SPINKS.

(.....Ky.....)

1. Retaining and attempting to collect an overdue premium note on an insurance policy will waive a provision in the policy that nonpayment of the note at maturity will terminate the contract.
2. A provision of a life insurance policy that suit shall be brought on it within a period less than that fixed by the statute of limitations is void as against public policy.

On Rehearing.

3. Failure to credit overdue premium notes on a life insurance policy in entering judgment thereon, as provided in the contract, is cause for reversal.

(*Paynter, J., dissents.*)

(December 9, 1904.)

A PPEAL by defendant from a judgment of the Circuit Court for Campbell County in favor of plaintiff in an action brought to recover the amount alleged to be due on a life insurance policy. *Reversed.*

The facts are stated in the opinion.

Messrs. Robert Ramsey, W. W. Helm, and Maxwell & Ramsey, for appellant:

The insurance terminated, without action on the part of the company, upon Spinks's failure to pay his note at maturity.

Union Cent. L. Ins. Co. v. Duwall, 20 Ky. L. Rep. 441, 46 S. W. 518; *Moreland v. Union Cent. L. Ins. Co.* 104 Ky. 129, 46 S. W. 516.

The agent's attempt to collect after maturity was not effective to reinstate the lapsed policy, for want of authority on his part.

Hartford Life & Annuity Ins. Co. v. Hayden, 90 Ky. 39, 13 S. W. 585; *Marcus v. St. Louis Mut. L. Ins. Co.* 68 N. Y. 625.

The policy terminated when the company formally canceled it and notified the insured.

The defendant is not estopped by the retention of the premium note.

Deppen v. Southern Mut. L. Ins. Co. 8 Ky. L. Rep. 57.

The one-year limitation clause in the policy was valid.

Lee v. Union Cent. L. Ins. Co. 22 Ky. L. Rep. 1712, 56 S. W. 724; *Owen v. Howard Ins. Co.* 87 Ky. 571, 10 S. W. 119; *Kentucky Mut. Security Fund Co. v. Turner*, 89 Ky. 665, 13 S. W. 104; *Riddlesbarger v. Hartford F. Ins. Co.* 7 Wall. 386, 19 L. ed. 257; 2 May, Ins. 478; 1 Wood, Limitation of Actions, 42.

NOTE.—As to validity of contract limitation for presenting claim or bringing suit to time shorter than period of limitations, see also cases in note to Case v. Sun Ins. Co. 8 L. R. A. 48; and the later cases, in this series, of *Suggs v. Travelers' Ins. Co.* 1 L. R. A. 847, and cases 69 L. R. A.

in note thereto; *Dwelling House Ins. Co. v. Brodle*, 4 L. R. A. 458, and cases in note; *Kirby v. Western U. Teleg. Co.* 30 L. R. A. 612; and *Western U. Teleg. Co. v. Eubank*, 36 L. R. A. 711.

Messrs. L. J. Crawford and Hazelrigg, Chenault, & Hazelrigg for appellee.

O'Rear, J., delivered the opinion of the court:

This suit was upon a ten-year-term life policy issued by appellant upon the life of Charles Spinks for \$10,000. The policy was issued February 1, 1894. The annual premium was \$396.80. The policy contained the following provisions:

"All premiums or notes, or interest upon notes, given the company for premiums, shall be paid on or before the days upon which they become due," etc.

"Upon the violation of any of the foregoing conditions this policy shall be null and void, without action on the part of the company, or notice to the insured or beneficiary," etc.

"The contract of insurance between the parties hereto is completely set forth in this policy and the application for the same, and none of its terms can be modified, nor any forfeiture under it waived, save by an agreement in writing signed by the president, vice president, or secretary of the company, whose authority for this purpose shall not be delegated."

"No suit to recover under this policy shall be brought after one year from the death of the insured."

The insured paid three of the annual premiums, and on December 15, 1897, executed to appellant a six months' note for \$396.80 for annual premium due on that date. The note was not paid at maturity. On the day following the maturity of the note defendant's general agent at Cincinnati wrote the insured as follows:

Cincinnati, O., June 16, 1898.

Charles Spinks, Esq.,
Newport, Ky.

Dear Sir:—

Your note of \$396.80 (\$11.90 interest) on policy 114,386 was due and unpaid on the 15th day of June, 1898. Your immediate attention to the above is of the utmost importance to the validity of your policy in the event of sudden misfortune. Please call and arrange to pay the same at once.

Yours respectfully,

E. W. Jewell,

General Agent.

The insured made no reply to this letter, so far as the proof shows.

On June 21st the general agent sent the note to a bank, with the following letter of advice:

60 L. R. A.

Cincinnati, O., June 21, 1898.

Newport National Bank,
Newport, Ky.

Gentlemen:—

I inclose you the note of Charles Spinks for collection.

Note\$396 80

Interest 11 90

\$408 70

Yours respectfully,

E. W. Jewell,

General Agent.

The bank, as agent of the insurance company, presented the note to the insured and demanded payment. But it was not paid. On July 7th following it was returned to appellant. On that day appellant wrote the insured as follows:

Cincinnati, O., July 7th, 1898.

Charles Spinks, Esq.,
Newport, Ky.

Dear Sir:—

The note given in payment of the annual premium on your policy 114,386 was due and unpaid June 15th, and, according to the rules of the company, you must furnish us a satisfactory certificate of good health before settling this note. If you will kindly take the indorsed health certificate to the medical directors of the company, they will fill it out and pass upon it.

Yours respectfully,

E. W. Jewell,

General Agent.

It is claimed for appellant that it about the same time forwarded to its local agent at Newport, where insured lived, a formal notice canceling the policy for nonpayment of premium; but there is no evidence that it was ever received by the insured. Omitting, therefore, the last-named act from the proceedings, we have, so far as the insured was advised, that the insurance company held his premium note, was endeavoring and intending to collect it in full, which represented the premium on his policy to December 15th following, and had taken no action looking to a cancellation of the policy. As a matter of fact, it is testified that the company, immediately upon default, when the note was due, marked the policy on its policy register "Canceled." The insured had been in the habit of executing notes to appellant for his premiums, and of paying them some time after maturity. They were always received, so far as this record shows, without question. The insured, however, died on the 14th of September, 1898. This suit is by the beneficiary of the policy, a son of the insured.

It is the well-settled law of this state that, if an insurer desires to avail itself of conditions in its policy to declare it forfeited for the nonpayment of a premium note, it must unequivocally elect to so treat it, and in fact then and thereafter so treat it. It will not be allowed, though, to claim both that it is not bound on the policy, but that the insured is bound to pay the note. Its action must be consistent. While it may retain the note, as evidence of its nonpayment, it must not retain it or treat it as an evidence of that much indebtedness. *Moreland v. Union Cent. L. Ins. Co.* 104 Ky. 129, 46 S. W. 516; *Union Cent. L. Ins. Co. v. Duvall*, 20 Ky. L. Rep. 441, 46 S. W. 518; *Johnson v. Southern Mut. L. Ins. Co.* 79 Ky. 406; *Walls v. Home Ins. Co.* 24 Ky. L. Rep. 1452, 71 S. W. 650. In the case at bar appellant must not retain the note after its maturity, but repeatedly endeavored to collect it in full thereafter. It thereby claimed that the insured owed to it \$396.80 as an enforceable debt. If he did, then appellant was bound to him, as the consideration for it, upon the policy of insurance. Even though such provisions in policies of insurance are automatic, they may be waived by the parties, and this waiver may be indicated by conduct, as well as by express language. The fact that the insured marked on its private books that the policy was canceled, did not cancel it, if thereafter it continued to assert the note as an enforceable obligation against the insured, thereby evincing to him that it was not canceled. Upon principle and authority we hold that the evidence here shows a waiver by the insurer of the condition of forfeiture in the policy.

The more important question is that of special limitation of one year provided for by the policy. The suit was not brought till more than one year after the death of the insured. We are aware that this or a similar provision is contained in nearly all insurance policies, fire and life. We are further aware that the provision is upheld by many courts, including the United States Supreme Court (*Riddlesbarger v. Hartford F. Ins. Co.* 7 Wall, 386, 19 L. ed. 257), and is approved by text writers. This court has also, though with hesitation and misgiving, followed the other courts in approving it. We therefore have come to the reconsideration of this question with a deep sense of its importance and difficulty, and of our duty in the premises. The legal question is, Can parties by contract substitute a period of limitation, binding upon the courts, for the statutes of limitation enacted by the legislature? If they can, it must be upon some general principle, the breadth and far-reaching effect of which cannot logically be

limited to mere contracts of insurance, but must incontrovertibly be applicable to all contracts; for, if it is a matter of agreement alone between parties competent to contract, the only inquiry that can ever be made is, Have they agreed upon it?

Pleas of limitation were allowed long before there was any statute on the subject. The courts applied them upon the theory of a fiction to the effect that after so long a lapse of time, during which the claimant made no assertion of his rights in a personal demand, a presumption was raised that the obligation had been paid or discharged, and, in the case of real estate, that a conveyance had been executed but lost. The fiction was justified in the reasoning of the courts by the evident justness of its effect; it being argued that one who had so long neglected his rights as to allow the other party to suffer by it, by the loss of evidence and the like, ought not to be heard to disturb a condition he had suffered to come about. But statutes of limitation have come to be enacted everywhere. They are not mere rules of evidence, presumptions of the payment or extinguishment of the obligation sued upon, but are statutes expressive of a public policy, and are favorably regarded by the law. They are not in operation or suspense at the mere will of the parties, but in spite of them. While the statutes themselves make provision for their suspension, it is to be noted that in every instance it is allowed for the purpose of continuing or prolonging a pre-existing right to sue, and never to close the door against suits by any kind of waiver in favor of an obligee.

Many statutory provisions are made for the protection of personal rights, which the parties may avail themselves of or not, in their transactions, as they may please. But, where the statute is expressive of the public policy, any contract made in contravention of it is *ipso facto* void. Parties will never be heard to say that they elect to waive the public policy, and are willing to abide by their own substituted policy. The public policy, as the term indicates, is impersonal, and essentially of universal and exclusive application within the territory of the authority declaring it. There could be no public policy otherwise, and the whole people would be powerless to enforce any wholesome general rule of conduct in business transactions, where any number chose to ignore or violate it. Statutes of limitation belong to this class. They pertain to the administration of justice by the courts of the state,—a subject of paramount concern to the whole public. That there may be a period of repose against stale claims is provided, recognizing the old idea that, but for the loss of evidence, death or removal of

witnesses, forgetfulness, and so on, an apparent condition might have been explained away. The statute means more than that no suit shall be maintained upon the class of claims treated of by it after the lapse of the time fixed by it. It means, also, that until that time has elapsed the courts are open to hear the claim. The statutes are substituted in lieu of the common-law rules of presumptions and practice, and establish the public policy of the state on the subject of limitation of actions. They supersede, not only the fictions of the common law, but also supersede the hitherto uncontrolled capacity of parties to themselves limit the time in which either may rightfully appeal to the courts for redress under their contracts. Agreements in advance to waive statutes of limitation altogether are held void on the grounds that such statutes are for the repose, the peace, and the welfare of society. *Greenhood*, Pub. Pol. 504; *Kellogg v. Dickinson*, 147 Mass. 432, 1 L. R. A. 346, 18 N. E. 223; *Trask v. Weeks*, 81 Me. 325, 17 Atl. 162; *Green v. Coos Bay Wagon Road Co.* 10 Sawy. 625, 23 Fed. 67.

It is old and familiar doctrine that the courts will not enforce a contract by which the parties have bound themselves not to sue at all, or to leave the difference exclusively to arbitrators. If parties by contract can lawfully provide when the suit shall be instituted (or when it shall not be, which is the same thing), why not let them go further within the same principle and stipulate as to the nature of the action; whether it shall be tried by a jury, and what evidence shall be receivable to establish or impeach the right; and, by force of the same logic, why not close the matter consistently by concluding how and out of what estate the execution upon the judgment may be levied, and within what time the judgment of the court may be enforced. If the fact be that by contract one party becomes bound to another, the policy of the law is to regulate in what forums, by what nature of proceedings, by what forms of practice, and within what period it may be enforced. An agreement in advance not to apply to any court for redress is admittedly void. An agreement to confer jurisdiction upon a court not provided with it by law is likewise void. An agreement not to avail oneself of the statutes regulating practice would be held void for the same reasons. Now, the remaining question, Can a party bind himself by an agreement in advance not to sue, not to appeal to the courts having jurisdiction of the matter, for fourteen years of the fifteen which are allowed by statute, thus confining himself to one fifteenth of the time the statutes give?

It is difficult, if not inadvisable, to attempt an exact definition of the term "public policy." Story says of it (Story, Contr. § 546): "It has never been defined by the courts, but has been left loose and free of definition, in the same manner as fraud. This rule may, however, be laid down, that, wherever any contract conflicts with the morals of the time, and contravenes any established interest of society, it is void, as being against public policy." In *Brooks v. Cooper*, 50 N. J. Eq. 761, 21 L. R. A. 617, 35 Am. St. Rep. 795, 26 Atl. 978, the subject appears to have been thoroughly considered, and exhaustively treated. In summing up a number of considered cases, the court wrote: "It has been declared that public policy is a variable quality, but the principles to be applied have always remained unchanged and unchangeable, and public policy is only variable in so far as the habits, capacities, and opportunities of the public have become more varied and complex. The relations of society become from time to time more complex, statutes defining and declaring public and private rights multiply rapidly, and public policy often changes as the laws change, and therefore new applications of old principles are required. *Davies v. Davies*, L. R. 36 Ch. Div. 364. Whatever tends to injustice or oppression, restraint of liberty, restraint of legal right; whatever tends to the obstruction of justice, a violation of a statute, or the obstruction or perversion of the administration of the law; whatever tends to interfere with or control the administration of the law as to executive, legislative, or other official action,—whenever embodied in and made the subject of a contract, the contract is against public policy, and therefore void, and not susceptible of enforcement." "When we speak of the public policy of the state, we mean the law of the state, whether found in the Constitution, the statutes, or judicial records." *People v. Hawkins*, 157 N. Y. 12, 42 L. R. A. 490, 68 Am. St. Rep. 736, 51 N. E. 257. These citations will serve to show the scope of the principle. Particular instances by way of illustration and application will be given further along. We cannot hope to reconcile the public policy of this state with that of other states. Each state necessarily establishes its own public policy, confined to its own territory. That they may not be uniform throughout the Union is neither surprising nor discouraging; for what may be deemed inimical by one may be treated as immaterial by another, and, indeed, may be so.

We will come directly to the question whether statutes of limitation are in this state indications of its public policy. The strength of every contract lies in the right of the promisee to resort to the courts of

public justice for redress for its violation. It is not enough that the parties may have voluntarily agreed, nor that there was a satisfactory consideration, nor that they have contractual capacity; for, if one has in such agreement bound himself to forego some positive right given to him by the law by which justice is secured, he should not be bound, for to do so is to bind oneself to oppression, which is contrary to the well-being of society. Courts are established at the public expense to redress wrongs, including breaches of contracts. They are open at all times for that purpose. Such is the public good. The knowledge of that fact exercises no small influence upon the conduct of individuals. It is useless for the oppressor to try to get what he knows the courts will not allow. So he regulates his conduct by knowledge of that fact. Stale claims, if allowed, would tend to encourage perjury and fraud. Therefore a statute is passed to restrict their assertion in the courts. On the other hand, claims which are not outlawed, for the reason just assigned, ought to have a forum in which they may be asserted against an unwilling or dishonest obligee. The existence of that right is of great value to the claimant, but it is likewise of great importance to the public, as by it the weak are assured of their rights against the strong,—the sum of all government. A contract agreeing in advance that the obligee will not resort to the courts for its enforcement after one year, when the statutes of the state allow fifteen years within which to begin the action upon it, is merely an agreement not to resort to the courts, in spite of the policy and laws of the state which give the right. To enforce such is to put it in the power of one party to practise oppression, and to close the courts against its relief.

Now for the instances in which the principle being discussed has been applied in this state. In *Wright v. Gardner*, 98 Ky. 454, 33 S. W. 622, 35 S. W. 1116, an agreement in advance waiving the statute of limitation provided for that class of transactions and extending the time beyond the statutory period was held void, because against the public policy of the state.

An agreement in a contract between a telegraph company and the sender of a message limiting the time to which claims should be presented and prosecuted against the former for a breach of the contract to a period shorter than that fixed by statute was held void as against public policy in *Western U. Teleg. Co. v. Eubanks*, 100 Ky. 604, 36 L. R. A. 711, 66 Am. St. Rep. 361, 38 S. W. 1068. This was followed and approved in *Davis v. Western U. Teleg. Co.* 107 Ky. 527, 92 Am. St. Rep. 371, 54 S. W. 849. It is true that 69 L. R. A.

in the *Eubanks Case*, 100 Ky. 604, 36 L. R. A. 711, 66 Am. St. Rep. 361, 38 S. W. 1068. it was intimated that the contract was void for the additional reason that it violated § 196 of the Constitution, prohibiting a common carrier from contracting against its common-law liability. In the later *Case of Davis*, 107 Ky. 527, 92 Am. St. Rep. 371, 54 S. W. 849, the decision was rested solely on the ground that the stipulation was void because contrary to public policy. It was probably doubted whether the statute of limitation was any part of a common carrier's liability.

A familiar feature of life insurance policies is the provision that after a given number of payments the insured shall be entitled to a paid-up policy proportioned as the number of payments bear to the maximum number required to be made by the policy, provided the insured shall within six months, or some such time, surrender his policy and demand the paid-up policy. In a number of cases it has been held that the provision limiting the time within which to demand the paid-up policy was not of the essence of the contract, was in the nature of a forfeiture, and was void. *Montgomery v. Phoenix Mut. L. Ins. Co.* 14 Bush, 51; *Mutual L. Ins. Co. v. Jarboe*, 102 Ky. 80, 39 L. R. A. 504, 80 Am. St. Rep. 343, 42 S. W. 1097 (Overruling *Northwestern Mut. L. Ins. Co. v. Barbour*, 92 Ky. 427, 15 L. R. A. 449, 17 S. W. 796, and *Heater v. United States L. Ins. Co.* 91 Ky. 356, 15 S. W. 863); *Washington L. Ins. Co. v. Miles*, 112 Ky. 743, 66 S. W. 740; *Manhattan L. Ins. Co. v. Patterson*, 109 Ky. 624, 53 L. R. A. 378, 95 Am. St. Rep. 393, 60 S. W. 383; *New York L. Ins. Co. v. Warren Deposit Bank*, 25 Ky. L. Rep. 326, 75 S. W. 234; *Manhattan L. Ins. Co. v. Savage*, 23 Ky. L. Rep. 483, 63 S. W. 278; *Mutual L. Ins. Co. v. O'Neil*, 25 Ky. L. Rep. 983, 76 S. W. 839.

Under § 700, Kentucky Statutes, it is provided that, in case of total loss of an insured building by fire, the insurer shall pay the amount of its policy, except in case of fraud or deterioration in value since the policy was issued. Contracts attempting in advance of loss to waive the statute, and agreeing upon a different basis of settlement, are held void as being against the public policy evinced by the statute, in *Caledonian Ins. Co. v. Cooke*, 101 Ky. 412, 41 S. W. 279; *Hariford F. Ins. Co. v. Bourbon County Court*, 24 Ky. L. Rep. 1850, 72 S. W. 739; *Thuringia Ins. Co. v. Malott*, 111 Ky. 917, 55 L. R. A. 277, 64 S. W. 991; *Palatine Ins. Co. v. Weiss*, 109 Ky. 464, 59 S. W. 509.

A contract in advance waiving the statute of exemption is held void in *Mosley v. Ragan*, 10 Bush. 156, 19 Am. Rep. 61. Agreements to pay attorney's fee in case

of suit to enforce a contract are held void, because in contravention of the public policy, in *Thomason v. Townsend*, 10 Bush, 114, and *Witherspoon v. Musselman*, 14 Bush, 214, 29 Am. Rep. 404.

The Constitution of this state (§ 59) prohibits the legislature from passing special or local acts concerning quite a number of enumerated subjects, including "(5) to regulate the limitation of civil or criminal actions." Under this provision, it has been held that a statute limiting actions against cities of the first class in this commonwealth to six months, whether based upon torts or contracts,—the general law providing different periods,—was void. *Gorley v. Louisville*, 104 Ky. 372, 47 S. W. 263; *Louisville v. Kuntz*, 104 Ky. 584, 47 S. W. 592. In the last-named case, it was said: "When the Constitution prohibits the legislature from passing special laws upon any given subject, it means that all laws upon that subject shall operate alike upon all whether individual or corporate, public or private. It is a safeguard provided by the Constitution for the protection of the weak as well as the strong."

A contract between an express company and a shipper, limiting its liability for a breach of its bill of lading to six months, when the statutory period was longer, was held void, as contrary to public policy, in *Adams Exp. Co. v. Walker*, 26 Ky. L. Rep. 1025, 67 L. R. A. 412, 83 S. W. 106.

Unless these cases are to be followed, and the principle which governed them applied to all cases, we will have it that everybody except express and telegraph companies may by contract abrogate the statutes of limitation by stipulating for a shorter period. Each contract will have its own barrier, which the courts will be bound to observe. And, though the legislature is prohibited by the Constitution from providing any but general and uniform laws of limitation, parties to contracts may have as many different periods as there may be contracts. Railroad operators, merchants, bankers, and employers of labor may all contract for such periods as may suit their whim or avarice, to which the other party may be compelled to submit by his present necessities. It would make the law a subject of barter, and the courts of justice to open or close as the result of a dicker. It seems to us to logically follow that, if part of a contract of insurance is not forfeited by a failure to comply with a stipulation in the policy that it will be unless it is claimed within six months, all of the policy will not be forfeited by a similar failure to sue for it within one year, according to the stipulations of the policy to that effect. In each instance the essence of the proviso in the policy is 69 L. R. A.

to work a forfeiture of the vested interest—a property right—because the person entitled to it does not sue for it within an agreed time, less than the statutory period of limitation.

The statutes of limitation of this state, like statutes of exemption, are enacted, not solely for individual welfare, but for the public well-being. They are, under our Constitution, of general and universal application within the state, and are indications of the state's public policy on those subjects. Contracts in contravention of them are void. In *Owen v. Howard Ins. Co.* 87 Ky. 571, 10 S. W. 119, the policy contained a provision that suit upon it must be begun within one year from the accrual of the cause of action. The question presented for decision was whether the year had gone. The court decided that it had not, as the last day of the year fell on Sunday, which was excluded by the court so as to allow the 365th day to fall on a secular day, when the suit could be filed. Having decided that the year had not run, it was not necessarily involved whether the stipulation was valid. The court, for the purposes of the case, assumed that it was; and this it might have done, whether it was or was not valid. In *Kentucky Mut. Security Fund Co. v. Turner*, 89 Ky. 665, 13 S. W. 104, a policy of life insurance contained a similar clause, limiting the cause of action to one year, should a cause arise. A cause of action did accrue upon it. Demand was made of the insurer within one year, and it made a partial payment upon it. Failing to pay the balance, suit was brought upon the policy to recover it. The insurer pleaded the contract limitation. The replication, in avoidance, was that the partial payment had operated to start anew the period of limitation within which suit might be brought. The question presented for decision, and decided, was that a partial payment within the year did operate to start anew the limitation period. A recovery was allowed. Counsel for the plaintiff admitted that the one-year provision was valid. The court likewise assumed that it was. There was no controversy about it in the case. It was passed over in the opinion, without citation of authority or statement of reason for its support. As in the case of *Owen v. Howard Ins. Co.* 87 Ky. 571, 10 S. W. 119, it was *obiter dictum*. In *Lee v. Union Cent. L. Ins. Co.* 22 Ky. L. Rep. 1712, 56 S. W. 724, the question was directly presented, and was finally decided on rehearing by an equally divided court. In *Smith v. Herd*, 110 Ky. 56, 60 S. W. 841, 1121, the question was again squarely presented, and was decided in conformity to the reasoning in *Riddlesbarger v. Hartford F. Ins. Co.* 7 Wall. 386,

19 L. ed. 257, and citing *Owen v. Howard Ins. Co.* 87 Ky. 571, 10 S. W. 119.

The gist of the reasoning advanced in the *Riddlesbarger Case*, and in the text-books which have adopted it, is that it is essential to the insurer to have the claim promptly presented and adjusted, as by a great lapse of time the circumstances of the transaction are apt to fade from the memory of disinterested witnesses, or the evidence will be lost, and the insured or beneficiary, being on the ground, would have an undue advantage, which might be turned into the fabrication of evidence and the like to support unmeritorious claims. The argument, when presented to the legislature, might justify that body's enacting a general law of limitation for this class of contracts different from that applied to ordinary written obligations. But it is not a good reason why the statute now in force and applicable to such contracts—the statute of fifteen years (Ky. Stat. 1903, § 2514)—should not be applied by the courts. Beside, the condition of the law in this state does not warrant the application of the reasoning. For here we enforce the provision of the contract requiring that the insured or beneficiary furnish promptly notice and proof of loss as a condition precedent to his right to sue. This puts before the insurer the fact that it is claimed to be liable on the policy, and the circumstances and names of witnesses by which it is proposed to establish it. *Etna L. Ins. Co. v. Milward*, 26 Ky. L. Rep. 589, 68 L. R. A. 285, 82 S. W. 364. It is then open to the insurer to protect itself, if it deems the claim unfounded in merit, in two ways: (1) To proceed under the Code to perpetuate its evidence, so that, whenever the action may be brought against it, it has lost nothing by deaths and removals of witnesses; (2) or it may sue at once to be relieved of the liability claimed, on the ground that it has been discharged, or that the contract has terminated, or for whatever reason, and it may thus at once force a trial of the matter, getting such advantages as accrue from that fact.

While recognizing the great ability of the justices of the supreme court, and the learning and wisdom of the courts of final resort of the states that have adopted a different policy, yet we feel constrained to declare that the public policy of Kentucky is a matter peculiarly for her own construction and application. The reasoning applied to uphold the distinction made in favor of insurance contracts to us is unsatisfying, while the objections to the principle on which it rests are insuperable. The supreme courts of two other states have come to the same conclusion at which we have arrived. *Barnes v. McMurtry*, 29 Neb. 184, 45 N. W. 285, and 69 L. R. A.

Georgia Masonic Ins. Co. v. Davis, 63 Ga. 471. And there may be others. *Smith v. Herd*, 110 Ky. 56, 60 S. W. 841, 1121, is overruled. *Lee v. Union Cent. L. Ins. Co.* 22 Ky. L. Rep. 1712, 56 S. W. 724, will not longer be considered authority on this point.

We conclude that the provision in the policy that no suit should be maintained upon it, unless begun within one year from the death of the insured, was in contravention of the public policy of this state, and is void. It follows that the judgment of the circuit court, having been in conformity to this conclusion, is affirmed, with damages.

Paynter, J., dissents.

A petition for rehearing having been filed, **O'Rear, J.**, on February 15, 1905, handed down the following additional opinion:

The policy provides that any indebtedness of the assured to the company will be deducted from the face of the policy if the latter becomes a claim against the company. The note for \$396.80 and interest from December 15, 1897, spoken of in the opinion, ought to have been credited on the sum payable to appellee under the terms of the policy. For the error in failure to do so, *the judgment must be reversed*, and cause remanded, to enter judgment on the verdict subject to the credit herein indicated. The opinion in other respects is adhered to.

On March 9, 1905, a further opinion was handed down by **Hobson, Ch. J.**, to the effect that, upon withdrawal of the transcript from the clerk's office, he could not tax costs as for two copies, although it was used by both parties, which throws no light on the main proposition in the case, and is therefore omitted.

A. H. HARGIS et al.

v.

Watts PARKER, Judge, etc

(.....Ky.....)

1. The supreme court may exercise its

NOTE.—As to superintending control of superior over inferior tribunals, see also, in this series, *State ex rel. Fourth Nat. Bank v. Johnson*, 51 L. R. A. 33, and *note*, and *Re Barber Asphalt Paving Co.* 67 L. R. A. 761.

As to jurisdiction of crime begun in one state or county and consummated in another, see also, in this series, *Watt v. People*, 1 L. R. A. 403; *Ex parte McNeely*, 15 L. R. A. 226; and *Graham v. People*, 47 L. R. A. 731.

As to crime committed by shooting across state boundary, see *State v. Hall*, 28 L. R. A. 59, *note*.

As to effect of prosecution in one county to bar prosecution in another county, where offense was partly consummated in both, see *Coleman v. State*, 64 L. R. A. 807.

constitutional power to prevent an inferior court from exceeding its jurisdiction, before the question of jurisdiction has been presented to such court, where the situation disclosed is such that to take the ordinary course would be of itself to subject the complaining party to irreparable loss.

2. The supreme court has jurisdiction to intervene by a writ of prohibition to stay an inferior court from proceeding out of its jurisdiction, under a constitutional provision empowering it to issue such writs as may be necessary to give it a general control of inferior jurisdictions.

3. A constitutional right to trial by jury of the vicinage does not prevent the trial taking place in either county, in case a crime is begun in one and consummated in another.

4. The arrest at their own instigation, for the purpose of preventing a trial elsewhere, of persons accused of crime, by a magistrate of the county where the commission of the crime is commenced, and blinding them over to await the action of the grand jury, will not prevent proceedings against them in the county where the crime is consummated, under a statute providing that, if the jurisdiction of any offense be in two counties, the accused shall be tried in the county in which he is first arrested.

5. An accessory before the fact to a murder in which the wound is inflicted in one county and the injured person dies in another may be tried in either county, although his acts are committed only in the former, under statutes providing that accessories shall be liable to the same punishment as principals, and may be prosecuted jointly with them, and, in case of a crime committed jointly in two counties the prosecution may be in either.

(March 10, 1905.)

APPPLICATION for a writ of prohibition to restrain defendant from taking jurisdiction of an indictment charging petitioners with murder. *Denied.*

The facts are stated in the opinion.

Messrs. J. B. Hanna, John M. Stevenson, and J. J. C. Bach, with Messrs. J. Smith Hays, Lewis McQuown, and Hazelrigg & Hazelrigg, for petitioners:

The jurisdiction of this court attached under the averments of the petition in this case.

Com. v. Jones, 26 Ky. L. Rep. 867, 82 S. W. 643; *Const. § 110; Weaver v. Toney*, 107 Ky. 419, 50 L. R. A. 105, 54 S. W. 732; *Louisville & N. R. Co. v. Miller*, 112 Ky. 464, 66 S. W. 5.

If every friend that the plaintiffs have in this case had gone to the magistrate at the instance of the plaintiffs, and implored him, in advance of any actual proceeding in Fayette county, to make the affidavit, to issue the warrant in this case; and implored the sheriff to execute it; and implored the

magistrate to grant the bail; and even implored the Breathitt grand jury to indict them,—still it would and could have been no legal fraud on the commonwealth, or on the jurisdiction of Fayette county.

The justice, having jurisdiction of the charge, had the undoubted right to admit to bail.

Com. v. Kimberlain, 6 T. B. Mon. 43; *Com. v. Nimmo*, 7 Ky. L. Rep. 286; *Vias v. Com.* 7 Ky. L. Rep. 742; 3 Enc. Pl. & Pr. p. 200.

While the court would not sustain the plea of action pending where the penalty was wholly inadequate, yet in a case where the penalty is fixed by law, and "the offender cannot lessen it by misrepresentation," it will be upheld.

Hamilton v. Williams, 1 Tyler (Vt.) 15.

If the jurisdiction is concurrent in two or more counties, an election must be made by somebody; and it is clear, if the commonwealth has not made such an election the accused may do so.

State v. Casey, 44 N. C. (Busbee, L.) 209; *State v. George*, 53 Ind. 434.

The justice of the peace residing nearest the courthouse had jurisdiction to issue the warrants of arrest and take bail bonds.

Act 1886, § 3, Carroll's Crim. Code, § 71; Act 1886, § 8, Carroll's Crim. Code, § 71; *Com. v. Kimberlain*, 6 T. B. Mon. 43; *Oreokmore v. Com.* 5 Bush, 312; *Com. v. Nimmo*, 7 Ky. L. Rep. 286; *Vias v. Com.* 7 Ky. L. Rep. 742; 3 Enc. Pl. & Pr. p. 200; *State v. George*, 53 Ind. 434.

The section of the Kentucky statutes (1147) under which jurisdiction is claimed for Fayette is unconstitutional.

Parker v. Com. 12 Bush, 194; 1 Bishop, Crim. Law, § 113; *United States v. Guiteau*, 1 Mackey, 498, 47 Am. Rep. 247; Bill of Rights, § 11; 1 Ky. Stat. 1796, Littell, p. 472; 1 Bishop, Crim. Proc. § 57, subsec. 2; *State v. Carter*, 27 N. J. L. 499; *Riley v. State*, 9 Humph. 646.

Messrs. J. R. Allen, N. B. Hays, C. H. Morris, J. R. Morton, A. F. Byrd, and B. R. Jowett for respondent.

O'Rear, J., delivered the opinion of the court:

The respondent the Honorable Watts Parker is the judge of the twenty-second judicial district of Kentucky, comprising Fayette county. The plaintiffs were indicted by the grand jury of Fayette county, charged with the murder of James Cockrill. A bench warrant issued upon the indictment, and was about to be served upon the plaintiffs in this proceeding, when they appeared in this court, and asked that a writ of prohibition issue against the respondent Parker to prevent his taking or exercising

jurisdiction over the persons of the plaintiffs. The facts upon which the application is based are that James Cockrill was shot and wounded in Breathitt county, this state, in July, 1902. He was immediately conveyed to Fayette county for treatment of his wound, but shortly thereafter died in Fayette county. He was shot and killed, it is alleged, by Curtis Jett, who has since been tried and convicted of the crime, and sentenced to death. Jett was indicted by the grand jury of Breathitt county, though he was tried in Harrison county upon a change of venue. The claim of the plaintiffs is that, as alleged by the state, they were accessories before the fact to the murder, and that their acts, if done as claimed, were committed wholly in Breathitt county; that on December 3, 1904, warrants were issued against the plaintiffs by one James W. Edwards, a justice of the peace for Breathitt county, charging them with this murder. They were arrested upon the warrants, carried before the magistrate, and were by him held over to answer such indictment as the grand jury might find against them, and were in the meantime released upon bail. On January 24, 1905, the Fayette county grand jury returned the indictment charging the plaintiffs with the same murder in that county, and it is under this last-named indictment that the Fayette court is proposing to take jurisdiction of the plaintiffs and to try the case. Since January 24, 1905, and in fact since the original petition was filed in this court, the grand jury of Breathitt county has been convened in regular session, has examined into the alleged murder of James Cockrill, and has returned in that court several indictments charging the plaintiffs with the murder of Cockrill. Upon these facts the plaintiffs assert that the authorities of Breathitt county first took jurisdiction of the offense and of the persons of the accused, and thereby affixed the exclusive jurisdiction to try them in the courts of that county. It is also contended by plaintiffs that the provision of the statutes and Code of this state allowing a trial to be had in either county where any part of an offense may have been committed is violative of the Constitution.

Judge Parker disclaims any intent or purpose in the proceeding other than to discharge his official duty as he sees it. The commonwealth of Kentucky, at the request of the attorney general and of the commonwealth's attorney of the twenty-second judicial district, was allowed to be made a party defendant, and has defended this suit. The contentions of the commonwealth are as follows: (1) That the writ should not be issued until the petitioners have first applied to the circuit court and had the

question of its jurisdiction passed on by that court. (2) That under the statutes of this state Fayette and Breathitt counties have concurrent jurisdiction of the offense charged in the indictment, and that the county where proceedings were first begun takes the exclusive jurisdiction. (3) That proceedings were first begun in Fayette county. (4) That the alleged proceedings in Breathitt county previous to the indictment returned in January are a myth; or, if in fact had, were the result of collusion between the accused and the officers, including the examining magistrate, were originated for the fraudulent purpose of preventing any prosecution, and were never intended to have been made public except as a defense to the jurisdiction of Fayette county.

The 110th section of the Constitution of Kentucky reads: "The court of appeals shall have appellate jurisdiction only, which shall be coextensive with the state, under such restrictions and regulations, not repugnant to this Constitution, as may from time to time be prescribed by law. Said court shall have power to issue such writs as may be necessary to give it a general control of inferior jurisdictions." The last sentence was not in any previous Constitution of this state. From that fact, and inasmuch as it had been held under the former Constitutions that this court might issue the common-law writ of prohibition against any inferior court proceeding out of its jurisdiction (*Arnold v. Shields*, 5 Dana, 18, 30 Am. Dec. 669; *Sasseen v. Hammond*, 18 B. Mon. 673), provided this court had appellate jurisdiction of the subject-matter, it was said that the last sentence of § 110 of the Constitution "seems to have been intended . . . to give to the court of appeals plenary power to issue writs in every case when necessary to give it general control of inferior jurisdictions." *Hindman v. Toney*, 97 Ky. 413, 30 S. W. 1006. Ordinarily, this court might well refuse to issue the writ before the question of jurisdiction had been made in the lower court, for it might be presumed that until that court had proceeded out of its jurisdiction, or had evinced by an order of court that it proposed doing so, it would not, or, at any rate, that the complainant was not injured, nor threatened with injury till then. But this is not necessarily so in all cases. If the situation disclosed be such as that to take the ordinary course would be of itself to subject the complainant to irreparable loss, the writ should issue without the objections having been made below. The matter of judicial courtesy should yield to substantial personal rights of litigants, such as a sacrifice of their liberty. If it be true that the

Fayette court is proceeding without jurisdiction, it is not substantial justice that it should be allowed to take the bodies of the complainants, confine them in jail without bail, as it might do at its discretion, subject the parties to enormous expense in defending the case, even if it went no further than a trial of the question of jurisdiction, and say to them, "Your remedy is solely by appeal if you have been wronged." We think the section of the Constitution, though it be deemed only declaratory of the common law on the subject, confers the power and jurisdiction on this court to intervene by the writ of prohibition to stay the inferior courts of the state from proceeding out of their jurisdiction. It may issue whether or not there is an appeal. Whether it ought to issue in advance of the decision of the lower court, or whether the party will be left to his remedy by appeal, will depend on whether that remedy is given, and whether it is adequate or not. This court will be slow to use the writ where there is an appeal, but its valuable office to the citizen who is being oppressed by unlawful assumption of judicial authority will not be limited by set rules. It is believed the general principles regulating the use of this writ are so well established and understood that it is unnecessary to further define them.

It is not an open question in this state whether an offense committed partly in two counties may be tried in either. Whatever may have been the common-law rule, though it seems to have been substantially as now declared by our statute, legislation in this state has settled it, unless it be said that the Constitution is violated thereby. Section 1147, Ky. Stat. 1903, provides: "If a mortal wound, or other violence or injury, be inflicted, or poison be administered, in one county or corporation, and death ensues in another, the offense may be prosecuted in either." And § 21 of the Criminal Code of Practice provides: "If an offense be committed partly in one and partly in another county, or if acts and their effects constituting an offense occur in different counties, the jurisdiction is in either county." If such was the common law—as we think it was—"a jury of the vicinage," at common law, was a jury selected from the neighborhood of the crime, which might be either county where it was in part committed. *Com. v. Jones*, 26 Ky. L. Rep. 867, 82 S. W. 643. It has always been understood that the right to trial by a "jury of the vicinage" was subject to certain necessary exceptions, such as changes of venue, and the like. *Parker v. Com.* 12 Bush, 191; *Adkins v. Com.* 96 Ky. 539, 32 L. R. A. 108, 33 S. W. 948; *Smith v. Com.* 108 Ky. 53, 55 S. W. 718. This was held to be the law under the old 69 L. R. A.

Constitution, before the provision found in § 11 of the present Constitution was adopted. *Com. v. Davidson*, 91 Ky. 162, 15 S. W. 53. As it is admitted that the shot that killed Cockrill was fired in Breathitt county, and that his death from the wound occurred within one year and a day thereafter in Fayette county, they each had concurrent jurisdiction of the crime. Manifestly, the courts of two counties could not try the same defendants for the same offense. There must be a time when the jurisdiction of one county becomes exclusive and that of the other county is lost. Section 24, *Crim. Code Prac.*, is: "If the jurisdiction of an offense be in two or more counties, the defendant shall be tried in the county in which he is first arrested, unless an indictment for the offense be pending in another county." A literal application of the last section might lead to absurdities certainly never contemplated in the purpose of its enactment. It was so held in *Massie v. Com.* 90 Ky. 485, 14 S. W. 419. Horse stealing is punishable by statute in the county where the horse may be stolen, or in any county into which it may be carried. *Massie* took a horse in Montgomery county, and carried it into Bourbon. At the instance of the Montgomery county authorities, and before an indictment in that county or elsewhere, they caused him to be arrested in Bourbon, and brought back to Montgomery, for trial, where he was convicted. He relied on § 24, *Crim. Code Prac.*, in bar of the jurisdiction of the Montgomery court. It would seem that literally his objection was well taken. But this court said: "This provision was not inserted in the Code for the benefit of the criminal, but to prevent a conflict of jurisdiction in cases where it belonged to more than one county." It is conceded, as it must be under the statute quoted, and the decisions of this court, if adhered to, that, where two or more counties have concurrent jurisdiction of an offense committed partly in each of them, no substantial legal right of the accused can be invaded whether one or the other takes cognizance of the matter. So long as the accused is not put in jeopardy by the proceedings in both counties, it cannot be the subject of complaint from him which of them takes the jurisdiction and proceeds with his trial, so long as only one does so.

The fact may be accepted as established by the proof in this case that Magistrate Edwards issued warrants against plaintiffs on December 3, 1904, charging them with the murder of James Cockrill. It may also be accepted as established, for the purposes of this hearing, that the accused were arrested or voluntarily surrendered themselves to the custody of the magistrate, who signed an

order committing them to the circuit court of Breathitt county for examination of the charge by the grand jury of that county, and that they executed bonds for their appearance before that court. It is contended for the commonwealth, though,—and this is the main question presented for decision,—that these proceedings are void. For the plaintiffs the argument is that, whatever may have been the motives of the officers of Breathitt county, or however their action might have been induced, the fact is that, having jurisdiction to do what was done, the accused are actually bound by the proceedings, and, the law's machinery being set in motion, under § 24, Crim. Code Prac., the jurisdiction of Breathitt county becomes exclusive. The court has come to the conclusion, upon the evidence before it, that the arrests of the plaintiffs in Breathitt county were procured upon their own instigation, or that of some of them acting for all, with the design not to have a trial of the charge there or elsewhere, but as a cloak to prevent the trial elsewhere. If such be not the fact, the plaintiffs are peculiarly unfortunate in the matter of certain coincidences shown in the proof, as well as certain discrepancies between the record of the squire's proceedings and the admitted truth. Being of this opinion as to the facts, the question recurs, Do the proceedings in Breathitt before the examining magistrate confer exclusive jurisdiction of the plaintiffs on the courts of that county? A judgment of a court may be a punishment or it may be a protection. It may or may not be a bar, according to whether he who relies on it is in a position to do so. If it be obtained by fraud, the one procuring it ought not to be permitted to use it as a protection. That would be to allow one to profit by his own fraud, which is a doctrine repugnant to the law, and wholly untenable by any kind of right thinking. It is said that the commonwealth has acted in the matter in Breathitt through her legally constituted officers, whose authority is as complete to bind the commonwealth as is that of the officers of Fayette or any other county. If the commonwealth is bound, it is upon principles analogous to agency that he who sets another to do his business is bound by such agent's acts within the scope of his authority; which is as it should be. But there is a necessary exception to that rule, which is, if the agent, in fraud of his principal, colludes with his opponent, so that, instead of acting for his principal, he becomes the tool or accomplice of the opponent, then the principal ought not to be bound by his agent's acts; nor is he. As between two persons, this is undeniably the law. The state will not be given less consideration in matters of

69 L. R. A.

public concern than any individual. The courts which administer the law may protect their own jurisdictions from machinations, from palpable subterfuges intended merely to defeat their jurisdiction. The sovereignty of the law depends upon the power of the courts to maintain the integrity of their jurisdiction against mere devices that would defeat them. Judgments obtained by extrinsic fraud ought not to bind anybody not a party to the fraud. They ought to be and are subject to impeachment either by direct or collateral attack. This is so although the court rendering them had jurisdiction of the subject-matter. *Grignon v. Astor*, 2 How. 319, 11 L. ed. 283; *United States v. Throckmorton*, 98 U. S. 68, 25 L. ed. 96; *Cole v. Cunningham*, 133 U. S. 112, 33 L. ed. 541, 10 Sup. Ct. Rep. 269; *Brunk v. Means*, 11 B. Mon. 214; *Talbott v. Todd*, 5 Dana, 190. In *Carrington v. Com.* 78 Ky. 83, the accused was indicted for a violation of the liquor laws. His offense was a misdemeanor. A statute provided that, "whenever any person shall be lodged in jail, in default of bail, being charged with a misdemeanor," whether under an indictment or not, the judge of the quarterly court, the circuit court not being in session, had jurisdiction to try the case. The defendant surrendered to the jailer, failed to give bond, and was brought before the quarterly court, tried, convicted, and fined. Notwithstanding, the circuit court proceeded afterwards to try him under the same indictment, rejecting his plea of former conviction in bar. This court said: "The circuit court properly refused to permit its jurisdiction to be ousted, and to allow the prisoner, by a device so transparent, to choose the tribunal in which he would be tried. A judgment of acquittal thus procured was not a bar, and was properly disregarded." Plaintiffs seek to distinguish *Carrington's Case* from this one upon the suggestion that the quarterly court had not jurisdiction of the case, because Carrington was not in fact in jail, but was simply in the custody of the jailer. The court, however, did not rest its decision upon that feature of the case. It was referred to only as indicating a lack of good faith in the matter. The court said: "The evidence in this case shows that the prisoner never was committed to jail, nor was he in good faith committed to the custody of the jailer." From this it appears that, had the defendant been in good faith committed to the custody of the jailer, it would not have been necessary to have gone through the idle form of locking and unlocking the jail door. Emphasis was laid upon the lack of good faith in the defendant's surrendering himself to the jailer's custody in this language: "Whatever was done toward bringing the case within the

letter of the statute was evidently done, not to avoid the imprisonment of the defendant, but to secure a trial before the county judge. . . . The evidence in this case shows conclusively that the surrender of the prisoner to the jailer was merely formal, and merely with the design to give the quarterly judge jurisdiction, and not for the safe-keeping of the prisoner, or because he was either unable to give bail or unwilling to do so, except for the purpose of bringing his case within the statute." Of all this the court said: "It is to be treated as if the prisoner had procured himself to be accused, arrested, and tried, and then attempted to plead the judgment thus obtained in bar; for, although he had been regularly indicted, he procured a trial in the quarterly court by a fraud upon the statute giving that court jurisdiction." In applying that decision to this case, it follows, *a fortiori*, that one accused of a crime cannot procure himself to be arrested and bound over under form of law to give jurisdiction to a county of his preference, in fraud of the right of the prosecuting officers acting in good faith to fix it elsewhere, if they choose to do so in the interest of a fair trial. The position of this court on this subject appears to be in harmony with the trend of authority elsewhere. *State v. Colvin*, 11 Humph. 599, 54 Am. Dec. 60; *Watkins v. State*, 68 Ind. 427, 34 Am. Rep. 273; *Com. v. Dascom*, 111 Mass. 404; *State v. Simpson*, 28 Minn. 66, 41 Am. Rep. 270, 9 N. W. 78. No reflection can be indulged against the judge and prosecuting attorney of the Breathitt circuit court. Their fitness and willingness to enforce the law is in no sense involved. This case, as made up on the trial, has to do solely with what occurred before the prosecution took any form in the Breathitt circuit court. In view of the language of § 24 of the Criminal Code of Practice, the case is resting upon the bona fides of the alleged prior arrest in Breathitt county. If that was not, properly speaking, an arrest of the accused, then, as the Fayette circuit court first indicted them for the offense of murdering James Cockrill, it took jurisdiction of the matter by virtue of § 24 of the Criminal Code of Practice, to the exclusion of the Breathitt circuit court.

The final contention of the plaintiffs is that they are charged as accessories before the fact to the murder of Cockrill, and, as their alleged acts are admitted to have been done in Breathitt county, under the authority of *Tully v. Com.* 13 Bush, 142, that county alone has jurisdiction to try them. Tully was accused as accessory after the fact to a murder committed in Scott county. The Scott court was held to be without jurisdiction, as the act of 1796 (1 Stat. Laws, 530), held in that case not to have been repealed. 69 L. R. A.

but expressly continued in force by the Revised Statutes then in effect, provided: "An accessory to a murder or felony committed shall be examined by the court of that county and tried by the court in whose jurisdiction he became accessory, and shall answer upon his arraignment, and receive such judgment, order, execution, pains, and penalties as is used in other cases . . . of felony." But the saving clause contained in the Revised Statutes, which continued the practice provided by the act of 1796, is not in the present statutes or Code of Practice. Section 3 of the present Criminal Code of Practice reads: "All laws coming within the purview of this act shall become repealed when this act goes into effect, except as provided in the preceding section." (The preceding section relates alone to prosecution begun before January 1, 1877.) The Criminal Code of Practice regulates the trial of all criminal prosecutions. But it does not contain the provision from the act of 1796 just quoted. Section 1128, Ky. Stat. 1903, provides: "In all felonies, accessories before the fact shall be liable to the same punishment as principals, and may be prosecuted jointly with principals, or severally, though the principals be not taken or tried, unless otherwise provided in this chapter." This section is found under the title of *Crimes and Punishments*, in Kentucky statutes (Barbour), in which this court declared in *Buchannon v. Com.* 95 Ky. 334, 25 S. W. 265, "to be a complete system of statutory law relating to crimes and punishments, and, as a consequence, to supersede or repeal all existing statutes on that subject." If accessories before the fact can be indicted jointly with principals, and if the principals could be indicted in Fayette, the accessory before the fact could also be indicted and tried there, although his act may have been committed elsewhere. It follows that the present statute and the act of 1796 are incompatible in their provisions, and the latter must of necessity supersede the former. In *Com. v. Parker*, 108 Ky. 673, 57 S. W. 484, this precise question arose. The accessory before the fact, whose sole connection with the crime was shown to have been in Kenton county, was indicted and tried in Jefferson county. The court said: "We do not desire to go further than is necessary to decide the question here presented; i. e., that an accessory before the fact, who devises in one county a scheme to commit a crime in another, thereafter actually committed, or who in one county procures the commission of a crime in another, is, under § 21 of the Code, properly triable in either county."

The court is of opinion that the Fayette circuit court has now exclusive jurisdiction

to try the case made by the indictment returned by the grand jury, and that the proceedings before Justice of the Peace Edwards are a nullity in so far as they attempt to confer jurisdiction upon the courts of Breathitt county. *The application for the*

writ of prohibition against the judge of the Fayette Circuit Court is consequently denied. The temporary writ heretofore issued is discharged.

Cantrill, J., did not sit.

LOUISIANA SUPREME COURT.

City of CROWLEY

v.

M. ELLSWORTH, *Appt.*

(.....La.....)

- *1. On an appeal coming to this court solely under the grant of jurisdiction to this court over suits involving the constitutionality or legality of a fine or penalty imposed by a municipal corporation, the question of whether the facts were sufficient to justify the conviction of the appellant cannot be considered.
2. An ordinance is not informal or illegal because the cause or reasons of its enactment are not given, nor because it punishes as a nuisance what neither by it nor by another ordinance is expressly declared to be such.
3. An ordinance which applies alike to all persons, firms, or corporations engaged in the business legislated against is not discriminatory.
4. Authority to a municipal corporation to regulate the storage of combustible and inflammable materials includes authority to prohibit the storage of refined and other explosive oils within the corporate limits; and an ordinance so providing is not unreasonable.
5. A special ordinance granting to a particular person permission to store refined oils within the corporate limits of a town is repealed by a subsequent general ordinance, applicable to all persons alike, making such storage of oils a criminal offense.
6. Though an ordinance prohibiting the storage of explosive oils in large quantities within the corporate limits happens to have the effect of putting an end to a business, and of rendering valueless certain structures used in connection with the business, its enforcement will not constitute a depriving of property without due process of law, when the circumstances justified its adoption as a police regulation.

(February 27, 1905.)

A PPEAL by defendant from a judgment of the Crowley City Court convicting him of violating a municipal ordinance. *Affirmed.*

The facts are stated in the opinion.

*Headnotes by PROVOSTY, J.

NOTE.—As to ordinances regulating the storage of oil within corporate limits, see also, in this series, *Richmond v. Dudley*, 10 L. R. A. 187, 13 L. R. A. 587.
69 L. R. A.

Messrs. Medlenka & Taylor, for appellant:

Before any lawful business can be prohibited or regulated by a municipal corporation, it must first be shown to be and declared to be a nuisance.

Waters-Pierce Oil Co. v. New Iberia, 47 La. Ann. 863, 17 So. 343; *Dill. Mun. Corp.* p. 454.

A particular law is not repealed by a general law, unless the two are so repugnant that they cannot stand together under any circumstances.

State v. Callac, 45 La. Ann. 27, 12 So. 119; *Cooley*, *Const. Lim.* last ed. p. 216; *Dill. Mun. Corp.* § 87; *Bond v. Hiestand*, 20 La. Ann. 140; *State ex rel. Carcass v. First Dist. Judge*, 32 La. Ann. 723; *Concordia v. Natchez, R. River & T. R. Co.* 44 La. Ann. 613, 10 So. 809; *Johnston v. Pilster*, 4 Rob. (La.) 77.

Where the law enables a corporation to make by-laws or ordinances in certain cases and for certain purposes, its power of legislation is limited to the cases and objects specified, all others being excluded by implication.

New Orleans v. Philippi, 9 La. Ann. 44; *Crowley v. West*, 52 La. Ann. 531, 47 L. R. A. 652, 78 Am. St. Rep. 355, 27 So. 53; 1 *Dill. Mun. Corp.* ¶ 379.

In order to hold an officer or agent criminally liable individually for an offense committed by the corporation, or by its officers or agents, it must be shown that he had some actual, personal connection with the illegal acts charged.

21 Am. & Eng. Enc. Law, 2d ed. p. 896.

The power vested by legislation in a corporation to make ordinances for its own government does not give the power to enlarge, diminish, or vary its powers by its ordinances.

Thompson v. Roe, 22 How. 422, 16 L. ed. 387; *Thomas v. Richmond*, 12 Wall. 349, 20 L. ed. 453; *New Orleans v. Ursuline Nuns*, 2 La. Ann. 611.

Mr. Thomas R. Smith, for appellee:

Officers, directors, or agents of a corporation participating in a violation of law in the conduct of the company's business may be held criminally liable individually therefor.

21 Am. & Eng. Enc. Law, 2d ed. p. 896; Clark, Crim. Law, p. 102.

One indicted for a nuisance cannot defend on the ground that he acted as the agent of another in maintaining the nuisance.

21 Am. & Eng. Enc. Law, 2d ed. p. 712; *Williams v. Hendricks*, 115 Ala. 277, 41 L. R. A. 657, 67 Am. St. Rep. 32, 22 So. 439.

Under power to pass an ordinance if necessary, the necessity for its enactment, being implied from its mere passage, need not be recited in the ordinance, nor averred in proceedings to enforce it.

Dill. Mun. Corp. p. 395, note 2.

An ordinance need not recite the authority under which it is enacted.

Elliott, Mun. Corp. p. 183.

The mere fact that an ordinance, general in its application, injures in a peculiar way a particular individual, will not authorize the courts to presume that it was executed for the purpose of annoying him and depriving him of his rights, and, for that reason, to declare it void.

17 Am. & Eng. Enc. Law, 2d ed. p. 253.

The regulation of petroleum and other inflammable substances is not the taking of private property without due process of law; nor is it in restraint of trade.

Waters-Pierce Oil Co. v. New Iberia, 47 La. Ann. 863, 17 So. 343; 17 Am. & Eng. Enc. Law, 2d ed. p. 249, note; Dill. Mun. Corp. 4th ed. p. 396, note 2; Elliott, Mun. Corp. p. 202.

Provosty, J., delivered the opinion of the court:

The defendant is the local agent of the Waters-Pierce Oil Company, of Missouri, which company does a wholesale oil business in the city of Crowley. In April, 1898, said company obtained permission from the city council "to construct and erect three iron storage tanks" at a designated place within the corporate limits, "for the purpose of storing illuminating, lubricating, and other oils for the sale and supply of the demand in the town of Crowley and vicinity." In July, 1904, the city council adopted an ordinance providing that "hereafter it shall be unlawful for any person, firm, or corporation to keep on their premises or in storage tanks within the corporate limits of the city of Crowley, at any one time, more than two barrels of gasoline, coal oil, or other refined oils of an explosive nature," and punishing by fine of not less than \$5, nor more than \$100, or by imprisonment in the city jail for not less than two nor more than thirty days, any violation of the ordinance. Defendant was prosecuted and convicted in the city court for a violation of the ordinance, was fined \$100, and he has appealed.

His first contention is that the city authorities have hold of the wrong man; that he is a mere employee executing orders, and therefore not responsible. With this defense this court has nothing to do. The case comes here under the provision of the Constitution granting appellate jurisdiction to this court of "suits involving the constitutionality or legality of any . . . fine or penalty imposed by a municipal corporation;" and no question can be inquired into except that as to which jurisdiction is thus specially conferred. *Burguières v. Sanders*, 111 La. 109, 35 So. 478.

Defendant claims that the ordinance under which he has been prosecuted and fined is unconstitutional for six reasons, which we now proceed to consider in regular order.

First. That no grounds are assigned as a cause for passing the ordinance, and that, although the storage of oil of an explosive nature in quantities greater than two barrels is not a nuisance *per se*, the ordinance punishes it as a nuisance without having declared it to be such.

The first branch of this objection is clearly without merit. Clearly, a legislative body does not have to give any reasons for its enactments; not though such reasons "were plentiful as blackberries in June." Dill. Mun. Corp. 3d ed. § 318, note 2; Elliott, Mun. Corp. p. 183.

The second branch is no better than the first. An ordinance which makes an act unlawful, by necessary implication declares it of a noxious character, and any further declaration on the subject would be mere useless tautology.

Second. "The said ordinance is discriminatory, unreasonable, arbitrary, and unequal in its operation and effect, for the reason that it is confined exclusively to refined oils handled by the Waters-Pierce Oil Company, when in truth and in fact, to the express knowledge of the city of Crowley, other oils of an explosive nature are stored in large quantities within the city limits of Crowley, by other persons, firms, and corporations."

The ordinance applies alike to all persons, firms, or corporations engaged in the business legislated against, and is certainly not discriminatory. The discrimination is said to consist in that the ordinance applies only to refined oils, and not to crude oils. Conceding that this discrimination in favor of crude oils would be fatal to the ordinance if crude oil were shown to be equally explosive as refined oil, the evidence fails to show that fact, and every presumption is in favor of the fairness of the ordinance. Elliott, Mun. Corp. p. 202.

Third. "That the city of Crowley ex-

ceeded its chartered authority as conferred upon it by paragraph 9, § 16, of act No. 136 of 1898, p. 232, in excluding (which exclusion is an absolute prohibition of conducting of the wholesale oil business in the said city from its limits) the storage of refined oils of an explosive nature in quantities greater than two barrels; the said ordinance not regulating, but absolutely prohibiting, the Waters-Pierce Oil Company from carrying on its business."

The "chartered authority" thus referred to is conferred in the following terms: "The following additional powers are conferred upon the mayor and aldermen of cities and towns: . . . Ninth. To regulate the storage of powder, pitch, turpentine, rosin, hemp, hay, cotton, and all other combustible and inflammable materials.

In the case of the same *Waters-Pierce Oil Co. v. New Iberia*, 47 La. Ann. 863, 17 So. 343, a similar ordinance was sustained by this court, although the authority to pass it was not so clearly conferred as in the present case.

Fourth. "That the said ordinance is unreasonable, and in restraint of a lawful and legitimate business carried on and surrounded with the greatest precaution against danger of fire, explosion, or accident likely to entail the loss of life or property."

Clearly, an ordinance prohibiting the storage of oils of an explosive nature within the built-up parts of the city would not be unreasonable. Inasmuch as the ordinance is made to apply to the entire corporate limits, the inference is that there is no place within the corporate limits where, in the judgment of the council, it would be safe to store the inflammable and explosive substance mentioned in the ordinance. The evidence shows that there are buildings within dangerous proximity to the storage tanks of which the defendant is in charge.

Fifth. That the ordinance is unconstitutional in so far as it affects the employer of defendant, because it does not repeal the former ordinance granting permission to the said employer of defendant to erect tanks, etc.

The question here raised is that of repeal *vel non*, and therefore, at best, of the legality of the fine, and not of the constitutionality, *vel non*, of the ordinance.

Surely, the first ordinance, in so far as it may authorize the doing of anything which the second prohibits and punishes as a crime, is inconsistent with it, and therefore repealed. The manifest intention of the second ordinance is that the storing of explosive oil in large quantities shall be unlawful for defendant's employers as well 69 L. R. A.

as for all others. To such a case the rule as to a special statute not being repealed by a general has no application.

Sixth. "That the said ordinance is further illegal and unconstitutional, and deprives the Waters-Pierce Oil Company of its property without due process of law, without compensation or indemnity, and violates the Constitution and the laws of the United States and of this state, and more particularly the 4th, 5th, and 14th Amendments of the United States Constitution, articles 1, 2, 166, and 167 of the Constitution of Louisiana, and article 497 of the Civil Code of Louisiana."

This exact point was passed on in the case of the same *Waters-Pierce Oil Co. v. New Iberia*, 47 La. Ann. 863, 17 So. 343. Judgment affirmed.

Rochbert P. RICHARD

v.

SPRINGFIELD FIRE & MARINE INSURANCE COMPANY.

(.....La.....)

- *1. Where a nonresident fire insurance company appointed a local agent in this state, and supplied him with blank policies signed by the president and secretary of the company, to be filled up, countersigned, and issued as occasion may require, such agent will be considered as having the powers of a general agent as to policies issued by him under such circumstances.
- *2. An agent authorized to issue policies binds the company by all waivers, representations, or other acts within the scope or requirements of his business, unless the insured has notice of the limitation of his power.
- *3. Such an agent has the apparent power to waive, prior to a loss, a breach of the iron-safe clause by him attached to the policy, resulting from the failure of the insured, through illness, to make a complete inventory of stock within 30 days from the date of the issuing of the policy.

(May 8, 1905.)

APPPLICATION by plaintiff for a writ to review a judgment of the Court of Appeals for the Third Circuit, which reversed a judgment for the Parish of St. Landry in

*Headnotes by LAND, J.

NOTE.—As to power of general agent of insurance company to waive condition in policy, see also, in this series, *Smith v. Niagara F. Ins. Co.* 1 L. R. A. 216, and cases in note; *Lamberton v. Connecticut F. Ins. Co.* 1 L. R. A. 222; *German Ins. Co. v. Gray*, 8 L. R. A. 70; and *Carey v. German American Ins. Co.* 20 L. R. A. 267.

his favor in an action brought to recover the amount alleged to be due on a fire insurance policy. *Reversed.*

The facts are stated in the opinion.

Messrs. Lewis & Lewis, for applicant:

Notice given to an agent relating to business which he is authorized to transact, and while actually engaged in transacting it, will inure as notice to the principal.

McEwen v. Montgomery County Mut. Ins. Co. 5 Hill, 101; *American Ins. Co. v. Gallatin*, 48 Wis. 36, 3 N. W. 772; *Mattocks v. Des Moines Ins. Co.* 74 Iowa, 233, 37 N. W. 174; *Aetna Ins. Co. v. Eastman* (Tex. Civ. App.) 80 S. W. 255.

Knowledge of an agent authorized to countersign, issue, and deliver policies of insurance, and collect the premiums therefor, is knowledge imputable to the company.

1 May, Ins. 617, ¶ 294 E; May, Ins. p. 130, ¶¶ 70a, 131, 132, 143, 152, p. 247; Kerr, Ins. pp. 218 *et seq.*; Clement, Ins. p. 415, rule 11; Elliott, Ins. p. 91; Wood, Fire Ins. ¶¶ 372-374, 435; Richards, Ins. p. 25; *Stage v. Home Ins. Co.* 76 App. Div. 509, 78 N. Y. Supp. 555; *Brooks v. Erie F. Ins. Co.* 76 App. Div. 275, 78 N. Y. Supp. 748; *Bennett v. Union Cent. L. Ins. Co.* 203 Ill. 439, 67 N. E. 971; *Hunt v. State Ins. Co.* 66 Neb. 121, 92 N. W. 921; *German-American Ins. Co. v. Paul* (Ind. Terr.) 83 S. W. 60; *Continental F. Ins. Co. v. Cummings* (Tex. Civ. App.) 78 S. W. 378; *Carnes v. Farmers' F. Ins. Co.* 20 Pa. Super. Ct. 634; *Born v. Home Ins. Co.* 120 Iowa, 299, 94 N. W. 849; *State Ins. Co. v. Hale*, 1 Herdman (Neb.) 191, 95 N. W. 473; *Union Assur. Soc. v. Nalls*, 101 Va. 613, 99 Am. St. Rep. 923, 44 S. E. 896; *Modern Woodmen v. Coleman*, 64 Neb. 162, 89 N. W. 641; *Anderson v. Manchester F. Assur. Co.* 59 Minn. 182, 28 L. R. A. 609, 50 Am. St. Rep. 400, 60 N. W. 1095, 63 N. W. 241.

If the insurer receives a premium with full knowledge, through its agent, of the facts constituting a breach of one of the conditions of the policy, the right to insist that the policy is forfeited for the cause is gone.

Elliott, Ins. p. 129; *Mutual Ben. L. Ins. Co. v. Daviess*, 87 Ky. 541, 9 S. W. 812; *Dunbar v. Phenix Ins. Co.* 72 Wis. 492, 40 N. W. 386; *Continental Ins. Co. v. Pearce*, 39 Kan. 396, 7 Am. St. Rep. 537, 18 Pac. 291; *Pickel v. Phenix Ins. Co.* 119 Ind. 291, 21 N. E. 898; *Cotten v. Fidelity & C. Co.* 41 Fed. 506; *Reynolds v. Iowa & N. Ins. Co.* 80 Iowa, 563, 46 N. W. 659; *Manhattan F. Ins. Co. v. Weill*, 28 Gratt. 389, 26 Am. Rep. 364; *Germania F. Ins. Co. v. Hick*, 125 Ill. 361, 8 Am. St. Rep. 384, 17 N. E. 792; *Anderson v. Manchester F. Assur. Co.* 59 Minn. 182, 28 L. R. A. 609, 50 Am. St. Rep. 400, 60 N. W. 1095, 63 N. W. 241; *Gans v.* 69 L. R. A.

St. Paul F. & M. Ins. Co. 43 Wis. 108, 28 Am. Rep. 535; *Bennett v. Council Bluffs Ins. Co.* 70 Iowa, 600, 31 N. W. 948.

Unless instructions limiting the authority of a general agent of an insurance company, whose powers would otherwise be coextensive with the business intrusted to him, are communicated to the party with whom he deals, the company is bound to the same extent as though such special instructions had not been given.

Southern L. Ins. Co. v. McCain, 96 U. S. 84, 24 L. ed. 653; *Murphy v. Royal Ins. Co.* 52 La. Ann. 778, 27 So. 143.

The agent, though representing his principal in a particular locality, or within a limited territory, and therefore called "local agent," is in fact a general agent. He is supplied with blank policies, properly signed by the company, which he is authorized to fill up, countersign, and deliver to the assured.

Continental Ins. Co. v. Ruckman, 127 Ill. 364, 11 Am. St. Rep. 121, 20 N. E. 77; Elliott, Ins. Cases, p. 156; *Pitney v. Glen's Falls Ins. Co.* 65 N. Y. 6; *Georgia Home Ins. Co. v. Kinnier*, 28 Gratt. 98; *Viele v. Germania Ins. Co.* 26 Iowa, 9, 96 Am. Dec. 83; *Carroll v. Chadler Oak, Ins. Co.* 40 Barb. 292; *Aetna Ins. Co. v. Maguire*, 51 Ill. 342; 1 May, Ins. ¶ 126, p. 235; *Post v. Aetna Ins. Co.* 43 Barb. 351; *Ruggles v. American Cent. Ins. Co.* 114 N. Y. 415, 11 Am. St. Rep. 674, 21 N. E. 1000.

An agent's authority to alter or modify a policy by oral or written agreement may be inferred from a course of dealing acquiesced in by the principal, even though the policy provided to the contrary.

Kerr, Ins. ¶ 100, p. 223; *Knickerbocker L. Ins. Co. v. Norton*, 96 U. S. 234, 24 L. ed. 689; *Powell v. Factors' & Traders' Ins. Co.* 28 La. Ann. 19.

The assured was not required to keep books of account until the taking of the inventory:

St. Landry Wholesale Mercantile Co. v. Springfield F. & M. Ins. Co. (La.) 37 So. 988; *St. Landry Wholesale Mercantile Co. v. Teutonia Ins. Co.* 113 La. 1053, 37 So. 967; *Continental Ins. Co. v. Waugh*, 60 Neb. 348, 83 N. W. 81; *Citizens' Ins. Co. v. Sprague*, 8 Ind. App. 275, 35 N. E. 720; *McCullum v. Niagara F. Ins. Co.* 61 Mo. App. 352; *Bayless v. Merchants' Town Mut. Ins. Co.* 106 Mo. App. 684, 80 S. W. 289.

Messrs. Clegg & Quintero and Kenneth Baillio, for respondent:

The burden of proof as to all the facts going to establish a waiver is upon the assured.

Wood, Ins. 2d ed. p. 71, note; *New York L. Ins. Co. v. Fletcher*, 117 U. S. 529, 29 L.

ed. 937, 6 Sup. Ct. Rep. 837; *Murphy v. Royal Ins. Co.* 52 La. Ann. 775, 27 So. 143.

Defendant cannot be held to be bound, either by the first extension granted to the plaintiff in this suit, or by the second extension, which was an attempted waiver of the forfeiture of the policy, which had ensued some ten days before said second extension was granted.

Wood, Ins. ¶ 423; *Knickerbocker L. Ins. Co. v. Norton*, 96 U. S. 234, 24 L. ed. 689; 2 May, Ins. ¶ 511, p. 144; *Kenyon v. Knights Templar & M. Mut. Aid Asso.* 122 N. Y. 257, 25 N. E. 299.

A local or soliciting agent having no authority as to losses cannot waive the provisions of the iron-safe clause.

Clements, Valid Contr. p. 271; 2 May, Ins. p. 1197.

Land, J., delivered the opinion of the court:

On August 25, 1903, plaintiff was insured by defendant against loss by fire in the sum of \$1,000 on a small stock of merchandise. The policy was countersigned and issued by the Roos-Edwards Agency, of the town of Opelousas, Louisiana. The usual "iron-safe clause" was attached to the policy, and the following indorsement appears thereon, to wit:

"Permission is hereby given for thirty days to take complete inventory of stock."

No inventory was taken, and on November 5, 1903, the agency made the following indorsement on the policy, to wit:

"The assured, under the above named and numbered policy, having been prevented through illness from completing the inventory of his stock of merchandise, a further period of thirty days additional is hereby given in which to complete said inventory."

On November 8th, five days later, the stock of merchandise was destroyed by fire. The company received notice of the total loss before it received notice by mail of the extension of thirty days.

Payment of the policy having been refused, plaintiff brought suit thereon to recover the full amount, and obtained judgment in the district court. The insurance company appealed to the court of appeal, which reversed the judgment, and the case is now before us on a writ of review.

The court of appeal held that the policy was forfeited by the failure of the assured to make the inventory within thirty days, as stipulated, and that the agents had no power, express or implied, to waive such forfeiture by granting an extension of time for the completion of the inventory. It is to be noted that the written extension for thirty days is indorsed on the "rider" containing the iron-safe clause. It does 69 L. R. A.

not appear whether the agent overlooked the fact that the clause itself granted this delay, or intended to grant a further delay of thirty days. Defendant's counsel, in their brief, suggest this doubt, and argue that the agent had no power to grant an extension of any kind.

The policy in question was signed by the president and secretary, and was to become valid when "countersigned by the duly authorized agent of the company at Opelousas." This agent had full power to make the contract of insurance, to fill in the blanks, and to attach or indorse on the policy other provisions, agreements, or conditions. He was intrusted by the nonresident company with blank forms of policy, and the assured had no notice of the mandate, other than that conveyed by the policy itself, and the nature of the agent's employment. The last clause of the policy reads as follows, viz; "This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements, or conditions as may be indorsed hereon or added hereto, and no officer, agent, or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto, and, as to such provisions and conditions, no officer, agent, or representative shall have such power, or be deemed or held to have waived such provisions or conditions, unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached."

It follows from the terms of this clause that "provisions, agreements, or conditions" indorsed on, or added to, the policy were subject to waiver written upon or attached to such instrument. The iron-safe clause formed no part of the printed conditions of the policy, but was added thereto by the agent, and hence was subject to the written waiver referred to in the last clause of the policy.

The agent had power to issue and renew policies, to make waivers, and grant permits, and the only question for discussion is whether his mandate or employment included the power to waive the forfeiture of the policy resulting from the failure of the insured to complete his inventory within the thirty days stipulated. Doubtless the company or its agent could have insisted on the forfeiture as a legal right, but at the same time would have been compelled to return the unearned premium for eleven months. The agent, being informed of the

facts, was called upon to take some action in the premises. He elected to waive the forfeiture, rather than to cancel the policy and return the unearned premiums. This action induced the assured to rely on the policy as a still subsisting protection against loss by fire. This waiver was sent to the company by mail in the usual manner, but was not received until the day after the happening of the loss. The company did not notify the assured or the agent that the waiver was repudiated, and, after proofs were furnished, sent an adjuster to investigate the loss. The adjuster, however, acted under a nonwaiver agreement, and therefore all the defenses of the company were preserved.

The agent was furnished with blank policies signed by the president and secretary of the company, and was in the habit of issuing policies without requiring an application, and without referring the subject-matter to the company, in Springfield, Massachusetts. The agent had apparently undoubted power to issue policies, and to attach thereto all the usual and customary agreements and "riders."

It is argued, however, that the agent had no power to waive conditions added to, or attached to, the policy at the time of the issuance. The last clause of the policy authorized a written waiver of such conditions, provided it be annexed to the policy. The district judge said: "The term stipulating for the completion of the inventory is a mere incidental portion of the contract entered into exclusively for the benefit of the insurer. The extension of time and implied waiver of the expiration of the original period for the completion of the inventory were acts done by the agent solely for the purpose of making the contract of insurance available to the insurer as well as to the insured."

The district judge cited authorities to show that the agent had general powers, and argued that, as the agent had authority to issue a new policy to the assured on the same conditions as those contained in the original policy, he had implied authority to recognize the validity of the subsisting contract, and to grant additional time for the completion of the inventory.

The court of appeal reversed the judgment of the district court on the authority of the case of *Murphy v. Royal Ins. Co.* 52 La. Ann. 775, 27 So. 143.

While the case cited is a mine of insurance law, the decision simply recognized and enforced the last clause of the policy, to the effect that no officer or agent of the company should have power to waive, or be deemed to have waived, any condition of the policy, unless such waiver should be

written upon or attached thereto, against the contention that at the very time of the making of the contract the parties thereto had entered into a verbal contract waiving the iron-safe clause and the three-fourths value clause, which were attached to the policy. The court decided correctly that the plain terms of the policy notified the assured that the agent had no power to waive, unless by writing on or attached to the policy.

In the case at bar the waiver was in writing attached to the policy, and was made several months after the contract was executed. The waiver was in due form, and the only question is one of power in the agent. There is in the last clause of the policy a necessary implication that agents, officers, or representatives may waive provisions, agreements, or conditions indorsed on, or added to, the policy, and may grant privileges or permissions affecting the insurance.

The iron-safe clause was therefore a subject-matter of waiver. The printed policy is a general form applicable to all fire insurance business, and, by its terms, contemplates that the agent making the contract shall have power to add other "provisions, agreements, and conditions," and to grant permits or privileges affecting the insurance. The policy bristles with forfeitures for causes existing at the date of the contract, or arising subsequently, unless otherwise provided by agreement indorsed on or added to the policy. It is clear that the agent making the contract of insurance under such a policy may modify or change the forfeiture clauses by indorsements on, or additions to, the instrument. With such power over the matter of forfeitures, it is not difficult to conclude that such an agent may waive a subsequent forfeiture, in the interest of the company which he represents.

"An agent authorized to issue policies binds the company by all waivers, representations, or other acts within the scope of his business, unless the insured has notice of a limitation of his powers. The question always is not what power the agent did in fact possess, but what power the company held him out to the public as possessing." 1 May, Ins. 4th ed. § 126. "A person authorized to accept risks, to agree upon and settle the terms of insurance, and to carry them into effect, . . . must be regarded as the general agent of the company pending negotiations." Id. p. 235. "And the possession of blank policies and renewal receipts signed by the president and secretary is evidence of such general agency." *Ibid.* "If a foreign company appoints A.

and B. as local agents, and supplies them with blank policies signed by the company, and which they may fill up and counter-sign, they are its general agents. *Continental Ins. Co. v. Ruckman*," 127 Ill. 364, 11 Am. St. Rep. 121, 20 N. E. 77. Id. note. "That an insurance agent authorized to make contracts of insurance and issue policies may waive forfeitures, and reinstate and restore a void policy, . . . is held by numerous cases." 2 Wood, Ins. § 415.

In the *Murphy Case* this court cited with approval the doctrine that an insurance company is bound by the acts of its agent "in all matters within the scope of his real or apparent authority," and that third persons, in dealing with such agent, are not bound to go beyond the apparent authority conferred on him. *Murphy v. Royal Ins. Co.* 52 La. Ann. 782, 27 So. 143. In the case at bar the agent apparently had original powers to make contracts of insurance without previous applications, and without referring the matter to the company. In issuing the policy in question he exercised such original powers, and the company acquiesced therein. The agent had a power of attorney, but the assured knew nothing of its provisions, and it therefore matters not whether it was general or special. The testimony of the agent is positive that the second extension was not subject to the approval or ratification of the company, but was simply notified as in other instances. It is certain that it was written and attached to the policy prior to notice to the company.

Speaking of general agents, Ostrander says: "Having power to make a completed contract, they will also be presumed to have power, by agreement with the assured, to change, alter, or nullify its terms and conditions at any time after the delivery of the contract, and after it has become binding between the parties, unless limitations are imposed, of which assured has notice." *Fire Ins.* § 265, p. 551.

Hence there can be no real distinction between a local agent with power to make contracts of insurance and issue policies, and general agents having the same power. The power to make and complete contracts differentiates such agents from solicitors and other intermediaries between the assured and the company.

Agents, whether local or general, with power to contract, represent the company within the territorial limits to which they are assigned. Their knowledge is imputed to the company, and their acts bind the company within the scope of their employment. The question of the forfeiture of in-

surance policies comes clearly within such scope, and is within the apparent authority of such local agents. Every policy of insurance is full of forfeiture clauses, many of which do not affect the soundness of the risk, but at the same time may avoid the policy at the option of the insurer. We consider that it is within the province of a local agent in such cases to decide whether the policy shall continue in force or be canceled. Justice to the insured requires an immediate decision of such questions, which could not be had if the rules of the company required the reference of such cases to the general management, perhaps in a distant state or foreign country. No holder of a policy could afford to await the result of such a reference, nor could any insurance company afford to transact business under such conditions. The agent is present as the representative of his company in all matters of insurance within his territorial district, and his apparent authority cannot, as to the public, be limited by private instructions.

"The authority of an agent must be determined by the nature of his business, and is prima facie coextensive with its requirements." May, Ins. 4th ed. § 126, p. 231. "With respect to waiver of the breach of a condition in a policy, the most liberal view is that the agent's authority is coextensive with the business intrusted to his care." Id. p. 232, note, citing *Weed v. London & L. F. Ins. Co.* 116 N. Y. 106, 22 N. E. 229; *German Ins. Co. v. Gray*, 43 Kan. 497, 8 L. R. A. 70, 19 Am. St. Rep. 150, 23 Pac. 637.

In the case at bar we are of opinion that the agent had the apparent power to waive the forfeiture resulting from the failure of the insured to complete the inventory within the thirty days specified in the contract.

This was the only issue discussed or decided by the court of appeal. As to keeping a set of books, the obligation did not arise until after completion of the inventory.

As to the charges of fraud and bad faith, they were decided by the district judge to be unsupported by evidence, and were not noticed by the court of appeal. The writ of review is intended to correct errors of law, and this court will not review questions of fact, save in exceptional cases.

It is therefore ordered that the judgment of the Court of Appeal herein rendered be annulled and reversed, and it is further ordered that the judgment of the District Court be affirmed, and that defendant pay costs in both appellate courts.

UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT.

THREE STATES LUMBER COMPANY,
Plff. in Err.,
v.

H. B. BLANKS.

(133 Fed. 479.)

1. A plaintiff in replevin who obtains actual possession of property seized under the writ is estopped from claiming that the writ was wrongfully executed, upon a proceeding to assess damages against him for seizure of property upon which he had no rightful claim.
2. The Federal court is not bound to follow a decision of the courts of the state in which it is sitting, declaring that a plaintiff in replevin is not bound to

return the property replevied if prevented by act of law, which is based not upon a statute, but upon general principles.

3. A plaintiff in replevin who took into his possession, under the writ, lumber to which he was not entitled, cannot plead, in defense of his liability to return the property, that he had caused it to be sold to satisfy his own claim for salvage in recovering and preserving the property, after the vessel on which it was stored, while in his possession, had sunk.
4. A plaintiff in replevin cannot claim salvage for rescuing the replevied property after it had sunk while in his possession, since it was his legal duty to care for and preserve it.

(December 1, 1904.)

NOTE.—Duty to preserve and return property seized under writ of replevin.

I. Loss or destruction of the property.

a. In general, 283.

b. Emancipation of slaves, 286.

II. Depreciation of the property, 286.

I. Loss or destruction of the property.

a. In general.

With the exception of a few decisions, which have in almost every instance been subjected to criticism and disapproval, the rule is that the plaintiff in replevin, in possession of the property under a replevin bond, or the defendant in replevin, retaining possession of the property under a forthcoming bond, is liable, at all events, for its return, if the action is decided against him, and the fact that his failure to make return is caused by an act of God or other circumstance beyond his control, and notwithstanding all due care upon his part, is of no avail to relieve him from his obligation. The principle upon which the rule rests is the old common-law theory that one in possession of property seized in replevin, under a replevin or forthcoming bond, is claiming the property as owner, not as a bailee during the pendency of the action, and, if his claim is decided against him, his possession has been wrongful and in violation of the rights of the true owner; and therefore he cannot escape liability under his bond for a failure to return the property, as conditioned therein, by showing that the failure comes from circumstances beyond his control, and notwithstanding such reasonable care by him as is required of bailees or others rightfully in possession.

This principle first appears in 7 Hen. IV., 18. "So, if the defendant claims property, or says that he did not take, etc. If in the meantime the beasts die, or are sold, so that he cannot have a return, he may recover all in damages, if it be found for him." Hale's Notes, Fitzherbert, Nat. Brev. 69.

The question does not arise, so far as discovered, in any other English decisions, but in this country, where the old common-law action of replevin has, by statutory enactment in almost every state, been adapted and enlarged to meet modern needs, the following decisions are found:

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One who replevins cattle, which, without negligence upon his part, die while in his possession, will not, upon that account, be excused from satisfying a judgment for their return or value. *De Thomas v. Witherby*, 61 Cal. 92, 44 Am. Rev. 542. The court says: "A plaintiff, not being the owner of goods, who takes them out of possession of the real owner, holds them in his own wrong, and at his own risk. He has deprived the real owner of the possession, and has also deprived him of the means of disposing of the property pending the litigation; and when, at the end of perhaps a protracted litigation, it is determined that the plaintiff in the replevin suit had no right to the possession of the goods, and judgment is rendered against him for the return of the property or its value, he cannot, on principle or authority, be excused from satisfying said judgment under a plea that the property has been lost in his hands, even by the act of God."

If it appear that the property in controversy has been hopelessly lost or destroyed, a judgment for its value only, without a demand for its return, will be regarded as a technical error merely, not requiring reversal. *Brown v. Johnson*, 45 Cal. 76.

It appearing that corn which had been replevied had perished or been consumed, a verdict and judgment for the value thereof is proper. *Clark v. Adair*, 3 Harr. (Del.) 113.

Plaintiffs in replevin, detaining property without a valid claim, act at their peril, and the destruction of the property by fire does not release them from the liability assumed to return it or respond in damages for a failure to do so. *Supplier v. Gruaz*, 137 Ill. 216, 27 N. E. 22, Affirming 38 Ill. App. 60.

This last decision was expressly followed in *Schott v. Youree*, 142 Ill. 233, 31 N. E. 591, Affirming 41 Ill. App. 476, sustaining demurrer to the plea that property was burned after it was replevied, and that it was therefore impossible to make return in accordance with the judgment in the replevin suit.

So, one who wrongfully takes the property of another, although under a writ of replevin, cannot escape liability for the value thereof by showing that it was destroyed by act of God. *Scott v. Rogers*, 56 Ill. App. 571.

A defendant in replevin, who gave a delivery bond in the statutory form, and retained possession of horses replevied, cannot be dis-

ERROR to the Circuit Court of the United States for the Western District of Tennessee to review a judgment awarding damages to defendant in a replevin suit for failure to return the property. *Affirmed.*

Statement by **Lurton**, Circuit Judge:

The plaintiff in error instituted an action of replevin in the court below to recover 250,000 feet of lumber which it claimed had been unlawfully taken out of its possession by the defendant. The writ was returned as executed "by taking the within-described property out of the possession of the within-named H. B. Blanks, and delivering the said property to O. H. Scoggins, agent of the Three States Lumber Company. . . ."

charged *pro tanto* thereunder, by the fact that one of the horses died while in his possession. His undertaking is absolute to become liable in damages for a failure to return the property in as good condition as it was when the action was commenced. *Hinkson v. Morrison*, 47 Iowa, 167.

And so, notwithstanding part of the animals die while in plaintiff's possession, a successful defendant in replevin may recover the value of all the property, including that which died. *Lillie v. McMillan*, 52 Iowa, 463, 3 N. W. 601.

Evidence in a replevin action that sheep detained by defendant in replevin under a redelivery bond died from unavoidable causes is inadmissible, since one wrongfully detaining property cannot be excused from satisfying a judgment therefor under a plea that it has been lost in his hands, even by the act of God. *Blaker v. Sands*, 29 Kan. 551.

The death of a slave pending an action in replevin does not relieve from the obligation to account for the value thereof. *Gentry v. Barnett*, 6 T. B. Mon. 113. This decision is based upon a similar holding in *Carrel v. Early*, 4 Bibb, 270, which was an action in detinue. The court, in discussing that case, says: "It is hard to conceive of a reason supporting this decision [*Carrel v. Early*] which will not equally apply to the death of a slave pending the action of replevin. Indeed, the reason in the latter case is much stronger. In the first case the defendant is charged because of his wrong only; in the latter, he is not only guilty of the same wrong, but has expressly stipulated in the replevin bond that he will restore, not excepting the death of the slave."

And so, the death of a slave while in the possession of a defendant in replevin, during the pendency of the action, is not a sufficient plea in avoidance of a judgment *de retorno habendo*. *Scott v. Hughes*, 9 Mon. 104.

And, likewise, in a statutory action in analogy to the common-law action of replevin, the claimant of attached property may not escape liability upon his bond by reason of the death of the animal in question during the pendency of the action, since by his wrongful interference he protracted the litigation, resulting in the loss of the attached property. *Dear v. Brannon*, 4 Bush, 471.

The court says, *obiter*, in *Stevens v. Tuite*, 104 Mass. 328: "Even in the case of perishable property, or such as has been worn out or de-

The defendant, by special plea, admitted plaintiff's title to 15,000 feet of lumber so replevied, and pleaded the general issue as to the remainder. Upon the issues joined, the jury found for the defendant as to 235,000 feet of lumber, and assessed the value at time of taking at \$2,820 and interest thereon from that time, amounting to \$241.11. They also awarded the defendant \$822.50 as damages for the seizure and detention. A judgment was thereupon rendered for the return of the lumber so assessed, or its value, with interest, and for the damages for wrongful detention, as assessed by the jury. From this judgment the plaintiff has sued out this writ of error.

preciated by use, or been destroyed by fire or other accident . . . since the service of the writ, the bond would still continue to represent it; and the remedy upon the bond is understood to be its equivalent."

A defendant in replevin, who had given a bond for the forthcoming of the property, is not released from her liability thereunder by the destruction of the property, even though it resulted from circumstances beyond her control and without her fault. *George v. Hewlett*, 70 Miss. 2, 35 Am. St. Rep. 626, 12 So. 855.

Such as the burning of the property while in his possession. *McPherson v. Acme Lumber Co.* 70 Miss. 649, 12 So. 857.

When the defendant in replevin gives a forthcoming bond, liability for the goods is thereby fixed upon him and his sureties, which is not affected by the partial destruction of the property; and a tender of the partially destroyed property will not relieve them. *Hazlett v. Witherspoon* (Miss.; 25 So. 150).

A tender in money of the value, as found by the court, of articles replevied, but which are lost or cannot be returned, is the proper course. *Reavis v. Horner*, 11 Neb. 479, 9 N. W. 643.

It appearing that the property replevied was destroyed by fire, a failure to render an alternative judgment is not prejudicial error. *Richardson Drug Co. v. Teasdale*, 59 Neb. 150, 80 N. W. 488. To the same effect is *Brown v. Johnson*, 45 Cal. 76, *supra*.

In a few states—Maine, New York, and Tennessee—decisions more or less at variance with the rule above shown are found.

Thus, in Maine, the natural death of a horse without the fault of anyone, while in the possession of the plaintiff in replevin, but before the determination of the action, was held a valid excuse for a failure to return it according to the condition of the replevin bond, in an action thereon. *Melvin v. Winslow*, 10 Me. 397. This decision is expressly disapproved in *De Thomas v. Witherby*, 61 Cal. 92, 44 Am. Rep. 542, *supra*.

In a subsequent Maine case, *Walker v. Osgood*, 53 Me. 422, the court distinguishes *Melvin v. Winslow* and limits the rule therein laid down by holding that the death of an animal without fault, pending the replevin action, exonerates the plaintiff in replevin from liability in an action upon the replevin bond, if the replevin suit was instituted and prosecuted in good faith and in the honest belief of a good title.

In New York, upon the principle that wher

Argued before *Lurton, Severens, and Richards*, Circuit Judges.

Mr. W. A. Percy for plaintiff in error.

Mr. Tim E. Cooper, for defendant in error:

When performance of the condition of a bond becomes impossible by the act of the obligor, such impossibility forms no answer to an action on the bond.

Bestwick v. Swindells, 3 Ad. & El. 883; *Broom, Legal Maxims*, 200; *Doe ex dem. Muston v. Gladwin*, 6 Q. B. 963; *Keys v. Harwood*, 2 C. B. 905; *Walker v. Walker*, 2 De G. F. & J. 255, 29 L. J. Ch. N. S. 856; *Dunlap v. Clements*, 18 Ala. 778; *Jøger v. Stoelting*, 30 Ind. 341; *Swain v. Bartlett*, 82 Mo. App. 642; *Duchess of Kingston's Case*, 20 How. St. Tr. 355, 2 Smith, Lead. Cas. 435.

a bond becomes impossible of performance by the act of God or of the law, the obligors are excused, it was held in *Carpenter v. Stevens*, 12 Wend. 589, an action upon a replevin bond, that a plea that, before judgment de retorno habendo in the replevin action, the animal replevied died, without the act or default of the plaintiff in replevin, but by the act of God, was a good plea, the legal presumption being that it would have died had it not been taken from the possession of the legal owners. This decision was expressly disapproved in *De Thomas v. Witherby*, 61 Cal. 92, 44 Am. Rep. 542, *supra*; and in a subsequent New York case, *Snydam v. Jenkins*, 3 Sandf. 643, the court says in regard to it: "The decision is one of those which we regret, but are constrained to say we cannot follow. It appears to us to be wrong in principle, and it is plainly contradicted by many authorities. The undertaking of the plaintiff in the replevin bond, we conceive, is absolute to return the goods, or pay their value at the time of the execution of the bond. We cannot think that a wrongdoer is ever to be treated as a mere bailee, and that the property in his possession is to any extent at the risk of the owner." The point in this last decision was the proper measure of damages upon a recovery in replevin upon election to take judgment for value.

In Tennessee a statute has existed since 1845-46 to the effect that, if the issue be found for the defendant, the judgment shall be that the goods be returned to him, or, on failure, that he recover their value, etc. *Shannon's Code*, § 5144. A statutory bond is provided for, conditioned to perform the judgment of the court in the premises. *Shannon's Code*, § 5131.

The early case of *Mosely v. Baker*, 2 Sneed, 367, is not strictly an action of replevin. One claiming slaves under a bill of sale obtained in equity an injunction forbidding their sale, and, upon giving a forthcoming bond, obtained possession of them to abide the decree of the court. The slaves died of cholera while in his possession. Upon the ground that the plaintiff acted in good faith, although without sufficient legal cause, it was held that the death of the slaves, occurring, as it did, without any want of proper care upon his part, was an act of God operating to make the performance of the condition of redelivery in the bond impossible, and therefore excusing the obligors therein 69 L. R. A.

No error was committed in the assessment of damages, of which the plaintiff in error can complain.

Mayberry v. Cliffe, 7 Coldw. 117.

The judgment is in accordance with the statute.

Dornan Bros. v. Benham Furniture Co. 102 Tenn. 303, 52 S. W. 38.

The return of the marshal is conclusive.

Crane v. McCoy, 1 Bond, 422, Fed. Cas. No. 3,354. ..

Lurton, Circuit Judge, delivered the opinion of the court:

Many errors have been assigned, but in the argument those which are relied upon may, in substance, be reduced to two: (1) That the court erred in not instructing the

from its performance. This decision is expressly disapproved in *Suppliger v. Gruaz*, 137 Ill. 216, 27 N. E. 22, *supra*.

Upon the same theory, it was held in *Bobo v. Patton*, 6 Helsk. 172, 19 Am. Rep. 593, in the words of the opinion: "The plaintiff in replevin who takes possession of the property pending the litigation, takes the possession with a view to litigating the title. If, during such possession and before the trial, by the act of God or without the fault of the plaintiff, the property be lost or destroyed, the plaintiff is not to be held liable for its value. . . . The principle is that if a bond or obligation possible of performance . . . becomes impossible by the act of God, or of the law, . . . the obligation will be saved." The court, so far as appears, bases its conclusion entirely upon the principle above stated, evidently regarding the provisions of the statutes above set out subject thereto. This decision was expressly disapproved in *Suppliger v. Gruaz*, 137 Ill. 216, 27 N. E. 22, *supra*.

All the other Tennessee cases in which the point under discussion arose are cases of the replevy of attached property, especially in regard to which the Code provides: § 5275. "The death or destruction of the property, without any fault of the defendant, after the replevy, is no defense to the liability on such bond."

So, sureties in replevin bonds in cases of attachment levied are liable thereunder notwithstanding the death or destruction of the property by act of God. *Barry v. Frayser*, 10 Helsk. 206.

And where property attached is replevied the bond represents the debt, and stands in lieu of the property, so that upon proof of the destruction of the latter, it not appearing whether by plaintiff's fault or not, a judgment for the value of the property as stated in the bond is proper, without being in the alternative for a return of the property. *Epperson v. Van Pelt*, 9 Baxt. 74. The principle of *Bobo v. Patton*, 6 Helsk. 172, 19 Am. Rep. 593, *supra*, was declared not to apply on account of the statute above set out.

The court says, in *Kuhn v. Spellacy*, 3 Lea, 282, a case of the replevy of attached property, that, if a forthcoming bond be construed as a common-law, rather than a statutory, bond, then, if the return of the property becomes impossible by act of God, the obligors are re-

jury to return no verdict for the return of the lumber replevied, nor for the value, nor for any damages for detention. (2) That the court erred in not instructing the jury that any verdict in favor of the defendant must be limited to the market value of the lumber replevied on the day of its seizure, less a *pro rata* part of the award to plaintiff as salvage in a certain admiralty proceeding against same, to be mentioned hereafter.

That the plaintiff did not have the title, or right of possession, or any sort of special property, in the 235,000 feet of lumber seized under its writ of replevin was conceded, and the only controversy was in respect of the character of the judgment in favor of defendant. In Tennessee the action of replev-

in is regulated by statute, and the plaintiff is required to give a "bond in double the value of the property, payable to the defendant, and conditioned to be void if the plaintiff abide by and perform the judgment of the court in the premises." Shannon's Code (Tenn.) § 5131. By § 5144 it is provided that, "if the issue is found for the defendant, or the plaintiff dismisses, or fails to prosecute, his suit, the judgment shall be that the goods be returned to the defendant, or, on failure, that the defendant recover their value, with interest thereon and damages for the detention, the value of the property and the damages to be assessed by the jury trying the cause."

The defense against a judgment in favor of the defendant for the value of the proper-

leased; citing *Mosely v. Baker*, 2 Sneed, 369, *supra*.

Thus, it is apparent that in Tennessee the courts have been inclined to depart from the almost universal rule upon this question, except where held closely to it by the statute in the case of the replevy of attached property. The decision in *THREE STATES LUMBER CO. v. BLANKS* is in harmony with the great weight of authority, but, as recognized in the opinion therein, is in conflict with the trend of the Tennessee cases which, so far, have had the question up.

b. Emancipation of slaves.

The few cases as to the effect of the emancipation of slaves seized in replevin, upon the obligation to return them, are unanimous in holding the obligors thereby relieved from their obligation.

In Alabama, where special provision is made by statute in regard to the death of replevied property, it was held not to extend to cases of the destruction of property by emancipation, but that, under such circumstances, the condition of a replevin bond to return slaves is excused. *Glover v. Taylor*, 41 Ala. 124.

So, it was held in Tennessee that the emancipation of slaves held under a replevin bond excuses the obligors therein from the condition to return the property; that the emancipation of slaves is not embraced in the statute providing that the death or destruction of the property is no defense to liability on the bond. *Green v. Lanier*, 5 Helsk. 602.

And so, where an injunction against the sale of negroes by creditors of a husband was allowed to the wife, who claimed property in them, and they were delivered to her to abide a decree in the cause, upon her giving a forthcoming bond, the emancipation of the negroes was held to absolve her from her obligations under the bond, on the ground that the negroes were *in custodia legis* during the pendency of the action, and, upon the condition becoming impossible by act of God, the obligation was saved. *Green v. Smith*, 4 Coldw. 440.

One in possession of a slave under a replevy bond under the belief that his possession is rightful is not liable under the condition to return in the bond when that condition becomes impossible of performance by reason of the

slave's emancipation. *Pait v. McCutchen*, 43 Tex. 291.

II. Depreciation of the property.

There is no doubt as to the liability of one in possession of property seized under writ of replevin, for its depreciation in value during the time of its detention by him, if the action is decided against him, and judgment *de retorno habendo* is rendered.

"It would be anything but an act of justice to permit a person who has wrongfully deprived another of his goods, and retained them in his possession until they were nearly destroyed by time and use, afterwards, when judgment was rendered against him for his wrongful act, to save a forfeiture of the bond by an offer to return the article in its depreciated condition. Nor can the sureties be placed in any better situation than the principal." *Gibbs v. Bartlett*, 2 Watts & S. 34, *obiter*.

The real owner in an action for wrongful taking and detention may recover the value of any injury the property may have sustained. *Phillips v. Harriss*, 3 J. J. Marsh. 122, 19 Am. Dec. 166.

The rule of damages in replevin includes damages for depreciation, if any, between the time of taking and the time of the trial. *Miller v. Bryden*, 34 Mo. App. 602.

Compensation for any actual injury to the property wrongfully taken is one of the elements of damage assessable against the defendant by a successful plaintiff in replevin. *Aber v. Bratton*, 60 Mich. 357, 27 N. W. 564; *Teel v. Miles*, 51 Neb. 545, 71 N. W. 296; *Mitchell v. Burch*, 36 Ind. 529; *Brennan v. Shinkle*, 89 Ill. 604; *Wadleigh v. Buckingham*, 80 Wis. 230, 49 N. W. 745; *Deveridge v. Welch*, 7 Wis. 465.

Or in the action to recover possession of personal property provided by the Code as a substitute for the action of replevin. *Young v. Willet*, 8 Bosw. 486.

But a plaintiff in replevin, who retained possession of the articles replevied until rendition of judgment, cannot claim damages for depreciation in their value during that period. *Gordon v. Jenney*, 16 Mass. 465. The court says: "Any deterioration of the goods while in possession of the defendant after the unlawful taking is a proper subject of damages. But after they are restored, if they should be injured, decayed, or otherwise impaired in

ty and for damages for detention was grounded upon the following circumstances:

The lumber seized was upon a barge lying at the bank of the Mississippi river. The defendant had contracted to sell to the Chicago Mill & Lumber Company a large amount of lumber, and had loaded upon a barge belonging to that company something more than 400,000 feet when the marshal executed the plaintiff's writ of replevin. This writ he returned "as executed as the law directs by taking the within-described property out of the possession of the within-named H. B. Blanks, and delivering said property to O. H. Scoggins, agent of the Three States Lumber Company, for the said Three States Lumber Company." Although there was upon the barge considerably more

than 250,000 feet of lumber, no separation appears to have been made, and there was evidence tending to show that, although the plaintiff's agent claimed possession of only 250,000 feet, he took possession of the barge and all of the lumber thereon, and made no effort to separate that seized or claimed from that not so claimed. However defective such a levy may be as against the defendant or a stranger, in a proceeding where such a question might be properly made, it is clear that, if the plaintiff obtained the actual possession of the lumber of the defendant under his replevin writ, whether by right or by wrong, he is, for the purposes of the questions here to be considered, estopped to say that the writ was wrongly issued or executed, or to contradict

value, it must be at the plaintiff's risk, if he prevails in the suit, however long the process may continue; because he may always convert them into money, under such circumstances as will furnish proper evidence of their value, when he comes to be answerable upon his bond, or he may keep them in possession, at his election."

If the property has depreciated in the hands of the plaintiff, such depreciation should be considered in fixing the damages, when the defendant is successful. *Mix v. Kepner*, 81 Mo. 93; *Rowley v. Gibbs*, 14 Johns. 385.

The court recognized in *Harrison v. Chappell*, 84 N. C. 258, the recoverability by defendant of damages for deterioration.

A surety on a replevin bond is liable for depreciation caused by the wrongful conduct of the person replevying the property. *Bradley v. Reynolds*, 61 Conn. 271, 23 Atl. 928.

It is said in *Capital Lumbering Co. v. Learned*, 36 Or. 544, 78 Am. St. Rep. 792, 59 Pac. 454, that, when a return of personal property is adjudged in an action for its recovery, it is the duty of the plaintiff, if he has secured possession thereof pending the litigation, and would escape the penalty of his undertaking, to take active measures to redeliver it to the defendant within a reasonable time in the same condition as when taken.

A statute providing that plaintiff is to "return the said property in case such shall be the final judgment" was not intended to do away with the theretofore existing obligation to return it in like good order and condition as when taken, and therefore, when part of the goods were deteriorated and much depreciated in value, a proper allowance will be made for the depreciation. *Parker v. Simonds*, 8 Met. 205.

"If the property is damaged or deteriorated in actual value while in the plaintiff's custody in any respect, . . . this damage or deterioration must also be allowed in the calculation; otherwise it would be in the power of the plaintiff, by returning the damaged or deteriorated property, to throw upon the defendant the loss which he himself ought to sustain." *Mayberry v. Cliffe*, 7 Coldw. 117, *obiter*.

Mere restoration by the plaintiff in replevin of the goods replevied, if damaged, will not be a compliance with the bond which requires them to be restored in like good order and con-

dition as when taken. *Berry v. Hoeffner*, 56 Me. 170.

Where a plaintiff in replevin fails to return some of the goods, and those which are returned are injured, the damages, in a suit on his bond, include the value of the goods not returned, and the deterioration in value resulting from the injury of those returned. *Franks v. Matson*, 211 Ill. 338, 71 N. E. 1011.

A sheriff entitled to a return of property replevied is entitled to damages on account of its depreciation while in the hands of the plaintiff in replevin. *Bowersock v. Adams*, 59 Kan. 779, Appx. 54 Pac. 1064.

But after a redelivery of the property involved in claim and delivery proceedings to the defendant, he is not entitled, upon being successful in the action, to recover on plaintiff's bond any damage to, or depreciation in the value of, the property subsequent to that time. *Katz v. Hlavac*, 88 Minn. 56, 92 N. W. 506.

A plaintiff in replevin may recover the depreciation in value of a horse, caused by improper care and attention. *Riley v. Littlefield*, 84 Mich. 22, 47 N. W. 576.

If a horse, while detained, was injured through the carelessness or neglect of the defendant, the plaintiff in replevin may recover his expenses in taking care of and doctoring the horse, over and above what his expenses would have been had the animal not been injured. He may also recover for permanent depreciation in value of the horse, resulting from the injury. *Zitske v. Goldberg*, 38 Wis. 216.

Deterioration of a buggy, harness, and horse between the time of taking and the day of trial is one of the just and proper elements of damage for the detention of the property. *Hinchey v. Koch*, 42 Mo. App. 230.

But in one case, *Odell v. Hole*, 25 Ill. 204, it is held that the natural depreciation in value of a mare while in the possession of a plaintiff in replevin cannot be recovered; for any depreciation, however, caused by abuse or want of reasonable care, it is conceded that recovery may be had.

A tender of a piano in a worse condition than it was in when taken possession of under writ of replevin, the depreciation being due to the ordinary wear and tear resulting from use, will not fulfil the requirement of the replevin bond. *Johnson v. Mason*, 70 N. J. L. 13, 56 Atl. 137.

The tender of an engine in a condition much

the return of the marshal. 6 Bacon Abr. Wilson's ed. * * 59, 60.

This barge, while lying at the bank of the river, sank through stress of storm, and about half of the lumber was submerged. The plaintiff thereupon raised the barge, and loaded the lumber upon other barges hired by it, and carried the lumber to Cairo, Illinois. There the plaintiff caused the entire 400,000 feet of lumber to be libeled in a proceeding started by itself in the district court of the United States for the southern district of Illinois, for the purpose of enforcing against same a claim in favor of itself for salvage and towage. By due course of proceedings in said cause, said lumber was seized, and a salvage allowance of \$1,833.29 made in favor of the libellant, and said lumber was exposed and sold under decree of said court for the sum of \$2,000. After satisfying costs and libellant's salvage claim there remained in court the sum of about \$50 for the owners, whoever they

may be, who had shared in the benefit of the libellant's salvage services.

The decree of the district court in this proceeding is now relied upon as a complete defense to any demand of the defendant for a judgment for the return of the lumber seized, or for its value, or for its detention, although the plaintiff had no shadow of title or right to the lumber taken under its writ of replevin. The conclusiveness of that decree as a decree *in rem* is not and cannot be collaterally disputed. By that decree it is effectually determined that the plaintiff had rendered salvage services to the extent of \$1,833.29, and that the same could be enforced, at its demand, against the lumber in question. Under the sale made in pursuance of that decree, the title and right of possession have effectually passed to the purchaser.

The question we must decide is whether that proceeding operates as a discharge of the plaintiff's obligation to prosecute his suit with effect, or return the property re-

deteriorated from its condition when taken is not a compliance with a judgment requiring it to be in as good condition as when taken. *Nichols & S. Co. v. Paulson*, 10 N. D. 440, 87 N. W. 977.

The plaintiff in replevin may recover damages for depreciation in ice replevied, caused by its melting away. *Findlay v. Knickerbocker Ice Co.* 104 Wis. 375, 80 N. W. 436.

A plaintiff in replevin is liable for the depreciation in value of a portion of ice replevied, which was returned in not as good order and condition as when taken. *Washington Ice Co. v. Webster*, 125 U. S. 426, 31 L. ed. 799, 8 Sup. Ct. Rep. 947.

Depreciation in the market value of the property while detained will also render the one detaining it liable therefor, if unsuccessful in the action.

Thus, depreciation in the value of a note while retained by a plaintiff in replevin is recoverable. *Fair v. Citizens' State Bank*, 69 Kan. 353, 76 Pac. 847.

The plaintiff, in an action of replevin for the possession of bonds, is entitled to recover any depreciation of value in the bonds between the time he became entitled to their possession and the time when he actually received them. *Clow v. Yount*, 93 Ill. App. 112.

The allowance of damages for a decrease in the market value of cattle during the time they were wrongfully detained by the defendant in replevin is not error. *Russell v. Smith*, 14 Kan. 366.

And deterioration in iron and in the market price thereof during the pendency of the replevin action is a proper element of the damages recoverable by the defendant. *Boylston Ins. Co. v. Davis*, 70 N. C. 485.

The measure of damages upon a return of part of the goods in a damaged condition on account of bad packing and storage is the difference between the value of the property so damaged and its value when taken. *Yelton v. Slinkard*, 85 Ind. 190.

But the recovery of damages for depreciation 60 L. R. A.

is conditioned, however, upon the return of the property,—if an alternative judgment for the value is had, the value therein is fixed as of the day of taking. *Schrandt v. Young*, 62 Neb. 254, 86 N. W. 1085.

An allowance of \$5,000 for depreciation upon property worth \$2,000 at the time of trial, in the absence of any evidence to warrant it, is erroneous. *Crossley v. Hojer*, 11 Misc. 57, 31 N. Y. Supp. 837, Affirmed in 158 N. Y. 734, 53 N. E. 1124.

If special damages on account of depreciation are claimed, they must be specially pleaded. *Whitney v. Levon*, 34 Neb. 443, 51 N. W. 972.

So, in an action to recover a mare, a plaintiff may not recover special damage caused by reason of the mare's having been placed in poor pasturage by defendant, unless the facts are specially averred in the complaint. *Stevenson v. Smith*, 28 Cal. 102, 87 Am. Dec. 107.

In a few instances the courts have not regarded the damages for depreciation recoverable in the replevin action.

Thus, damages for injury and depreciation to the property while in the hands of the plaintiff in replevin are properly recoverable in an action separate from the replevin action. *Colby v. Yates*, 12 Helsk. 267.

And, according to *Citizens' Nat. Bank v. Oldham*, 136 Mass. 515, damages for deterioration should not be allowed in the replevin action. The remedy is an action upon the bond.

So, damages sustained by reason of depreciation in value of the replevied property may be recovered by the defendant in replevin in a suit on the replevin bond. *Dalby v. Campbell*, 26 Ill. App. 502.

But it is decided in *Douglass v. Douglass*, 21 Wall. 98, 22 L. ed. 479, that if the defendant in replevin injured the property, or culpably suffered it to become injured while it was in his possession, the remedy is not a suit on the bond, when the bond stipulated only for a return of the property, and nothing else in regard to it.

M. M. M.

plevied to the defendant, or pay its value, and damages for detention. Replevin is one of the most ancient and well-defined writs known to the common law. The plaintiff in replevin does not take or hold the goods replevied as a bailee or custodian, nor are the goods in any sense *in custodia legis*. It is an ancient common-law proceeding by which the owner recovers possession of his own. It is defined in the old books as "a redelivery to the owner, by the sheriff, of his cattle or goods distrained upon any cause, upon surety that he will pursue the action against him that distrained. If he pursue it not, or if it be adjudged against him, then he who took the distress shall have it again, and for that purpose may have a writ of *retorno habendo*." 6 Bacon, Abr. Wilson's ed. *52. By the statute of Westminster II., chap. 2, § 3, 13 Edw. I., the sheriff was required to take pledges from the plaintiff in an action of replevin that he would prosecute the suit and return the property replevied if the court should so direct, and by a later statute of the time of George II. he was required to take a bond with sureties that he would prosecute without delay, and for the return of the property in case its return should be awarded. 24 Am. & Eng. Enc. Law, 2d ed. p. 529. If the goods were not restored under the writ of *retorno habendo*, this was a breach of obligation to return, and the return of *elongata*, or eloinement, by a sheriff on a writ de *retorno habendo* is conclusive in an action on the replevin bond. *Caldwell v. West*, 21 N. J. L. 411. The plaintiff's possession of the goods is for himself. His pledges or sureties are substituted for the goods, and he holds subject to his own disposition, free from any lien in behalf of his sureties. 6 Bacon, Abr. *67. His failure to establish his title fixes his status as a wrongdoer. Being a wrongdoer, he is not permitted to set up even a blameless loss or destruction of the defendant's property, while wrongfully withheld from him, as a discharge of his obligation to return the goods or pay their value and damages. Cobbey, Replevin, § —; Shinn, Replevin, § 812; 24 Am. & Eng. Enc. Law, 2d ed. p. 536; 6 Bacon, Abr. Wilson's ed. *67; Wells, Replevin, §§ 455, 601. The case of *Whitfield v. Whitfield*, 44 Miss. 254, cited to the contrary, is overruled by *George v. Hewlett*, 70 Miss. 2, 35 Am. St. Rep. 626, 12 So. 855. *Carpenter v. Stevens*, 12 Wend. 589, is also overruled by *Suydam v. Jenkins*, 3 Sandf. 643. The other Mississippi cases cited in brief of plaintiff in error are likewise explained away in *George v. Hewlett*, 70 Miss. 2, 35 Am. St. Rep. 626, 12 So. 855.

The Tennessee Code provisions prescribing the bond to be executed and the judgment to be rendered when the plaintiff fails in his

suit do not materially depart from the common law and the terms of the ancient statutes requiring the plaintiff to give security for the return of the property if it shall be so adjudged, unless it be in respect to interest upon the value, and the option to the plaintiff to return or pay value. The statute in no wise deals with the consequence if the plaintiff is unable to return by reason of the loss or destruction of the property replevied. The Tennessee supreme court, in *Bobo v. Patton*, 6 Heisk. 172, 19 Am. Rep. 593, held that the death of an animal replevied, without fault, relieved the plaintiff from his obligation to either return or pay value. But this was put upon the ground that, "if a bond or obligation possible of performance at the time of execution becomes impossible by the act of God, or of the law, or of the obligee himself, the obligation will be saved;" citing Comyns, Dig. *Condition*, D; 1 Co. Litt., and certain earlier Tennessee cases, dealing with bonds made under decree of courts of equity for the forthcoming of property committed to the custody of the obligor as receiver or custodian. The decision did not profess to be an interpretation or construction of any statute, but was put upon principles of general law. It is, therefore, not a decision which a court of the United States is required to follow with respect to the liability of a plaintiff in replevin whose suit was prosecuted in a court of the United States, under a bond made in such court according to the requirement of the Tennessee statute. The general principles governing courts of the United States in respect of state laws and state decisions are so fully considered in *Swift v. Tyson*, 16 Pet. 1, 10 L. ed. 885; *Venice v. Murdock*, 92 U. S. 494, 23 L. ed. 583; *Chicago v. Robbins*, 2 Black, 418, 17 L. ed. 298; and *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368-376, 37 L. ed. 772-777, 13 Sup. Ct. Rep. 914; and by this court in *Wilson v. Perrin*, 11 C. C. A. 66, 22 U. S. App. 514, 62 Fed. 629; *Byrne v. Kansas City, Ft. S. & M. R. Co.* 24 L. R. A. 693, 9 C. C. A. 666, 22 U. S. App. 220, 61 Fed. 605; *Zacher v. Fidelity Trust & S. V. Co.* 45 C. C. A. 480, 106 Fed. 593; and *Elliott v. Felton*, 56 C. C. A. 75, 119 Fed. 270,—that it is unnecessary to further consider the matter.

The question as to what will excuse a plaintiff for the nonreturn of property replevied when he fails to establish his title is clearly a question of general law, and was so regarded by the Tennessee court in the case cited. It is not a decision establishing a rule of property, as in *Warburton v. White*, 176 U. S. 484, 44 L. ed. 555, 20 Sup. Ct. Rep. 404; nor does it involve the construction of a state statute, as in *Byrne v. Kansas City, Ft. S. & M. R. Co.* 24 L. R. A. 19

693, 9 C. C. A. 666, 22 U. S. App. 220, 61 Fed. 605; nor the effect or validity of a chattel mortgage, as in *Wilson v. Perrin*, 11 C. C. A. 66, 22 U. S. App. 514, 62 Fed. 629; nor the title of a foreign receiver to local property under a general assignment, as in *Zacher v. Fidelity Trust & S. V. Co.* 45 C. C. A. 480, 106 Fed. 593; nor the extent of the powers and liability of a local municipal corporation, as in *Detroit v. Osborne*, 135 U. S. 492, 34 L. ed. 260, 10 Sup. Ct. Rep. 1012. The obligation of the plaintiff in a replevin suit does not become impossible of performance by the loss or destruction of the goods replevied, because his obligation is an alternative one, and, if it has become impossible to return to the defendant the goods wrongfully taken, it is not impossible to pay their value. And under Shannon's Code (Tenn.) § 5144, he is given the option to return the goods or pay their value.

Nor is such a plaintiff a mere custodian, responsible only for negligence. As we have seen, replevin is a redelivery to the owner of goods wrongfully taken or detained. If in fact he is not the owner, his claim was groundless, and he must restore that wrongfully taken, and will not be heard to say that he held at the risk of the true owner, and was liable only for negligence as a receiver or other bailee. But if we shall regard the case of *Bobo v. Patton*, 6 Heisk. 172, 19 Am. Rep. 593, as a case which we should follow as defining the local law in reference to replevin bonds instituted under the Code provisions of Tennessee, that decision is by no means controlling in the case now under consideration. The property replevied in that suit was an animal, which died from disease contracted without plaintiff's fault or agency. This was held to relieve the plaintiff from liability to return, that being, of course, impossible, and to also relieve him from his obligation to pay her value. The death of the animal wholly without the agency or fault of the plaintiff was, in fact, a blameless misfortune. But in the case at bar the plaintiff, through his own act and active agency, elected to cause the goods replevied to be exposed to sale for the satisfaction of an alleged salvor's lien in its own favor. How can it be said that this property has been lost or destroyed or taken from him without any active agency of his own? Quite another question might arise if this proceeding had been adverse to the plaintiff. The proceeding was one *in rem*. The defendant did not appear or defend, so that no judgment *in personam* was rendered.

Considering the conclusiveness of the proceeding as to the lumber, and its liability as a whole to the salvage and towage claim asserted by the plaintiff as sole libellant, the fact remains that the lumber was 69 L. R. A.

so seized and subjected to this claim only at the instance of the plaintiff and solely for its own benefit. There was evidence that the plaintiff's agent was not only in the possession of the replevied lumber, but of the entire cargo, as well as the barge. Whether it be regarded as in possession of the replevied lumber as owner, or only as a bailee or custodian, it was under obligation to protect it against loss or injury, and in taking it off the submerged boat it was but saving its own or that committed to it as a bailee. *Fleming v. Lay*, 48 C. C. A. 748, 109 Fed. 952, 956. But whatever its rights against the barge and the remainder of the cargo, it could not have a salvor's lien against its own property or that in its care which it was under legal obligation to save. Salvage is a reward for services successfully rendered in saving property from maritime danger by one under no obligation or duty to render the service. *The Neptune*, 1 Hagg. Adm. 227, 236; *Firemen's Charitable Asso. v. Ross*, 9 C. C. A. 70, 13 U. S. App. 643, 60 Fed. 456; *The Lydia A. Harvey*, 84 Fed. 1000; *Murphy v. The Suliste*, 5 Fed. 99; *The Nebraska*, 21 C. C. A. 448, 24 U. S. App. 559, 75 Fed. 598. The barge upon which this lumber was situated was sunk at the bank, and in such shallow water that only about half of the entire cargo of lumber was submerged. By the services of the plaintiff the barge was raised, the lumber taken off, and reloaded upon another barge chartered by the plaintiff.

Conceding, for the purposes of this case only, that the plaintiff was wholly without fault, and that under the case of *Bobo v. Patton* the injury sustained by the replevied lumber should be regarded as a loss or destruction *pro tanto*, and allowance made for this in the recovery against plaintiff for damages for detention, the question remains whether the subsequent carrying of the lumber to Cairo, and there enforcing against it both a salvage and towage claim, by means of which the lumber has passed beyond the control of the plaintiff, is a discharge of his liability to pay the value of defendant's lumber. What plaintiff did in saving the defendant's lumber from loss and injury by water it was under obligation to do as one in possession under claim to ownership. What it did in carrying it, after it was saved, to Cairo, and there causing it to be seized and sold, it did voluntarily and in its own exclusive interest. The obligation to return the replevied lumber or pay its value and damages for detention has not become impossible through an "act of God, or of the oblige, or of the law," except as the law was put in force by the plaintiff for its own purpose. An obligation which is excused by act of law is where a covenant or condition sub-

sequent, which is law when made, becomes subsequently unlawful by a change in the law. Thus, when property was conveyed to be used for burial purposes, and such use becomes subsequently unlawful, the forfeiture is excused. *Mahoning County v. Young*, 8 C. C. A. 27, 16 U. S. App. 253, 59 Fed. 96. Other illustrations are found in *Doe ex dem. Anglessea v. Rugeley*, 6 Q. B. 107; *Brewster v. Kitchin*, 1 Ld. Raym. 317, 321; *Briok Presby. Church v. New York*, 5 Cow. 538. We have not been referred to any case which gives sanction to the claim that a plaintiff in replevin may relieve himself from his obligation to return or pay for property replevied in case he is cast in the suit, when he, as in this case, by his own institution of a suit *in rem* disables himself from the duty of returning. In *Washington Ice Co. v. Webster*, 68 Me. 449, taxes assessed against the defendant on the replevied property were paid by the plaintiff voluntarily, no seizure having been made to enforce collection. The payment was disallowed in reduction of damages for detention.

The judgment below was for the value of the lumber at the time it was taken, with interest. That much was in strict accordance with § 5144, Shannon's Code (Tenn.) as construed in *Mayberry v. Cliffe*, 7 Coldw. 117. The jury also found, upon evidence, that there had been a rise in the value, and they accordingly assessed the difference between the value when seized and the value at date of trial as damages for detention. This, too, is in accord with the construction placed on the act by the case cited above. But the court told the jury that they might mitigate damages for detention if they found that this lumber had been damaged by the sinking of the barge, without fault of the plaintiff. The jury rendered a special verdict in these words and figures:

We, the jury, find for the defendant:	
235,000 feet of cottonwood lumber at \$12.00 per thousand, amounting to	\$2,820 00
Interest from January 22, 1902, to date	241 11
	<hr/> \$3,061 11
We also fix damages at.....	822 50
	<hr/>
Total	\$3,883 61
We arrive at the damage in the following manner:	
117,500 feet, at \$18.00 per thousand	\$2,115 00
117,500 feet, at \$13.00 per thousand	1,527 50
	<hr/>
Total	\$3,642 50
Less value at time of seizure	2,820 00
	<hr/>
Damage	\$ 822 50

It thus appears from the verdict that the jury found that one half of the lumber seized had not been damaged at all, and that the other half had sustained a damage of \$5 per thousand, which reduced the value of the lumber at date of trial by \$587.50, and this was accordingly deducted from the damages for detention. The plaintiff has thus been allowed to reduce the damages, recoverable otherwise by the amount of the injury done the lumber by the sinking of the barge while it was in its possession. This was admissible only upon the theory that plaintiff was liable only for a loss due to its own negligent act. The plaintiff in error cannot complain of this, and the defendant in error has not.

In our view of the case, the plaintiff has obtained a better result than it was entitled to, and *the judgment must be affirmed.*

Petition for rehearing denied.

TENNESSEE SUPREME COURT.

John PRESSLY, *Appt.*,
v.

STATE of Tennessee.

(.....Tenn.....)

1. A general consent in writing, by a mother, that liquor may be furnished by the person to whom the

NORM.—For a case in this series holding that written authority from parent or guardian for selling or furnishing intoxicating liquor to a minor must be special for each occasion, and that a general permit without limitation as to time or quantity is void, see *Gill v. State*, 12 L. R. A. 433.
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writing is addressed, to her minor child, whenever he may desire to do so, will not bar a prosecution of such person for furnishing liquor to minors without the parent's consent, since such consent would frustrate the purpose of the statute.

2. Where a statute prescribes a fine as the punishment for giving liquor to minors, the court has no authority to impose imprisonment therefor.

3. The appellate court may correct a judgment which erroneously imposes imprisonment in addition to a fine for a statutory misdemeanor, by striking out the erroneous portion and affirming the judgment as modified.

(March 18, 1905.)

A PPEAL by defendant from a judgment of the Circuit Court for Putnam County convicting him of violating the statute against furnishing liquor to minors. *Affirmed.*

The facts are stated in the opinion.

Mr. John Tucker for appellant.

Mr. Charles T. Cates, Jr., Attorney General, for the State.

Neil, J., delivered the opinion of the court:

The plaintiff in error was indicted and convicted in the circuit court of Putnam county on a charge of giving liquors to a minor without the consent of his parents. He was thereupon sentenced to pay a fine of \$10 and to six months' confinement in the county workhouse. From this judgment he has appealed and assigned errors.

The statute under which he was indicted is found in Shannon's Code, § 6786, and reads as follows: "It shall be unlawful for any person or individual, or firm or corporation, whether engaged or not in the manufacture or sale of any spirituous liquors, malt, or mixed liquors, their employees, agents, or servants, or other persons for them, knowingly to sell, give, furnish to, or procure for, any person under the age of twenty-one years, any spirituous, vinous, or malt liquors, or any mixture thereof with other liquors or ingredients, without the consent of the parents, guardian, or person having the care of such person under the age of twenty-one years."

The punishment is fixed by § 6789, which reads as follows: "Any person or persons violating the provisions of §§ 6786 or 6787 shall be guilty of a misdemeanor, and, upon conviction, shall be fined not less than \$10 nor more than \$200."

Two objections are made in this court.

The first is that his honor erred in refusing to permit the defendant below to introduce the following paper in evidence, executed by the mother of the minor, *viz.*:

Mr John Pressly:—

You can give any of my children drinks of whisky or brandy at any time you may desire to do so. This December 1, 1903.

her

Angelina X Palmer.
mark

Attest J. L. Palmer.

The mother of the boy was a widow. The child to whom the whisky was given was only fifteen years old. The whisky was given to him during the month of July, 1904.

There was no error in the action of the trial judge in rejecting this paper. It was 69 L. R. A.

the specific purpose of the statute to restrain the giving, selling, or furnishing intoxicating beverages to minors, or procuring such beverages for them. An exception was permitted in case of the consent of "the parents, guardian, or person having the care of such" minor. It was supposed that parents and guardians, and other persons having charge of minors, would have concern for, and exercise care over, the children committed to them in the course of nature or by operation of law, and that they would use discretion in giving or withholding consent in every instance of a proposed gift or sale to such child or children. To admit the validity of such a general consent as the paper above set out purports to give would not only violate the spirit of the act, but would wholly frustrate the purpose which the legislature had in view; since a general consent of this character would be tantamount to a withdrawal of the child or children referred to in such paper from the protection of the act; at least, in favor of the person or persons to whom such writing might be addressed. If such consent should be held good, no sound reason could be offered against the validity of a writing addressed "to whom it may concern," conferring upon all persons who might choose to take advantage of it, the right to give intoxicating liquors to the children of any parent or guardian sufficiently heedless, or reckless, or wicked to consent to the debauching of the youth under their charge. The legislature did not intend to sanction such a course of conduct. Indeed, we believe that the legislature must have intended that a parent or guardian, or other person having the care of a minor, could give consent that another might give, sell to, furnish to, or procure liquors for, such minor only in cases of emergency; as, for instance, for medical purposes. It was never intended that a general permission should be given to enable minors to use intoxicating liquors as a beverage; on the contrary, authority to sell to, give to, furnish to, or procure liquors for, them, is limited to such occasions and emergencies.

The second objection raised against the judgment of the court below is that His Honor added imprisonment to the fine, and that he had no legal right to do so.

We are of the opinion that this objection is well taken, and must be sustained.

The rule at common law is thus stated by Mr. Bishop: "The ordinary common-law punishment for misdemeanor is fine and imprisonment, or either, at the discretion of the court. It is imposed whenever the law has not provided some other specific penalty. For example, when a statute forbids or commands an act of a public nature, but is

silent as to the punishment, the common law provides fine and imprisonment."1 Bishop, New Crim. Law, § 940.

The foregoing rule is recognized in several of our own cases (*Atchison v. State*, 13 Lea, 275; *Wickham v. State*, 7 Coldw. 525; *Durham v. State*, 89 Tenn. 723, 18 S. W. 74; *Kittrell v. State*, 104 Tenn. 522, 58 S. W. 120; *Thompson v. State*, 105 Tenn. 177, 51 L. R. A. 883, 80 Am. St. Rep. 875, 58 S. W. 213), the fine being assessed by the court if \$50 or under, and by the jury if over \$50 (Shannon's Code, § 7212); and the imprisonment to be fixed by the court (Shannon's Code, § 7202). The Code further provides that when the performance of any act is prohibited by statute, and no penalty for the violation of such statute is imposed, the doing of such act is a misdemeanor. Shannon's Code, § 6437. See also *Robinson v. State*, 2 Coldw. 181; *State v. Keeton*, 9 Baxt. 559.

It has been held, however, that where the statute which creates an offense does not

make it indictable, but prescribes a penalty, the specific remedy given, the penalty, excludes the resort to an indictment. *State v. Maze*, 6 Humph. 17; *State v. Lorry*, 7 Baxt. 95, 32 Am. Rep. 555; *State v. Manz*, 6 Coldw. 557. It would seem to be true, also, that where the statute creates an offense, and prescribes a special form of punishment, this would exclude any other different or additional punishment.

Such is the present case. The statute does not impose imprisonment, but declares that the punishment shall be a fine of not less than \$10 nor more than \$200.

We are of opinion, therefore, that His Honor erred in imposing the imprisonment. This court, however, has power to modify the judgment by striking out the imprisonment and then affirming it as modified. *Griffin v. State*, 109 Tenn. 17, 70 S. W. 61. This course will be pursued, and the judgment will be remanded to be executed as modified.

UNITED STATES CIRCUIT COURT OF APPEALS, FIRST CIRCUIT.

STEAM DREDGE NO. 1.

MORRIS & CUMMINGS DREDGING COMPANY, Claimant, Appt.,

v.

William NELSON.

(184 Fed. 161.)

1. A government inspector whose duty it is to see that work is properly done by a dredge employed on a government contract is entitled to protection from negligent acts of those in charge of it, when upon it, even in the intervals when there is no occasion for him to be actually engaged in any immediate active duty.
2. The mere act of one rightfully on board a vessel, of leaning against, or wholly sitting upon, a bitt around which runs a line used in shifting the position of the vessel, is not negligence on his part.
3. Negligently sitting within the bight of a hawser which is subject to strain will bring one within the admiralty rule of apportionment of damages in case both parties are in fault, where, by reason of the negligence of the vessel, the strain is put upon the line in such a way that the bitt around which it runs gives way and he is thrown overboard by the sweeping forward of the line.

NOTE.—As to doctrine of last clear chance, see also, in this series, *Bogan v. Carolina C. R. Co.* 55 L. R. A. 418, and note, and the later case of *Harrington v. Los Angeles R. Co.* 63 L. R. A. 238.

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4. No peculiar rule which can be deduced from the doctrine of last clear chance, as originated in *Davies v. Mann*, can be applied in an admiralty case.
5. To make applicable the doctrine of last clear chance, it must clearly appear that the negligence of one person was subsequent to that of the other.

(December 22, 1904.)

A PPEAL by claimant from a decree in admiralty of the District Court of the United States for the District of Maine, holding Steam Dredge No. 1 liable for injuries alleged to have been negligently inflicted upon libellant. *Reversed.*

The facts are stated in the opinion.

Argued before *Colt* and *Putnam*, Circuit Judges, and *Aldrich*, District Judge.

Messrs. *George E. Bird* and *William M. Bradley*, for appellant:

The burden of proof is upon the libellant, and such burden must be sustained by evidence sufficiently clear, distinct, and preponderating to enable the court to find the fact without resort to conjecture or surmises.

The Baron Innerdale, 93 Fed. 492.

Libellant—a man of thirty-two years' experience in maritime matters—brought this misfortune upon himself by taking a position of known danger, within the bight of a rope which he knew was to be subjected to strain.

The libel should have been dismissed.

The Burgundia, 29 Fed. 464; *The Lydia M. Deering*, 97 Fed. 971; *Elder Dempster Shipping Co. v. Pouppirt*, 60 C. C. A. 500, 125 Fed. 732; *Maryland use of Dombroska v. Westoll*, 106 Fed. 233; *The Samuel S. Thorpe*, 99 Fed. 108.

The burden of showing freedom from fault was on libellant.

The Great Republic (*Thompson v. The Great Republic*) 23 Wall. 34, 23 L. ed. 59; *The Lion*, 1 Sprague, 44 Fed. Cas. No. 8,379; *The Louisburg*, 21 C. C. A. 424, 33 U. S. App. 543, 75 Fed. 424; *Merchants' & M. Transp. Co. v. Hopkins*, 48 C. C. A. 128, 108 Fed. 890; *The Chattahoochee*, 21 C. C. A. 162, 33 U. S. App. 510, 74 Fed. 903; *The H. F. Dimock*, 23 C. C. A. 123, 33 U. S. App. 647, 77 Fed. 230; *The Carbonero*, 45 C. C. A. 314, 106 Fed. 335; *The Clara* (*Shepherd v. The Clara*) 102 U. S. 203, 26 L. ed. 146; *The Nereus*, 23 Fed. 448.

A case brought in the admiralty for the recovery of damages for personal injuries is treated as if one of collision between two vessels.

The Max Morris (*The Max Morris v. Curry*) 137 U. S. 1, 34 L. ed. 586, 11 Sup. Ct. Rep. 29.

In case the dredge should be found in fault, the damages should be divided, by reason of fault and want of care on the part of libellant.

The Joseph Stickney, 31 Fed. 156; *The Truro*, 31 Fed. 158; *The Nautique*, 44 Fed. 399; *Union Ice Co. v. Crowell*, 5 C. C. A. 49, 5 U. S. App. 270, 55 Fed. 87; *The Haverston*, 31 Fed. 566; *Lane v. The A. Denike*, 3 Cliff. 117, Fed. Cas. No. 8,045.

The same rule, not only of damages, but as to fault or blame or error, is to be applied in cases brought for the recovery of damages for personal injuries as is applied in cases of collision.

Atlee v. Northwestern Packet Co. 21 Wall. 389, 22 L. ed. 619; *The Max Morris* (*The Max Morris v. Curry*) 137 U. S. 1, 34 L. ed. 586, 11 Sup. Ct. Rep. 29; *Workman v. New York*, 179 U. S. 587, 45 L. ed. 330, 21 Sup. Ct. Rep. 212.

Davies v. Mann, 10 Mees. & W. 546, has not been recognized by the admiralty courts of this country.

It is impossible, with any degree of security, to reason from the doctrines of the mere municipal code, in relation to purely home pursuits, to those more enlarged principles which guide and control the administration of the maritime law.

Reed v. Canfield, 1 Sumn. 195, Fed. Cas. No. 11,641; *The Max Morris* (*The Max Morris v. Curry*) 137 U. S. 1, 34 L. ed. 586, 11 Sup. Ct. Rep. 29; *Waring v. Clarke*, 5 How. 441, 12 L. ed. 226; *McCord v. The Tiber*, 6 69 L. R. A.

Biss. 409, Fed. Cas. No. 8,715; *Greenwood v. Westport*, 63 Conn. 587, 60 Fed. 560.

The common-law rule of contributory negligence is unknown to the maritime law, administered in courts of admiralty jurisdiction.

Pollock, Torts, 6th ed. p. 458; *Wm. Johnson & Co. v. Johansen*, 30 C. C. A. 675, 58 U. S. App. 104, 86 Fed. 888; *Workman v. New York*, 179 U. S. 552, 45 L. ed. 314, 21 Sup. Ct. Rep. 212; *The Daylesford*, 30 Fed. 633.

The rule of *Davies v. Mann*, 10 Mees. & W. 546, is a qualification of the rule of contributory negligence, and is of recent growth.

Grand Trunk R. Co. v. Ives, 144 U. S. 429, 36 L. ed. 493, 12 Sup. Ct. Rep. 679.

In all cases in admiralty where there is mutual fault (presenting facts under which the old rule of contributory negligence applied), the admiralty courts divide the damages.

Western Ins. Co. v. The Goody Friends, 1 Bond, 459, Fed. Cas. No. 17,436; *The Clover*, 1 Low Dec. 342, Fed. Cas. No. 2,908; *The Marcia Tribou*, 2 Sprague, 17, Fed. Cas. No. 9,002; *O'Neil v. Sears*, 2 Sprague, 52, Fed. Cas. No. 10,530; *The Maud Webster*, Haskell, 325, Fed. Cas. No. 9,303; *The Mary Ann*, 11 Fed. 336; *McWilliams v. The Vim*, 12 Fed. 906; *The City of Merida*, 24 Fed. 229; *The Westerland*, 24 Fed. 703; *The Marion*, 56 Fed. 271; *The Passaic*, 76 Fed. 460; *The City of Norwalk*, 46 C. C. A. 63, 106 Fed. 982; *The Senator D. C. Chase*, 47 C. C. A. 240, 108 Fed. 110; *The Arthur*, 108 Fed. 557; *The William E. Ferguson*, 108 Fed. 973; *The Devonian*, 110 Fed. 588; *The James D. Leary*, 110 Fed. 685; *The Annex No. 5*, 117 Fed. 754; *Hall v. Chisholm*, 55 C. C. A. 31, 117 Fed. 807; *The De Veaus Powcell*, 120 Fed. 522; *The Caldys*, 123 Fed. 802; *The Catharine v. Dickinson*, 17 How. 170, 15 L. ed. 233; *Rogers v. The St. Charles*, 19 How. 108, 15 L. ed. 563; *Cushing v. The John Fraser* (*The James Gray v. The John Fraser*) 21 How. 184, 16 L. ed. 106; *Chamberlain v. Ward*, 21 How. 548, 16 L. ed. 211; *Nelson v. Leland*, 22 How. 55, 16 L. ed. 272; *The Gray Eagle* (*Pfister v. Greening*) 9 Wall. 505, 19 L. ed. 741; *The Ariadne* (*Pentz v. The Ariadne*) 13 Wall. 475, 20 L. ed. 542; *The Continental* (*New Haven Steam Transp. Co. v. The Continental*) 14 Wall. 345, 20 L. ed. 801; *The Sunnyside* (*Miner v. The Sunnyside*) 91 U. S. 208, 23 L. ed. 302; *The Stephen Morgan* (*The Stephen Morgan v. Good*) 94 U. S. 599, 24 L. ed. 266; *The Connecticut*, 103 U. S. 710, 26 L. ed. 467; *The Albert Dumois*, 177 U. S. 240, 44 L. ed. 751, 20 Sup. Ct. Rep. 595; *The Ottoman*, 20 C. C. A. 214, 33 U. S. App. 443, 74 Fed. 316; *The Louisburg*, 21 C. C.

A. 424, 33 U. S. App. 543, 75 Fed. 424; *The Newburgh*, 124 Fed. 954; *The Rabboni*, 53 Fed. 952; *The Parthian*, 5 C. C. A. 171, 5 U. S. App. 314, 55 Fed. 426; *The Mabel Comeaux*, 24 Fed. 490; *The James M. Thompson*, 12 Fed. 189; *The Pegasus*, 22 Blatchf. 7, 19 Fed. 46; *The David Dows*, 16 Fed. 160; *The Pennsylvania (The Pennsylvania v. Troop)*, 19 Wall. 136, 22 L. ed. 151, 1 Conkling U. S. Adm. 373; *Ladd v. Foster*, 31 Fed. 827; *The Grace Girdler (Lockwood v. The Grace Girdler)*, 7 Wall. 203, 19 L. ed. 116; *Memphis & St. L. Packet Co. v. H. C. Yaeger Transp. Co.* 3 McCrary, 259, 10 Fed. 395; *The Monticello*, 15 Fed. 474; *The Columbia*, 27 Fed. 238; *The Roman*, 12 Fed. 219; *Connolly v. Ross*, 11 Fed. 342; *The Richmond*, 12 C. C. A. 1, 26 U. S. App. 183, 63 Fed. 1020; *The Anerly*, 58 Fed. 794; *The Marion*, 56 Fed. 271; *Fristad v. The Premier*, 51 Fed. 766; *The John Henry*, 3 Ware, 264, Fed. Cas. No. 7,350.

Messrs. William H. Looney and Benjamin Thompson, for appellee:

The dredge owed libellant the duty of prosecuting its work with reasonable skill, care, and prudence to provide for his safety.

The Calista Hawes, 14 Fed. 493; *The City of Naples*, 16 C. C. A. 421, 32 U. S. App. 613, 69 Fed. 794; *Low v. Grand Trunk R. Co.* 72 Me. 313, 24 Am. Rep. 331; *Gerrity v. The Kate Cann*, 2 Fed. 246.

He had a right to assume that the crew would properly perform their duties, and, if they were going to do anything out of the ordinary course, or subject the bitt to any unusual strain, that they would give him notice.

The Calista Hawes, 14 Fed. 493.

In the common-law courts, contributory negligence which will defeat the plaintiff's right of recovery must be a concurring negligence.

Gilbert v. Erie R. Co. 38 C. C. A. 408, 97 Fed. 747; *Inland & Seaboard Coasting Co. v. Tolson*, 139 U. S. 551, 35 L. ed. 270, 11 Sup. Ct. Rep. 653; *Turnbull v. New Orleans & C. R. Co.* 57 C. C. A. 151, 120 Fed. 783.

Where the negligence is concurrent, or both parties are at fault, courts of admiralty will apportion the damages, or give or withhold them, in the exercise of a sound discretion, according to principles of equity and justice, considering all the circumstances of the case.

Olson v. Flavel, 34 Fed. 477; *Anderson v. The Ashbrooke*, 44 Fed. 124; *The Max Morris*, 24 Fed. 860, Affirmed in 137 U. S. 1, 34 L. ed. 586, 11 Sup. Ct. Rep. 29; *Heil v. Glanding*, 42 Pa. 493, 82 Am. Dec. 537; *Cayzer v. Carron Co.* L. R. 9 App. Cas. 873; *The Nereus*, 23 Fed. 448; *The E. A. Packer*, 20 Fed. 327; *McCord v. The Tiber*, 6 Biss. 409, Fed. Cas. No. 8,715.
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On petition for rehearing.

The district judge, in reaching his conclusions upon the question of contributory negligence, did not rely upon *Davies v. Mann*.

Among the authorities which were before the district court, and upon which it relied, was *Cayzer v. Carron Co.* L. R. 9 App. Cas. 873, in which it was held that, even assuming that the Clan Sinclair had transgressed the rule, yet such transgression was not the cause of the collision; that ordinary care on the part of the Margaret would have enabled her to avoid the collision, and that she alone was to blame.

Cayzer v. Carron Co. L. R. 9 App. Cas. 873; *The Nereus*, 23 Fed. 448; *The Pennland*, 23 Fed. 551; *The Britannia*, 34 Fed. 546; *The Titan*, 44 Fed. 510; *The Susquehanna*, 35 Fed. 320.

Persons having business on board of a vessel do not commit a negligent act by permitting themselves to be in the bight of a line, especially when their duties require them to be there.

The Calista Hawes, 14 Fed. 493.

Putnam, Circuit Judge, delivered the opinion of the court:

This was a libel brought in the district court for the district of Maine against Steam Dredge No. 1, a vessel engaged in dredging, under a contract with the United States, in Cape Porpoise harbor, in the district of Maine, for injuries to William Nelson, on the 4th day of September, 1900. The substance of the allegations of the libel is that at the time of the injury Nelson was employed by the United States, aboard the dredge, as an assistant inspector in regard to improvements then being made at Cape Porpoise harbor; that, as part of his duties, it was necessary for him to observe whether the work was being executed in accordance with the plans and specifications, and, as incidental thereto, to note the shifting of the position of the dredge from time to time; that about 4 o'clock on the afternoon of the day in question, he was sitting on a double bitt for the purpose of observing a change then being made; that the quarter line used in moving the dredge came in over the port quarter, was carried around the forward part of the double bitt on which he was sitting, and then inboard to a steam gypsy; that while the location of the dredge was thus being changed, either by reason of the heavy strain put on the quarter line by the use of the steam gypsy, or by reason of the insecure condition or the insufficiency of the bitt, the bitt suddenly broke off at the deck, thereby causing the line to sweep over the front side of the deck, striking Nelson and throwing him into a scow alongside;

that the injury was caused wholly by the negligence of the crew of the barge in subjecting the quarter line to an improper strain, and by reason of the weak and insecure condition of the bitt; and that it was without negligence on the part of Nelson. We will refer again to such of these allegations as are disputed and also are material.

The barge, while at work, was held in position by spuds in the usual way; the outboard end of the quarter line which was used in moving her run out to an anchor, or some other permanent object, and it was kept taut to assist in holding the barge in position. The barge was moved by the use of this and other lines. The inboard end of the quarter line was run over a gypsy head, operated by a steam engine of considerable power. Before putting the gypsy head in gear, it was customary to raise the spuds, so that the dredge could be moved with the assistance of the engine. On this occasion the engine was started before the spuds were raised, with the gypsy head in gear, and the result was that the bitt broke off, as stated in the libel.

The answer alleges that the claimant of the dredge is ignorant for what purpose Nelson was sitting on the bitt. It denies it was necessary for him to sit there in the discharge of his duties. It denies that the injury was caused by the negligence of the crew in subjecting the quarter line to an improper strain, or by the weak and insecure condition of the bitt. It alleges that Nelson was, at the crucial time, in a sitting position on the bitt, facing forward, with his feet and legs on the forward side of the bitt, and within the bight of the quarter line. Also, that the breaking of the bitt and the consequent injury of the libellant were not caused by the negligence of any officer or any of the crew of the dredge, or of the owners thereof, but wholly by the negligence of the libellant in assuming an unnecessary position on the dredge, and that he, as a man of long experience as a sailor and inspector, knew the dangers.

It is not questioned that the bitt gave away, and that the cause of its giving away was the starting of the engine while the gypsy was in gear, and before the spuds were raised. Much of the evidence and many of the contentions of the parties relate to one Christiansen, one of the crew of the dredge, whose duty it was to take charge of the raising the spuds and to superintend the lines. The dredge claims that he was ignorant that the gypsy was in gear when the signal for moving was given, and also ignorant of the position of Nelson on the bitt. But the work was in open daylight, under circumstances where there was no difficulty in perceiving and understanding all

the conditions in question; so that the issue cannot be cut down to a mere contention as to the personal negligence of any single member of the crew. The case, in this particular, comes within the well-known presumptions which were applied by us in *Burr v. Knickerbocker Steam Towing Co.* 65 C. C. A. 554, 132 Fed. 248. Likewise we pass by, as not of substantial importance, all criticisms arising from any suggestion that Nelson, at or about the time of the injury, was not actually engaged in his duties as inspector. Such duties required him to be quite constantly aboard the barge, and to pass from time to time, in his discretion, from one part of her deck to another. Of course, there would be intervals when there would be no occasion for him to be actually engaged in any immediate active duty; but his presence aboard and about such parts of the deck as he might reasonably select, even at those times, was proper, and entitled him to protection. The law does not apply to this so fine a rule as to be impracticable.

Neither can it be said that the mere act of leaning against the bitt, or wholly sitting on it, was one of negligence. There is no evidence in the record that there was any reason, arising either from the condition of this particular vessel, or from the customary course of events with reference to happenings in connection with bitts and lines, which would reasonably create any apprehension that, in case of an unusual strain, this bitt would give way instead of the line. It is common knowledge that it is customary to lean against or sit on the windlass or the bitt or the rail of a vessel; and yet each, especially the rail, under some circumstances, is subject to its own peculiar contingencies. In fact, it is difficult to say what part of a vessel is not at times so subjected; and yet it remains to be shown that a passenger, or other person rightfully aboard a vessel, performing duties thereon, is not entitled to be protected in any of these particular positions. For one, however, to take a position in the bight of a line, subject to a strain, is another matter: and to do this may well subject him to criticism as guilty of negligence if injury results to him.

The facts, as understood by the learned judge of the district court, are so fully detailed in his opinion that we need not touch on them further, except to a very limited extent. We have stated those parts of the case where there are questions of mixed law and fact, or where the topics are so far within the common knowledge that we could apprehend them clearly. As to the substantial questions of mere fact,—that is, as to negligence on the part of the libellant, so far as that is affected by the claim that he was

within the bight of the quarter line,—and as to the negligence of those whose duty it was to attend to the movements of the barge with reference to the strain put on the bitt and its giving way, the proofs are contradictory, and, moreover, not entirely clear. The learned judge of the district court found that those who were at the time managing the barge were guilty of negligence as a matter of fact, and the effect of his other finding is that the libellant had so placed himself within the bight of the line that he, also, was guilty of negligence. He also held that the negligence of those who were maneuvering the barge supervened, so that, consequently, damages could not be divided. We have carefully examined the record, and, while there are unquestionably serious doubts on all the mere questions of fact,—whether the libellant, and also whether those in charge of the barge, were each guilty of negligence,—yet, under the circumstances stated, we cannot determine that any conclusion we might reach, different from those reached by the district court, would be more satisfactory to ourselves, or better supported by the record.

The allegations of the libel, in that it says that the sudden breaking of the bitt caused the quarter line “to sweep over the port side of said deck with tremendous force, striking the libellant, and throwing him” into the scow, gives strong support to the proposition that the libellant was within the bight of the line, although it does not necessarily lead to that conclusion. On the other hand, the proofs in the record that the construction of the parts of the barge involved were of an improved character, and the common knowledge that the bitt would reasonably have been expected to bear even the strain which was improperly put on it, leaves an impression that the injury to the libellant was not a consequence for which the barge, within the contemplation of the law, could be held responsible merely because the gypsy was put or left in gear unseasonably. Yet, in this case, the bitt consisted of a bedplate of nearly 5 feet in length, and of good width and thickness. The length of the bedplate was in line with the keel of the barge. From this bedplate came up two uprights, also in line with the keel of the vessel, and braced by a heavy cross-bar extending from one upright to the other. The line was run around the upright which was nearer the gypsy, so it failed to receive the support of both uprights, braced as they were by the cross-bar which we have described. The upright around which the line was run gave way at its base. To the common comprehension this would not have occurred; and, in lieu thereof, the line would have given way,

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if it had been run in such a way as to receive the support of both uprights of the double bitt, braced as they were by the cross-bar which we have described. Also other elements suggest themselves which might well have been considered by the district court, but which are not clearly solved by the record; as, for example, the reasonable probability that the power of the engine of the barge was so great, and its action was so sudden, and the quarter line itself so unyielding, that, whatever might be the reasonable apprehension ordinarily, the reasonable apprehension in this particular case must have been that, where only a single upright was availed of, as was the fact, the bitt would probably give way if anything gave way. However all these things may have been, we cannot, as we have already said, satisfy ourselves that, if we should reverse the conclusions of the district court on these mere questions of fact, we should reach any new conclusions which could be better supported than those of that court.

It may be said that the district court did not positively find that the libellant was guilty of negligence in placing himself in the bight of the quarter line. It said that, in leaning upon an object within the bight of a rope, he assumed a position of some danger; that “as a reasonable man, he must have known that in placing himself in such a position he took some chances;” and that he must be charged with the knowledge of the ordinary risk incident thereto. The court also observed that it must be remembered that the libellant was not aware that the gypsy was in gear, and that the hawser would be subjected to the strain to which it was exposed as a consequence thereof; and that, therefore, this was a risk of which he had no knowledge, and which he cannot be held in law to have assumed. The court also adds later: “It is true that the libellant was guilty of some negligence in sitting within the bight of the hawser.” Notwithstanding the libellant was entitled to exercise a liberal discretion as to what parts of the barge he would visit, as we have already explained, yet certainly he could have had no occasion to put himself within the bight of the quarter line; so that, taking all in all, the observations of the district court must be held to amount to a finding that Nelson was guilty of negligence in this respect. That this negligence was specially contributory follows from the allegation of the libel that Nelson was struck and thrown by the quarter line. That it was of a lesser degree than the negligence of the barge, if it was such, it is settled cannot be taken account of in admiralty, unless the ratio was so overwhelming as to render his negligence trivial.

The district court does not find such to be the fact, nor are we impressed that it was.

The refusal to apportion the damages, and the assessment of the whole on the dredge, are sought to be justified on the strength of the line of cases represented by *Davies v. Mann*, 10 Mees. & W. 546, decided in 1842. As we have said, we must adopt the findings of the district court on questions of mere fact. They show that it was the duty of the dredge, in providing for the safety of all concerned, to take care that when the steam was to be given the engine, the spuds should be raised before the gypsy was put in gear, and that the managers of the dredge committed this duty to Christiansen. The findings, also show that if he had properly attended to that duty, he would have thrown the gypsy out of gear, and would have seen to it that it was kept out of gear until the spuds were raised. While the findings were that Christiansen knew that Nelson was in a negligent position, it does not appear that he knew that the gypsy was in gear, or how it happened to be in gear. The presumption is that it was through Christiansen's fault that it was in gear, but there is no presumption that he had in mind, at the time the whistle sounded, that such was the fact. In other words whatever negligence Christiansen was charged with, he was not charged with having allowed the engine to be started with a present appreciation of both facts,—that Nelson was sitting on the bitt and that the gypsy was in gear. If he had had both facts present in his mind, his conduct in allowing the whistle to be blown while the gypsy was in gear might have been so reckless or perverse that it might well be said to have been the sole proximate cause of the injury which resulted. But, for various reasons, *Davies v. Mann* cannot be held to apply.

Davies v. Mann must be taken in connection with *Butterfield v. Forrester*, 11 East, 60, decided in 1809, and *Tuff v. Warman*, 5 C. B. N. S. 573, decided in 1858. Of the three, the last-named case must be regarded as the leading one according to Pollock, *Torts*, 6th ed. 1901, 448, where it is said that those earlier than *Tuff v. Warman* are now material only as illustrations. In *Butterfield v. Forrester*, Lord Ellenborough said that the fact that a person was on the wrong side of the street would not authorize another purposely to ride up against him. This relates to mere perverseness. He also said some other things, more in line with *Davies v. Mann*. In *Davies v. Mann*, a donkey left unlawfully in the highway was run down by the defendant, driving a pair of horses. Lord Abinger said, in effect, that the plaintiff could recover, as the defendant might, by proper care, have avoided injuring

the animal. The case, however, to which we call especial attention, is the one we have already referred to,—*Tuff v. Warman*,—decided in 1858, where a barge was run down by a steamer. It was shown that the barge was negligent in not having a lookout. Nevertheless, the steamer saw the barge, but failed to port her helm, as she should have done. It being a common-law suit, the steamer was charged with all damages, on the ground that she continued in a course which would inflict an injury, and was therefore liable, although the plaintiff had no lookout. We will have occasion to refer to this case again in a pointed manner. *Davies v. Mann*, as interpreted and applied in England, is undoubtedly the law of England, as was declared in the House of Lords. *Radley v. London & N. W. R. Co.* L. R. 1 App. Cas. 754, 759. The difficulty, however, of applying *Davies v. Mann*, even in England at that late day (1876), is apparent from the fact that there, under the directions of the trial judge, a verdict was allowed to be taken for the defendant, which, on appeal to the divisional court, was set aside. The decision of the divisional court was reversed in the exchequer chamber by such eminent justices as Blackburn, Mellor, Lush, Brett, afterwards Lord Esher, and Archibald. An appeal was then taken to the House of Lords, which reversed the exchequer chamber, and restored the judgment of the divisional court. Lord Blackburn, who, pending the appeal, had taken a seat in the House of Lords, overruled himself, concurring with the other lords. In that case Lord Penzance, who delivered the opinion, in which the other lords briefly concurred, put *Davies v. Mann* in two different forms. One was (page 759) to the effect that if the defendant, by the exercise of ordinary care, might have avoided the mischief, the plaintiff's negligence would not excuse him; and the other (page 760) described the plaintiff's negligence as "a previous negligence." Therefore it was not a concurring, nor necessarily a contributing, negligence in any sense of either of those expressions.

In view of these varying applications, the observation of Pollock on *Torts*, at page 449, to the effect that *Davies v. Mann* has been much discussed in America, though not always wisely so, seems hardly suitable. This is very patent in the light of Sir Frederick Pollock's further observations as to *Davies v. Mann*. In connection with the discussion of this case, at page 451, he quotes with approval one whom he styles a "learned writer," although anonymous, who undertook to restate the rule of *Davies v. Mann*, as follows: "He who last has an opportunity of avoiding the accident, notwithstanding the

negligence of the other is solely responsible." The same "learned writer" also said that, "if the plaintiff could, by the exercise of ordinary care, have avoided the accident, he cannot recover." He sums up the result of both rules to be that the law looks to the proximate cause, and "holds that person liable who was, in the main, the cause of the injury." As practically applied in England, it may, after all, be well doubted whether this whole line of cases means anything more than to illustrate and emphasize the distinction between *causa causans*, which the fundamental rules of the law regard, and *causa sine qua non*, which they do not regard.

As indicated by Pollock, *Davies v. Mann* is still the subject of discussion in America, except so far as it recognizes the rule of a subsequent, disconnected negligence, or the rule of *causa causans*, or that of perverseness or persistency, spoken of by Lord Ellenborough. It is in this light that the *Inland & Seaboard Coasting Co. v. Tolson*, 139 U. S. 551, 558, 559, 35 L. ed. 270, 272, 273, 11 Sup. Ct. Rep. 653, is to the implied effect that the negligence of the plaintiff is a defense unless the defendant had knowledge of the position. However, as the appeal at bar is in admiralty, it is not necessary for us to follow the intricacies of *Davies v. Mann* and its history. We do not know that *Davies v. Mann*, or any decisions of its kin, was ever cited in a maritime court. Attempts have been made in England to apply this class of cases in admiralty, with contradictory and unsatisfactory results. Marsden's Collisions at Sea, 5th ed. pp. 16-22. Certain it is that there are decisions of the highest authority in admiralty directly impugning *Tuff v. Warman*, and dividing the damages under the same substantial circumstances as those of that case, and disregarding any application of *Davies v. Mann*.

In the circuit court of appeals in the second circuit we find *The James D. Leary*, appearing in the district court in 110 Fed. 685, and affirmed in 51 C. C. A. 620, 113 Fed. 1019, on the opinion of the district court. Both vessels involved were steamers,—*The James D. Leary* and *The Evelyn*. The *Evelyn* was found at fault for coming to anchor east of the proper anchorage ground, as marked by buoys, but her anchor light was visible to the *Leary* from one to two miles. The damages were divided. There is no mistaking that this decision absolutely disregarded any rule found in *Tuff v. Warman* or in *Davies v. Mann*, although all the substantial circumstances were alike. The same must be said about *The Providence*, decided by this court, and reported in 38 C. C. A. 670, 98 Fed. 133, where a large Sound steamer coming into Fall river, was in col-

lision with a schooner at anchor. The schooner was at fault. Nevertheless, the opinion observes at page 134, 98 Fed., page 671, 38 C. C. A., that, if the Providence had used proper precautions, the collision might have been avoided, or at least the consequences would not have been serious. Again the damages were divided.

In *The America* (*The America v. Camden & A. R. Transp. Co.*) 92 U. S. 432, 436, 23 L. ed. 724, 727, one vessel was a tug and the other a ferryboat. The ferryboat struck the tug on the port bow. The court states that the proofs were clear that each vessel was seen by the other in ample season to have prevented the collision, and yet, not only the ferryboat which struck the tug, but the tug, also, was held to half the damages. *The New York*, 175 U. S. 187, 209, 44 L. ed. 126, 135, 20 Sup. Ct. Rep. 67, is another very marked case. One steamer was in fault for not stopping when the other steamer failed to answer her signals. Both steamers saw each other, and both were held guilty, and damages divided. One of the most striking of all is *Atlee v. Northwestern Packet Co.* 21 Wall. 389, 392, 395, 397, 398, 22 L. ed. 619, 620, 621, 622, in which the circumstances were even more extreme than any which could be deduced from *Davies v. Mann* because in *Davies v. Mann* the object unlawfully left in the public highway was a donkey, only temporarily there, the presence of which might or might not be presumed to be known to travelers. In *Atlee v. Northwestern Packet Co.* the object unlawfully in the public highway—that is, in the river—was a pier of a permanent character, existing for so long a time that the court found that a skilful pilot was bound to know of it; and yet *Atlee*, who constructed and maintained the pier, as well as the steamer colliding with it, were both held liable, and the damages were apportioned equally between them. A more positive case is *Cushing v. The John Fraser* (*The James Gray v. The John Fraser*) 21 How. 184, 191, 16 L. ed. 106, 109, where the collision was with a vessel anchored in an improper place, without any light; but the other vessel was held in fault for not sighting her, and damages were equally divided. In every one of these cases the circumstances were known to the party who was guilty of the final negligent act. A multitude of other admiralty decisions to the same effect can be cited. Indeed, some of them go so far as to make it clear that the law of these tribunals is not strict with reference even to subsequent, and somewhat independent, disconnected negligences, as is the common law. In view of these propositions and decisions, we are not justified in applying in an admiralty case any peculiar rule which can be deduced, or ever has been

deduced, from *Davies v. Mann*. Moreover, on this appeal it is not clear that one negligence did supervene on the other. It is not even known which party's negligence first originated. Certain it is that both were existing and concurring at the time of the accident. Moreover, as we have shown, it is not proved that Christiansen had an existing appreciation of all the conditions, or was guilty of perverseness. In any view, applying the practical rules of the decisions of the supreme court and of the courts of appeals which we have cited, neither party to this proceeding can escape the consequence of his own fault.

It may be, in view of the fact that the admiralty is, under no circumstances, as stringent as the common law in refusing to impose liability on one party on account of the contributory negligence of the other,

that it need not apply the incidental rules of *Davies v. Mann*, and the cases akin to it, in any event. Its principal rule being amelioratory, it has no occasion to hold incidental rules too strictly for the purpose of avoiding results which otherwise might shock the common sense as to justice. However this may be, the decree of the district court must be modified to the extent of requiring a division of damages.

The decree of the District Court is reversed, and the case is remanded to that court, with directions to apportion to each party one half of the damages and of the interest thereon, and one half of the costs in the district court, and the appellant recovers its costs of appeal.

Petition for rehearing overruled March 17, 1905.

MAINE SUPREME JUDICIAL COURT.

George H. MARDEN

v.

PORTSMOUTH, KITTERY, & YORK
STREET RAILWAY.

(.....Me.....)

1. Failure to look and listen before crossing a street car track at a public crossing cannot be said, as matter of law, to be negligence *per se*.
2. One in charge of an electric street car approaching a public crossing must anticipate that any person approaching the junction from either side may turn his team into the cross street, and must exercise all due care to have his car under such control as to be able to stop it at the crossing, if necessary, to avoid an accident.
3. The jury must decide whether or not, under all the circumstances of the case, a street car company is guilty of negligence in approaching a street crossing at an unreasonable speed, which results in a collision with a vehicle using the highway.
4. One about to drive across a street car track at a public street crossing is not required to look along the whole length of visible track to see if a car is coming, but only far enough to warrant an ordinarily

careful and prudent man, having in mind his own safety, under like circumstances, to conclude that no car is in such proximity as, if properly managed, to endanger his safety in crossing.

5. The court will not, as matter of law, say that it is negligence for one driving a team to attempt to cross a street car track at a public crossing, after looking along the track 244 feet without seeing a car when he is only 20 feet from the track; but the question is for the jury.

(March 2, 1905.)

MOTION for new trial after verdict in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence, which was tried in York County. *Overruled.*

The facts are stated in the opinion.

Messrs. H. H. Burbank and John G. Smith, for plaintiff:

The fact that a person who, in attempting to cross a railroad, does not at the instant of stepping on it look to ascertain if a train is approaching, is not conclusive of a want of due care on his part.

Plummer v. Eastern R. Co. 73 Me. 593.

If the plaintiff looked back such a dis-

NOTE.—As to measure of care required of person in crossing street car track, see also, in this series, *Chicago City R. Co. v. Robinson*, 4 L. R. A. 126; *Carson v. Federal Street & P. Valley R. Co.* 15 L. R. A. 257; *Ehrisman v. East Harrisburg City Pass. R. Co.* 17 L. R. A. 448; *Newark Pass. R. Co. v. Bloch*, 22 L. R. A. 374; *McGee v. Consolidated Street R. Co.* 26 L. R. A. 300; *Cincinnati Street R. Co. v. Snell*, 32 L. R. A. 276; *Consolidated Traction Co. v.* 60 L. R. A.

Scott, 33 L. R. A. 122; *Baltimore Traction Co. v. Helms*, 36 L. R. A. 215; *Johnson v. St. Paul City R. Co.* 36 L. R. A. 586; *Evansville Street R. Co. v. Gentry*, 37 L. R. A. 378; *Hoelsel v. Crescent City R. Co.* 38 L. R. A. 708; *Tesch v. Milwaukee Electric R. & Light Co.* 63 L. R. A. 618; *Roberts v. Spokane Street R. Co.* 54 L. R. A. 184; *Keenan v. Union Traction Co.* 58 L. R. A. 217; and *Kansas City Leavenworth R. Co. v. Gallagher*, 64 L. R. A. 344.

tance that a car in sight, moving at a proper rate of speed, and under proper management, could have been stopped before reaching the crossing, and saw no car, he was justified in crossing, or attempting to cross, the track.

Creavin v. Newton Street R. Co. 176 Mass. 529, 57 N. E. 994; *Chaffee v. Boston & L. R. Corp.* 104 Mass. 108; *Williams v. Grealy*, 112 Mass. 79; *Duggan v. New England R. Co.* 172 Mass. 337, 52 N. E. 519; *Carlson v. Lynn & B. R. Co.* 172 Mass. 388, 52 N. E. 520; *Lahti v. Fitchburg & L. Street R. Co.* 172 Mass. 147, 51 N. E. 524; *Kelly v. Wakefield & S. Street R. Co.* 179 Mass. 542, 61 N. E. 139.

Plaintiff's negligence, if any, was not a contributory cause. If defendant's car had been traveling at proper speed it could and should have been stopped.

Page v. Bucksport, 64 Me. 53, 18 Am. Rep. 299; *O'Brien v. McGlinchy*, 68 Me. 557; *Pollard v. Maine C. R. Co.* 87 Me. 55, 32 Atl. 735; *Flewelling v. Lewiston & A. Horse R. Co.* 89 Me. 594, 36 Atl. 1056; *Atwood v. Bangor, O. & O. T. R. Co.* 91 Me. 400, 40 Atl. 67; *Conley v. Maine C. R. Co.* 95 Me. 149, 49 Atl. 668; *Ward v. Maine C. R. Co.* 96 Me. 145, 51 Atl. 947; *Cooley*, Torts, 2d ed. p. 816.

The conduct of the motorman should be influenced by the fact that the vehicle is covered.

Tashjian v. Worcester Consol. Street R. Co. 177 Mass. 81, 58 N. E. 281.

An electric car has no paramount right of way over pedestrians or other vehicles at street crossings, but the rights of each are equal.

Joyce, *Electric Law*, § 589; 23 Am. & Eng. Enc. Law, pp. 992, 1028.

Due care of the plaintiff is a question of fact for the jury.

Hobbs v. Eastern R. Co. 66 Me. 575; *Plummer v. Eastern R. Co.* 73 Me. 591; *Warren v. Bangor, O. & O. T. R. Co.* 95 Me. 118, 49 Atl. 609; *Treat v. Boston & L. R. Corp.* 131 Mass. 371; *Robbins v. Springfield Street R. Co.* 165 Mass. 30, 42 N. E. 334; *LeBlanc v. Lowell, L. & H. Street R. Co.* 170 Mass. 567, 49 N. E. 927; *Kelly v. Wakefield & S. Street R. Co.* 179 Mass. 542, 61 N. E. 139.

Negligence of the defendant, and whether or not it was the proximate cause of the collision, are questions of fact for the jury.

Atwood v. Bangor, O. & O. T. R. Co. 91 Me. 400, 40 Atl. 67; *Allen v. Boston & M. R. Co.* 94 Me. 402, 47 Atl. 917; *Conley v. Maine C. R. Co.* 95 Me. 149, 49 Atl. 668; *Ward v. Maine C. R. Co.* 96 Me. 145, 51 Atl. 947; *Griffin v. Boston & A. R. Co.* 148 Mass. 143, 1 L. R. A. 698, 12 Am. St. Rep. 526, 19 N. E. 166; *Kerrigan v. West* 69 L. R. A.

End Street R. Co. 158 Mass. 305, 33 N. E. 523; *Driscoll v. West End Street R. Co.* 159 Mass. 142, 34 N. E. 171.

Messrs. J. C. Stewart, Emery & Sims, and O. D. Baker for defendant.

Spear, J., delivered the opinion of the court:

This is an action on the case for negligence, resulting from a collision between the plaintiff's cart and the defendant's electric car. The case shows that the plaintiff, on the 15th day of June, 1901, was driving a covered butcher's cart along a public street in the town of Kittery in an easterly direction, parallel with the defendant's road, about 3 feet northerly thereof; the track being on the southerly side of the road. The highway and the track descend quite sharply towards the east, the grade being about 6 feet in 100. At the bottom of the grade, a cross-street called "Williams avenue" runs substantially at right angles and southerly from the highway on which the plaintiff was driving. When the plaintiff reached the mouth of Williams avenue he attempted to turn his team into it, thereby squarely crossing the defendant's rails. While crossing the track the front part of the off hind wheel of the plaintiff's cart was struck by the defendant's car, and the injuries were produced of which the plaintiff complains. After a long trial, involving more than 250 pages of testimony, the jury returned a verdict for the plaintiff of \$1,103.73. The case comes up on motion to set this verdict aside, as against the law and the evidence. The real issue to be considered is whether the defendant was guilty of negligence with respect to the speed with which it was running its car at the time the accident occurred, and whether the plaintiff was guilty of contributory negligence. The evidence upon the one side and the other upon the point of speed is conflicting; the plaintiff and some of his witnesses contending that the car was running from 15 to 20 miles an hour down the grade towards the crossing, while those of the defendant assert the car was moving at a rate of only 4 or 5 miles an hour. There was also testimony on the part of the plaintiff bearing upon the question of speed, tending to show that the cart and horse were thrown bodily in the air when the car struck them,—the cart some 40 feet, and the horse half that distance,—and that the car itself ran from 150 to 200 feet beyond the center of the crossing before it could be stopped, although the motorman claims that he did all in his power to check the car in the quickest possible manner after he discovered that the plaintiff was about to cross the track in

front of it. In finding the defendant guilty, the jury must have come to the conclusion that it was running its car at the time of the collision at an unsafe and unreasonable rate of speed.

But the defendant says, admitting its negligence as found by the jury, it is not guilty, because the plaintiff's own testimony, allow it to be true, clearly discloses the fact that by his own negligent acts he contributed to the accident which caused his injuries. Whether the plaintiff, in his connection with the accident, was guilty of contributory negligence, assuming the guilt of the defendant, may depend in a large degree upon the duty which the defendant, under the particular circumstances in this case, owed to the plaintiff. This consideration involves a question with respect to the relative rights and duties of electric cars and vehicles while concurrently approaching and passing over public street crossings. The law upon this subject seems to be well settled in many states. While the contention has been made that a person approaching an electric road with the intention of crossing the track should observe that same degree of watchfulness and care as when attempting to cross a steam road, it is readily obvious that the cases are entirely dissimilar. The steam road is invariably possessed of a private roadbed, protected by law, and vested with the right to punish as a trespasser any person who may invade its property outside of that part of its premises made public for the prosecution of its business. It is also permitted by law to propel its trains at a tremendous rate of speed, so that it is impracticable, if not impossible, to stop them quickly or within a short distance. The law recognizes these facts, and not only for the protection of the individual who may undertake to cross a steam railroad track, but for the safety of the many who may be riding in the public coaches, requires the individual, when he approaches the passageway of such an engine of destruction, within a proper distance of the track, to look and listen, not only with his eyes and ears, but with his mind, to discover whether a train is approaching. The law makes it imperative for travelers to do this, and a failure to comply with this law presumes them to be guilty of contributory negligence, if they are injured by a collision with a passing train. This is undoubtedly a wise and judicious law in its application to steam roads, but it should not be fully applied to the use of electric and other street railroads.

An electric road is installed and operated upon a principle entirely different from that of the steam road. Our court has

said, in *Briggs v. Lewiston & A. Horse R. Co.* 79 Me. 367, 1 Am. St. Rep. 316, 10 Atl. 48, that "the laying down rails in the street, and the running street cars over them for the accommodation of persons desiring to travel on the street, is only a later mode of using the land as a way,—using it for the very purpose for which it was originally taken. It may be a change in the mode, but it is not a change in the use. The land is still used for a highway." This rule of law applies equally whether the motor for propelling the car is a horse, steam, or electricity. It is apparent, therefore, that the electric cars, which are now becoming of very common use, not only in our cities, but in our villages and country towns, are operated for the most part within the limits of the legally located highways, as said in *Benjamin v. Holyoke Street R. Co.* 160 Mass. 3, 39 Am. St. Rep. 446, 35 N. E. 95, where "the use of the street for electric cars and by the general public was concurrent; and the defendant was bound, in using the street, to have reference to its reasonable use by others." Unlike steam cars, the electric car runs, or may be run at times, through streets crowded with people and vehicles, and therefore, instead of being vested with the right to run at a rapid rate of speed, they are required to make a reasonable use of the streets, consistent with the rights of other persons and vehicles who may occupy the streets in conjunction with them. Upon this point, the court, in *Driscoll v. West End Street R. Co.* 159 Mass. 145, 34 N. E. 172, holds that "the drivers and conductors of street railway cars, whatever the motive power, have in general the same rights and duties with reference to other vehicles crossing their course that the drivers of omnibuses have, for example, or that the driver of any other vehicle has. *O'Neil v. Dry Dock, E. B. & B. R. Co.* 129 N. Y. 125, 26 Am. St. Rep. 512, 29 N. E. 84. In *Com. v. Temple*, 14 Gray, 69, 75, it is said: 'Where the entire public, each according to his own exigencies, has a right to the use of the highway, in the absence of any special regulation by law the right of each is equal. . . . Each may use it to his own best advantage, but with a just regard to the like right of others.'" See also *Newark Pass. R. Co. v. Block*, 55 N. J. L. 605, 22 L. R. A. 374, 27 Atl. 1067. But a reasonable use must be measured by the relative facility with which cars and other kinds of vehicles are able to move about, with respect to one another, in the streets. It must be recognized that cars are confined to a track, and are unable to turn to the right or to the left; that they are permitted to occupy the streets for the purpose of facilitating travel;

and that teams and travelers, as far as practicable, must keep out of their way, and not impede their progress more than is absolutely necessary. It is perfectly obvious that a team can move with ease, while a car cannot, but is confined to one course; hence a reasonable use of the streets, having reference to the relative facility with which the locomotion of teams and cars can be controlled, necessarily gives the car between street crossings certain privileges over other vehicles. These superior privileges are well stated in *O'Neil v. Dry Dock, E. B. & B. R. Co.* 129 N. Y. 130, 26 Am. St. Rep. 512, 29 N. E. 85, as follows: "As the cars must run upon the tracks, and cannot turn out for vehicles drawn by horses, they must have the preference; and such vehicles must, as they can, in a reasonable manner, keep off from the railroad tracks, so as to permit the free and unobstructed passage of the cars. In no other way can street railways be operated. As to such vehicles, the railways have the paramount right, to be exercised in a reasonable and prudent manner."

But in the end, what is a reasonable use, is a question of fact, depending upon the circumstances of each particular case, having reference to the manner in which street railroads are obliged to be operated, and the purpose for which they are designed. *Hall v. Ogden City Street R. Co.* 13 Utah, 243, 57 Am. St. Rep. 729, 44 Pac. 1046; *Driscoll v. West End Street R. Co.* 159 Mass. 142, 34 N. E. 171.

Yet the defendant seems to assume in its brief that the same rule with respect to approaching a public street crossing traversed by electric cars applies to electric as to steam roads, and asserts that on this point this case falls clearly within the decision of *Blumenthal v. Boston & M. R. Co.* 97 Me. 255, 54 Atl. 747, and *Day v. Boston & M. R. Co.* 97 Me. 528, 55 Atl. 420. But the same rule does not apply. While it may be found, as a matter of fact, in any case involving an accident by crossing in front of an electric car, that it was the duty of the person undertaking to so cross to look and listen, it cannot be laid down as a rule of law that a failure to do this does *per se* constitute negligence. That is, whether the failure of the party injured to look and listen, before undertaking to pass in front of an electric car, constitutes negligence, is a question of fact, while the failure to do so in attempting to pass in front of a steam car is a matter of law. Our court has directly passed upon this distinction with respect to the duty imposed upon one approaching the crossing of steam and electric railroad tracks. *Fairbanks v. Bangor, O. & O. R. Co.* 95 Me. 60 L. R. A.

78, 49 Atl. 421, and *Warren v. Bangor, O. & O. R. Co.* 95 Me. 115, 49 Atl. 609. But the question is now so distinctly raised anew, and becomes so material in determining the rights of the parties in this case, that a more extended consideration may also be proper. The defendant claims, as a matter of law, that the plaintiff should have looked and listened immediately before going upon the crossing; but both of the cases last cited in 95 Me. and 49 Atl. hold to the contrary, and the weight of authority and the soundness of reasoning are also clearly the other way. This question was sharply raised in a recent Massachusetts case,—*Robbins v. Springfield Street R. Co.* 165 Mass. 30, 42 N. E. 334. The defendant requested the judge to give the following instruction: "If the plaintiff failed to look and listen, when by looking or listening he could have perceived the approach of the car, and the plaintiff drove in front of the car, and such failure to look and listen contributed directly to his injury, then he cannot recover, and the verdict should be for the defendant." The judge refused to give the instruction. Chief Justice Field, in passing upon the ruling of the court, said: "The questions of the due care of the plaintiff and of the negligence of the defendant's servants, we think, were for the jury, on the evidence which appears in the exceptions." He then holds, alluding directly to the above request, that "the third request could not properly have been given as an absolute rule of law. The decisions of this court show that a distinction has been taken with respect to the duty to look and listen when crossing the tracks of a steam railroad, where a railroad train has the exclusive right of way, and when crossing the tracks of a street railway company in a public street, where the cars have not an exclusive right of way, but are run in the street in common with other vehicles and with travelers. The fact that the power used by the street railway company is electricity, instead of that of horses, has not been deemed by the court sufficient to make the rule of law which has been laid down concerning the crossing of the track of a steam railroad exactly applicable to a street railway." In *Hall v. West End Street R. Co.* 168 Mass. 461, 47 N. E. 124, the court says: "There is no absolute rule of law that, to be in the exercise of due care, one about to cross a public street must look and listen for approaching vehicles;" and cites *Robbins v. Springfield Street R. Co.* 165 Mass. 30, 42 N. E. 334. In this case the verdict was directed for the defendant because, under the peculiar circumstances, the inference of fact was conclusive that the plaintiff's failure to look and lis-

ten constituted negligence and contributed to the accident. Again, it is held in *Benjamin v. Holyoke Street R. Co.* 160 Mass. 4, 39 Am. St. Rep. 446, 35 N. E. 95, that "the court rightly refused to instruct the jury that a mere failure to look would prevent her from recovering. This has been so held even in cases of collision. [*Consolidated Traction Co. v. Scott*, 58 N. J. L. 682, 33 L. R. A. 122, 55 Am. St. Rep. 629, 34 Atl. 1094;] *Shapleigh v. Wyman*, 134 Mass. 118; *French v. Taunton Branch R. Co.* 116 Mass. 537. The question was left to the jury, with proper instructions."

In *Hall v. Ogden City Street R. Co.* 13 Utah, 243, 57 Am. St. Rep. 733, 44 Pac. 1046, it is held: "Persons traveling on a public street along or across a street railway track are not held to the exercise of the same degree of care and precaution as they are when traveling along, or upon, or across, an ordinary steam railroad."

In *Consolidated Traction Co. v. Scott*, 58 N. J. L. 682, 33 L. R. A. 122, 55 Am. St. Rep. 629, 34 Atl. 1094, we find the rule stated in this way: "It may be said with reference to this request to charge that the proposition that one, to be in the exercise of due care, must look and listen before crossing a steam railway, is well established; but this duty does not apply with equal force to one in crossing the tracks of a street railway."

Wendell v. New York O. & H. R. R. Co. 91 N. Y. 429, holds: "The rules of conduct which should govern the approach of travelers to crossings over street railways, or in the track of vehicles whose rate of progress is under the control of their drivers, are necessarily quite different from those applicable to the crossing of the track of steam railroads, whose trains traverse vast distances, carrying great burdens, and moving with a momentum necessarily destructive to bodies with which they come in contact." This case was against a steam railway company, and the above quotation is employed to show the distinction between the rights and duties of steam and electric roads.

It is said in *Evansville Street R. Co. v. Gentry*, 147 Ind. 408, 37 L. R. A. 378, 82 Am. St. Rep. 423, 44 N. E. 311: "The rules that govern as to the crossing of steam railroads by travelers upon the highway are not fully applicable to street railroad crossings in cities. . . . The rule, therefore, to stop and look and listen, cannot apply, as it does to the crossing of a steam railroad track." In *White v. Worcester Consol. Street R. Co.* 167 Mass. 43, 44 N. E. 1052, Mr. Justice Holmes, as late as 1896, stated the proposition in this way: "But we suppose that the request was in-

tended to embody a statement of the rights of electric cars, irrespective of practice, and to put street railways on very nearly the footing of steam railroads. Whatever may be the law as to the latter, there is great difference between the two cases. Electric cars are far more manageable and more quickly stopped than trains upon steam railroads."

The duty imposed upon street cars when approaching public street crossings also clearly shows that the same rule with respect to such crossings cannot be invoked for both electric and steam cars. The very fact that the law, as far as we have been able to discover, almost universally holds that, upon the approach of public street crossings, the rights of street cars and vehicles are equal, and that neither has a paramount right over the other, necessarily modifies the rule applicable to the approach of steam car crossings.

If it was not incumbent upon the plaintiff, as a matter of law, to look and listen, what was the duty of the defendant to the plaintiff in the management of its car in approaching a public crossing in conjunction with the plaintiff? We can readily see, if the law gave the defendant an absolute right of way, to the seclusion of all else, like a steam car, and also required the plaintiff to look and listen, and, if he saw a car coming, however far away, and was injured, made him guilty of negligence, and, if he did not see the car, made him guilty for not seeing it, that the defendant could run its cars at almost any rate of speed, however negligent, without being chargeable with liability, on account of necessary contributory negligence on the part of the plaintiff.

But under the above principles of law, applicable to the reasonable use of the highway by electric cars, and to the duty of travelers in their relations with them, we think the safe rule to lay down with respect to the management of electric or other motor cars at street crossings is this: That the motorman, when approaching a public street, shall be held to anticipate that any person approaching such junction from either side may turn his team into it, and shall then exercise all due care to have his car under such control as to be able to stop it at the crossing if necessary to avoid an accident. This rule places upon the railroad using the highway only that degree of care that is commensurate with public safety and with a reasonable use of the road. It is also well-settled law. And it is proper to here observe that the decisions impose a special duty upon cars operated in the streets when approaching street crossings,—a duty which, instead of clothing them with

the paramount rights conceded between crossings, places them upon an equal footing with other vehicles rightfully occupying the streets. In the great state of New York, with its numerous cities and large towns, in which, without doubt, the necessity for rapid transit is as imperative as in any state in the Union, we find the distinction fully and clearly stated in the *O'Neil Case*, 129 N. Y. 130, 26 Am. St. Rep. 512, 29 N. E. 85. After the quotations above alluded to, finding, as to vehicles moving in the streets, that the railways have a paramount right, to be exercised in a reasonable and prudent manner, the court then proceeds to define their rights upon approaching crossings in this language: "But a railway crossing a street stands upon a different footing. The car has the right to cross, and must cross, the street, and the vehicle has the right to cross, and must cross, the railroad track. Neither has a superior right to the other. The right of each must be exercised with due regard to the right of the other, and the right of each must be exercised in a reasonable and careful manner, so as not unreasonably to abridge or interfere with the right of the other."

Driscoll v. West End Street R. Co. 159 Mass. 142, 34 N. E. 171, involving an accident at a street crossing, also recognizes the difference between the privileges of street cars while moving along the streets and when approaching street crossings and expressly differentiates *Com. v. Temple*, 14 Gray, 69, relative to the rights of cars running between crossings. The court say: "Street railway companies, under the decision of *Com. v. Temple*, 14 Gray, 69, in running their cars, have certain rights in the streets, different from those which belong to the drivers of ordinary vehicles, but none of these rights is directly involved in the case at bar;" and then lay down the principle: "The drivers and conductors of street railway cars, whatever the motive power, have, in general, the same rights and duties with reference to . . . vehicles crossing their course that the drivers of omnibuses have, for example, or that the driver of any other vehicle has;" and cite and adopt the *O'Neil Case*, in 129 N. Y. 125, 26 Am. St. Rep. 512, 29 N. E. 84, which specifically distinguishes the rights of cars at street crossings.

In *Richmond R. & Electric Co. v. Garthright*, 92 Va. 627, 32 L. R. A. 220, 53 Am. St. Rep. 844, 24 S. E. 267, it is held: "The people of a city and vehicles have the same right to pass along an intersecting street as the car has to go across it. 'The car has a right to cross, and must cross, the street, and vehicles and foot passengers have a right to cross, and must cross, the railroad

track. Neither has a superior right to the other.' *O'Neil v. Dry Dock, E. B. & B. R. Co.* 129 N. Y. 125, 26 Am. St. Rep. 512, 29 N. E. 84; *Buhrens v. Dry Dock, E. B. & B. R. Co.* 53 Hun, 571, 6 N. Y. Supp. 224, Affirmed in 125 N. Y. 702, 26 N. E. 752; *Chicago City R. Co. v. Young*, 62 Ill. 238; Booth, Street Railways, § 304, and cases there cited. And it is gross negligence in a street railway company to overcrowd and load down its cars with passengers beyond any reasonable and proper limit, and consequently not to be able to control and stop them readily as they approach an intersecting street, in case it may be necessary to do so to avert a collision or prevent an accident."

Evers v. Philadelphia Traction Co. 176 Pa. 376, 53 Am. St. Rep. 674, 35 Atl. 140, holds: "The fact that more caution should be exercised in running over crossings than on the street between them warrants no inference that the car can be run without caution except on approaching crossings. In the one case, rapid running is of itself evidence of negligence; in the other, it is not." This case distinctly holds that it is negligence *per se* to run an electric car rapidly over a crossing. *Buhrens v. Dry Dock, E. B. & B. R. Co.* 53 Hun, 571, 6 N. Y. Supp. 224; *Western Paving & Supply Co. v. Citizens' Street R. Co.* 25 Am. St. Rep. 477, note: "But at street crossings the right of a street railway company to the street, and its right to the use thereof, in respect to other vehicles, are precisely the same as those of such other vehicles."

Anderson v. Minneapolis Street R. Co. 42 Minn. 490, 18 Am. St. Rep. 525, 44 N. W. 518, also holds: The driver of a street car must be in a place and condition to exercise a reasonable degree of care and diligence in watching the street ahead of him, so as to prevent collision and avoid injuries to pedestrians lawfully traveling thereon.

In *Evansville Street R. Co. v. Gentry*, 147 Ind. 408, 37 L. R. A. 378, 62 Am. St. Rep. 423, 44 N. E. 311, it is held: "The street car, therefore, ought to be under full control as it passes over the crossing; and, as said in *Cincinnati Street R. Co. v. Whitcomb*, 14 C. C. A. 183, 31 U. S. App. 374, 66 Fed. 915, it is not the law that persons crossing street railway tracks in the city are obliged to stop as well as look and listen before going over such tracks, unless there is some circumstance which would make it ordinarily prudent to do so." See also other authorities cited, showing that the rules which must be observed in crossing the tracks of the steam railroads do not strictly apply to the crossing of electric or cable lines in cities.

In *Joyce on Electric Law*, § 589, we find

the following: "An electric car has no paramount right of way over pedestrians or other vehicles at street crossings, and the rights of each are equal." See also numerous cases cited in the note.

If it was the duty of the motorman—and we find that it was—to run his car in approaching a public crossing at a rate of speed that would enable him to have it under the degree of control prescribed by the above rules of law, then arises the first question of fact put in issue in this case: Did the motorman, in approaching the crossing at which the plaintiff was injured, have his car under proper control, or, *e converso*, was he running it at an unreasonable and negligent rate of speed? The undisputed evidence shows that the approach to this crossing was down a sharp grade, upon which the speed of the car would, from gravity alone, naturally be rapid. As before stated, the testimony of the plaintiff's witnesses tends to show that the car was moving at a rate of 15 to 20 miles an hour, and this testimony seems to be corroborated by other evidence relative to the distance which the horse and cart were carried by the impact of the car, and the distance which the car traversed before it finally stopped. All this evidence is controverted by the defendant's witnesses, but a careful reading of the testimony, while it might leave the question of speed somewhat in doubt, nevertheless warranted the jury in concluding that, under all the circumstances, the defendant's car, in approaching the crossing, was propelled at an unreasonable and dangerous rate of speed. "In determining whether the cause should go to the jury, we must give plaintiff the benefit of the most favorable view of his facts, and of every reasonable inference therefrom." *Buck v. People's Street R. & Electric Light & P. Co.* 108 Mo. 186, 18 S. W. 1090.

Upon this point, then, assuming that the finding of the jury was correct, arises the legal proposition, Does an unreasonable rate of speed by a street car constitute negligence? Our courts have repeatedly held that the speed of a car is a fact from which negligence may be inferred, and that whether such speed in any particular case constituted negligence was peculiarly a question for the determination of the jury.

In *Hall v. Ogden City Street R. Co.* 13 Utah, 243, 57 Am. St. Rep. 726, 44 Pac. 1046, we find this principle: "Some courts hold that, where the speed is greater than that permitted by the ordinance, it is negligence *per se*; but the better rule, and the one sustained by the weight of authority, appears to be that it is a circumstance from which negligence may be inferred, and is always proper to be considered by the jury 69 L. R. A.

in determining the question whether or not the railway company was guilty of negligence."

In *Birmingham R. & Electric Co. v. City Stable Co.* 119 Ala. 615, 72 Am. St. Rep. 957, 24 So. 558, the court says: "But if he had a right to drive on the track for the purpose of crossing it at this particular place, then it became their duty, not only to keep a lookout to observe him, but also to run the car at such a rate of speed on approaching the place, and to retain such control over it, as to be able to bring it to a full stop before striking the horse." In *Newark Pass. R. Co. v. Block*, 55 N. J. L. 614, 22 L. R. A. 374, 27 Atl. 1067, in the court below the defendants requested the judge to rule, in effect, that they had a right to run their cars through the streets at a high rate of speed, to accomplish the object of "rapid transit," and that it was the duty of other occupants of the street, at their peril, to keep out of the way of a moving car; and the court held: "It is a proposition applicable to the crossing of the highway by the lines of a steam railroad. It is inapplicable to the crossing of the street railway, the cars on which must not exceed such speed as will permit the lawful customary use of the highway by others with reasonable safety."

But it is unnecessary to cite further decisions upon this point. Not only all the authorities, but good common sense, invoke such to be the law. We therefore must let the verdict of the jury stand with respect to the rate of speed at which the defendants were running their car in approaching the crossing at the time of the collision, causing the accident to which the plaintiff attributes his injuries.

The only remaining question to be determined is whether the plaintiff, under the circumstances in this case, in attempting to pass over the crossing as he did, was guilty of contributory negligence. We have already seen that he was not required, as a matter of law, to look and listen. The question therefore now arises whether, as a matter of fact, under all the testimony, the exercise of ordinary care and prudence required him to do so, otherwise than the undisputed testimony shows he did,—at a distance of 20 feet from the track? Upon this point the defendant's contention is that, "if the plaintiff looked at all when 20 feet away from the crossing, he looked carelessly, and failed to see what was in plain sight. There can be no legal difference between negligence in the manner of looking and negligence in not looking at all." This may be a correct proposition of abstract law, but it does not fully apply to the facts in this case. Whether the plain-

tiff was negligent, if he looked and did not see, was a question of fact, depending upon the measure of duty devolving upon him to see. If this had been a steam road, it would undoubtedly have been the duty of the plaintiff to have observed the track to the fullest extent of the view to see if a train was coming, because ordinary care in such a case requires it; the degree of care on his part being commensurate with the degree of danger incident to the irresistible degree of speed and momentum acquired by steam cars when in motion. In like manner the degree of care to be observed by the plaintiff in crossing the defendant's track at the street junction is to be measured by the correlative duty of the electric car in approaching the same junction. But we have already determined that a car in approaching a crossing has only the same rights as other vehicles, and must be under control. Hence, as a corollary of this proposition, the plaintiff had a right to rely upon the assumption that the defendant would discharge its legal duty in approaching the crossing by having its car under control, and such assumption is embraced within the rule of ordinary care in its application to the plaintiff's duty. Under this rule, the plaintiff was not necessarily required to look the whole length of the visible track to see if the car was coming, but along the track far enough to warrant an ordinarily careful and prudent man, having in mind his own safety, under like circumstances, to conclude that no car was in such proximity, if properly managed, as to endanger his safety in crossing. *Hill v. West End Street R. Co.* 158 Mass. 458, 33 N. E. 582.

The decisions amply sustain this position. *Newark Pass. R. Co. v. Block*, 55 N. J. L. 605, 22 L. R. A. 374, 27 Atl. 1067, is a case in which the relative rights and duties of a street railroad in operating its cars in the streets, and of other occupants of the street, are fully discussed and carefully considered. The decision arose upon the following request: "If the jury believe the account of the plaintiff and her witnesses as to the fact that one car stopped at Prince street and passed the other below that street, it was the duty of plaintiff to wait long enough before crossing to allow the down-car to pass far enough for her to see whether another was coming, and, if she neglected that duty, she was guilty of contributory negligence, and cannot recover, although the jury may believe that the up-car was going at an unusual rate of speed; the track being straight, and the car visible far enough to avoid it at any possible speed." The judge declined to give this request, otherwise than

he had already done, and exceptions were taken. The court then proceeds to say: "The contention of plaintiff in error rather takes this shape: It asserts that its cars, propelled by electricity, are capable of being run at greater speed than other vehicles in the highway, and that the public convenience demands for passengers carried in such cars what is called 'rapid transit;' and it draws the inference that its cars may therefore be run at such speed as will satisfy this public demand, and that other persons lawfully using the highway in the customary modes must govern themselves and use the highway accordingly. Judicial opinions have been cited to us which appear to support these extraordinary propositions. I am unable to subscribe to the motion which, carried to its logical conclusion, would permit this company and other companies running cars in public highways, propelled by electricity, cables, etc., to run at any rate of speed which they may deem a demand undefined and unrecognized by law to require. . . .

"But the request before us brings into question the extent to which one crossing the roadway on foot must extend his observation. Its claim is that such observation must be extended to any approaching car, no matter how distant. But this is obviously an exaggerated notion of the duty required. The most prudent man would never suppose himself required to thus observe. If such rule of duty were adopted and practised in a crowded city, the crossing of many streets would be barred to pedestrians for a great part of the time. The general rule to which we have recurred does not justify this excessive view of the duty required. It will require one crossing the roadway on foot to extend his observation only to the distance within which vehicles proceeding at customary and reasonably safe speed would threaten his safety. . . .

"Prudence doubtless requires one about to cross a railroad track to use his eyes to observe any approaching car within his vision. But, as has been shown, prudence does not require one crossing the track of a street railway to extend his observation to the whole line of track within his vision, but only to such distance as, assuming the required care in their management, approaching cars would imperil his crossing."

While the last two paragraphs apply particularly to pedestrians, we think that they are equally applicable to the duty devolving upon teams in their use of the streets in connection with electric or other motor cars, or, as expressed in the opinion, upon "persons lawfully using the highway in the customary modes." In fact, tho

opinion quoted bases its discussion of the principle therein enunciated upon the relative rights of cars using the streets, and of "persons lawfully using the highway in the customary modes," which, of course, embraces both teams and pedestrians. Under these rules of law governing the duty of the plaintiff, was he, in crossing the defendant's tracks, under all the circumstances involved, as a matter of law, guilty of contributory negligence, or was the question whether his conduct on that occasion constituted contributory negligence one of fact for the jury?

The plaintiff testifies as to what he did with respect to the exercise of care in looking for the car as follows:

Q. Did you allow your eye that day, as you looked back, to travel back as far as you could see at your point of view?

A. That I could not say. I know I looked back to see if there was a car coming. I know I looked back beyond Mrs. Morse's.

The undisputed evidence shows that the Morse house, referred to, was 244 feet from the crossing. Another witness testifies positively that at the time the plaintiff was making a turn to cross the track into Williams avenue the electric car was just coming by the end of the Morse house,—as the evidence shows, 244 feet away.

The motorman testified as follows:

Q. When did you observe Mr. Marden turning to cross?

A. When I was most to the avenue.

Q. How far?

A. Between 40 and 50 feet,—somewhere along there.

Q. How near was Mr. Marden's team to the rails when he made the turn, or attempted to make the turn?

A. Five feet.

Q. Did Mr. Marden at any time, from the top of the hill until he made the turn to Williams avenue, drive his horse to the other side of the road?

A. I did not see him do that.

Q. Did Mr. Marden or anybody else look out from the front end of the cart back towards the car?

A. No, sir.

Q. Was the rear end of the cart closed or open?

A. Closed.

Q. Was the cart entirely covered, or an open cart?

A. Entirely covered.

Q. When Mr. Marden turned his horse to cross the track, what did you do?

A. I set up my brakes as hard as I could.

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And this, as far as the evidence shows, was the first act on the part of the motorman towards any effort to check the car so as to have it under control at the crossing.

Can the court say, under the law applicable to the duty respectively resting upon cars and teams in approaching a street junction, that it was negligence *per se* for the plaintiff to undertake to cross the car track into another street when the track was clear for a distance of 244 feet? We think it cannot. We think it was a question for the jury to determine. If the jury believed, as they might, that the plaintiff, 20 feet therefrom, looked up the track a sufficient distance to discover whether a car was in such close proximity as to imperil his crossing the track, and, discovering none, undertook to cross, they well might find that the plaintiff was not guilty of contributory negligence, and that the failure of the motorman to apply the brakes until within 40 feet of the accident was a clear case of negligence.

Driscoll v. West End Street R. Co. 159 Mass. 146, 34 N. E. 171, already cited, is a case which, in many of its elements, is not unlike the case at bar. The court says: "In the present case we think the questions of due care on the part both of the plaintiff and of the defendant's servants were for the jury. One circumstance to be considered is that the plaintiff's horses were across the defendant's track at the time his wagon was hit. When two vehicles are approaching at reasonable rates of speed on converging lines, the question arises as to which should give way; and one circumstance to be considered is, which, according to the rates of speed they are going, will first reach the point where the lines of travel cross each other. The plaintiff's testimony is that the car was nearly 400 feet from him when he proceeded to cross Hanover street diagonally to Elm street. It seems to have been daylight, and, although it does not appear when the driver of the car first saw the plaintiff, no reason appears why he should not have seen him long before he applied the brakes. The evidence was that he put on the brakes five or ten seconds before the collision and when the front of the car was about 20 feet from the plaintiff. It was the duty of the driver of the car to keep a reasonable lookout for teams coming from cross streets and reasonable control of his car, so as to avoid collisions, and we think that there was evidence for the jury that this was not done. Neither can we say that there was not evidence for the jury that the plaintiff was in the exercise of due care. Apparently, if the speed of the car had been seasonably

checked, the collision would have been avoided, and the danger was not immediate when the plaintiff undertook to cross the track."

This case, we think, is fully applicable to the one at bar. In this case the motor-man was running his car down a sharp grade in plain daylight, having the plaintiff in view all the time, approaching the crossing of a street at this time "considerably used for vehicles," as evidence shows, charged with the duty of anticipating that the plaintiff might turn into the avenue,

as he did, and of having his car under control; and yet he did not set the brakes for the purpose of controlling his car until within 40 feet of the crossing. We feel inclined to affirm of this conduct what was said in the last case cited: "Apparently, if the speed of the car had been seasonably checked, the collision would have been avoided, and the danger was not immediate when the plaintiff undertook to cross the track."

Motion overruled.

Judgment on the verdict.

MASSACHUSETTS SUPREME JUDICIAL COURT.

Henry SOUTHER *et al.*

v.

City of GLOUCESTER.

(187 Mass. 552.)

1. The fact that the construction of waterworks is a public use to be paid for by taxation does not require the basing of all rates upon the amount of water used in each instance, and on nothing else.
2. Owners of cottages in outlying districts of a city cannot complain that some discrimination is made in rates between them and consumers in the heart of the city, where special circumstances exist which justify it.
3. One charging that water rates imposed upon his property are unreasonable has the burden of establishing that fact.
4. Owners of summer cottages in outlying districts, who desire to use water from a city system during part of the year only, may be required to pay the same amount for such water as owners of property in the city are required to pay for service during the whole year, where the laying of special pipes and the construction of an additional reservoir are necessary to en-

able the city to furnish the water, which facts create special circumstances justifying a discrimination in rates between the two classes of consumers; and they cannot complain that the rule requiring payment in advance is applied to them.

(March 4, 1905.)

REPORT by the Superior Court for Essex County for the opinion of the Supreme Judicial Court of a bill filed to enjoin the cutting off of plaintiff's water supply. *Dismissed.*

The facts sufficiently appear in the opinion.

Mr. D. Chauncey Brewer, for plaintiffs:

The plaintiffs cannot be discriminated against on the ground that special expense has been incurred in order to serve them.

The general expenses of providing a supply of water, and the general benefits to the municipality from the uses of water, which are not strictly public, are paid for by general taxation of the inhabitants.

Merrimack River Sav. Bank v. Lowell, 152 Mass. 556, 10 L. R. A. 122, 28 N. E. 97; *Opinion of Justices*, 150 Mass. 597, 8 L. R. A. 487, 24 N. E. 1084; *San Diego Land & Town Co. v. National City*, 174 U. S. 739, 43 L. ed. 1154, 19 Sup. Ct. Rep. 804.

Nothing differentiated the plaintiffs from the regular customers of the city of Gloucester (who used the water under the faucet system for household purposes) in such a way as to render them liable to a larger tax.

Ladd v. Boston, 170 Mass. 332, 40 L. R. A. 171, 49 N. E. 627.

Individuals have a constitutional right to insist that rates charged them by public-service corporations, and by municipalities performing similar offices, shall be reasonable.

Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; *Smyth v. Ames*, 169 U. S. 526, 42 L. ed. 842, 18 Sup. Ct. Rep. 418; *Lowell v. Boston*,

NOTE.—As to regulation of municipal water supply generally, see *note* to *State ex rel. Hallauer v. Gosnell*, 61 L. R. A. 33.

As to validity of regulation of company requiring patron in default for rents to pay \$1 as condition precedent to his right to be again furnished with water, see *American Waterworks Co. v. State*, 30 L. R. A. 447.

As to regulation that water will not be turned on in building until unpaid rents of previous owners or tenants are paid, see *Turner v. Bevere Water Co.* 40 L. R. A. 657.

As to right to remove meter and require consumer to pay according to number of fixtures, see *Ladd v. Boston*, 40 L. R. A. 171.

As to power to compel corporation to furnish water to individual, see *note* to *Rushville v. Rushville Natural Gas Co.* 15 L. R. A. 321; also *Portland Natural Gas & Oil Co. v. State*, 21 L. R. A. 639; *Wood v. Auburn*, 29 L. R. A. 376; and *State ex rel. Milsted v. Butte City Water Co.* 32 L. R. A. 697.

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111 Mass. 464, 15 Am. Rep. 39; *State ex rel. Atty. Gen. v. Turn Village Water Co.* 98 Me. 214, 56 Atl. 763; *Lumbard v. Stearns*, 4 Cush. 60; *Rogers Park Water Co. v. Fergus*, 180 U. S. 628, 45 L. ed. 705, 21 Sup. Ct. Rep. 490.

When unreasonable rates are charged, or if the public is not served impartially, a company or city may be reached by the restraining hand of the court.

Kennebec Water District v. Waterville, 97 Me. 201, 60 L. R. A. 856, 54 Atl. 6.

A water company, or a municipality, abuses its franchises if it fails to furnish water; and it is its duty to supply all who apply for water on reasonable terms.

Turner v. Revere Water Co. 171 Mass. 329, 40 L. R. A. 657, 68 Am. St. Rep. 432, 50 N. E. 634; *Lumbard v. Stearns*, 4 Cush. 60; *Young v. Boston*, 104 Mass. 95; *Kennebec Water District v. Waterville*, 97 Me. 201, 60 L. R. A. 856, 54 Atl. 6; *Opinion of Justices*, 150 Mass. 597, 8 L. R. A. 487, 24 N. E. 1084; *Wood v. Auburn*, 87 Me. 292, 29 L. R. A. 376, 32 Atl. 906.

Rates and regulations must be uniform for parties charged by toll.

Young v. Boston, 104 Mass. 95; *Mobile v. Bienville Water Supply Co.* 130 Ala. 379, 30 So. 445; 29 Am. & Eng. Enc. Law, p. 19; *Griffin v. Goldsboro Water Co.* 122 N. C. 206, 41 L. R. A. 240, 30 S. E. 319; *Wood v. Auburn*, 87 Me. 291, 29 L. R. A. 376, 32 Atl. 906; *Twells v. Pennsylvania R. Co.* (Pa.) 3 Am. L. Reg. N. S. 728.

The basis of all calculations as to the reasonableness of rates is reached by considering the right of the company to derive a fair income based upon the fair value of the property at the time of its being used by the public,—taking into account the cost of maintenance or depreciation and current operating expenses,—and, on the other hand, the right of the public, considered individually and not in the aggregate, to exact no more than the service is worth.

Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; *San Diego Land & Town Co. v. National City*, 174 U. S. 739, 43 L. ed. 1154, 19 Sup. Ct. Rep. 804; *Covington & L. Turnp. Road Co. v. Sandford*, 164 U. S. 578, 41 L. ed. 560, 17 Sup. Ct. Rep. 198; *Cotting v. Kansas City Stock Yards Co.* (Cotting v. Godard) 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30; *Kennebec Water District v. Waterville*, 97 Me. 185, 60 L. R. A. 856, 54 Atl. 6.

Payments are to be exacted from water takers only for water "supplied at their request, and then only for what is furnished and for the time it is furnished."

Merrimack River Sav. Bank v. Lowell, 152 Mass. 556, 10 L. R. A. 122, 26 N. E. 97; *Turner v. Revere Water Co.* 171 Mass. 69 L. R. A.

329, 40 L. R. A. 657, 68 Am. St. Rep. 432, 50 N. E. 634.

A regulation providing that every taker of water shall be liable to pay rent for the whole year, whether he actually uses it for that length of time or not, and to make the payment in advance, is unreasonable.

Rockland Water Co. v. Adams, 84 Me. 472, 30 Am. St. Rep. 368, 24 Atl. 840.

A prospective water taker for two months, after tendering six months' advance payment (especially when it appears that this is all that is exacted of residents in the town), will not be required to pay for an additional six months' term, during which his tenement is unfitted for occupancy, even on the ground that he may have the privilege of bringing suit to recover back such excess.

Merrimack River Sav. Bank v. Lowell, 152 Mass. 556, 10 L. R. A. 122, 26 N. E. 97; *Turner v. Revere Water Co.* 171 Mass. 329, 40 L. R. A. 657, 68 Am. St. Rep. 432, 50 N. E. 634; *Wood v. Auburn*, 87 Me. 291, 29 L. R. A. 376, 32 Atl. 906; *Rockland Water Co. v. Adams*, 84 Me. 472, 30 Am. St. Rep. 368, 24 Atl. 840.

Messrs. Boyd B. Jones and Lincoln S. Simonds, for defendant:

The determination of rates by the water commissioners involves the exercise of their discretion, in which they may take into account, not only the quantity of water used by each taker, but also the use and benefit thereby accruing to the consumers, the number of persons served, the cost of supply, and the effect of a certain method of determining prices upon the revenues to be obtained by the city; and there is a presumption that in fixing rates they have acted fairly.

Ladd v. Boston, 170 Mass. 332, 40 L. R. A. 171, 49 N. E. 627; *Parker v. Boston*, 1 Allen, 361; *St. Louis Brewing Asso. v. St. Louis*, 140 Mo. 419, 37 S. W. 525, 41 S. W. 911.

There is a right to require payment in advance.

Turner v. Revere Water Co. 171 Mass. 329, 40 L. R. A. 657, 68 Am. St. Rep. 432, 50 N. E. 634.

Loring, J., delivered the opinion of the court:

We do not stop to consider whether, on the evidence before the superior court, the plaintiffs were shown to have had any interest in the water rate for cottage B for the year in question, for we are of opinion that the finding of fact on the merits was not wrong as matter of law. As the bill must be dismissed, even if the preliminary difficulty which we have had is overcome, we prefer to dispose of the case on the ground

on which it was tried and disposed of in the court below. The plaintiffs have undertaken to sweep aside any difference in rates charged them by reason of facts peculiar to the section of the city where the cottage in question is situated, on the ground that the construction of waterworks is a public use, to be paid for by taxation. From this they draw the inference that all rates are to be based on the amount of water used in each instance, and on nothing else. But that is not so. It was well said in *Ladd v. Boston*, 170 Mass. 332, 335, 40 L. R. A. 171, 49 N. E. 627: "Considerable discretion in determining the methods of fixing rates is necessarily given by the statute to the water commissioner. Money must be obtained from water takers to reimburse the city wholly or in part for the expense of furnishing water. An equitable determination of the price to be paid for supplying water does not look alone to the quantity used by each water taker. The nature of the use and the benefit obtained from it, the number of persons who want it for such a use, and the effect of a certain method of determining prices upon the revenues to be obtained by the city, and upon the interests of property holders, are all to be considered." See, in this connection, *Smyth v. Ames*, 169 U. S. 466, 546, 547, 42 L. ed. 819, 849, 18 Sup. Ct. Rep. 418; *San Diego Land & Town Co. v. National City*, 174 U. S. 739, 757, 43 L. ed. 1154, 1161, 19 Sup. Ct. Rep. 804; *Cotting v. Kansas City Stock Yards Co.* (*Cotting v. Godard*) 183 U. S. 79, 95, 96, 46 L. ed. 92, 103, 104, 22 Sup. Ct. Rep. 30. The special cost of extending the system to the "outlying section" in question; the fact that, even if water is wanted there for less than a year as a rule, the interest on the cost of the necessary special construction and on the construction of the works as a whole runs throughout the year; and the fact, if it is a fact, that there are but few persons who take water in this section, compared with the cost of extending the water system to it,—are all of them matters which can be taken into account in fixing a reasonable rate. It is proper, also, to take into account the additional fact that, "to enable the defendant to supply water to an increasing number of applicants therefor between the years 1900 and 1903, principally for summer houses, it was deemed necessary by the commissioners to construct during the year 1902 an additional reservoir or water basin at an expense of about \$250,000." There may be other matters which have not occurred to us. It is true that the charge in question is not a charge for this district, but for summer houses generally, and there are 500 summer houses, of which the plaintiffs own but 92; that is to say, not quite one fifth. If the 69 L. R. A.

other four fifths are so situated that similar peculiar circumstances apply to them, no one could complain of this rate. The plaintiffs, in any event, cannot complain that some discrimination is made between them and water takers in the heart of the city, and they have gone no further than that in their proof in the case at bar. There is not enough here to enable us to say that, provided some discrimination can be made, the discrimination made is too great. The burden is on the plaintiffs to show that the rate in question is an unreasonable one, and they have not gone far enough to sustain the burden which rests on them.

The plaintiffs' objection that they are made to pay for a year in advance falls with their objection to paying for water in this "outlying section," for the part of the year as is paid for water for the whole year in the heart of the city. All rates are payable in advance.

The plaintiffs have relied on *Rookland Water Co. v. Adams*, 84 Me. 472, 30 Am. St. Rep. 368, 24 Atl. 840, Referred to in *Turner v. Revere Water Co.* 171 Mass. 329, 333, 40 L. R. A. 657, 68 Am. St. Rep. 432, 50 N. E. 634. It is enough to say of that decision, so far as the case now before us is concerned, that it did not appear that there were any special circumstances in it. The only question before the court there seems to have been whether, other things being the same, as much could be charged for water for four months as for the whole year.

The plaintiffs' citation of *Norton v. Brookline*, 181 Mass. 360, 63 N. E. 930, makes it necessary to point out that this is not a case submitted on agreed facts; that is to say, is not a case stated, but a case which was tried on a "statement of agreed facts submitted as evidence."

No error in law appearing in the finding of fact made by the Superior Court, the entry must be:

Bill dismissed.

Hiram E. CAMPBELL

v.

JUSTICES OF SUPERIOR COURT FOR
SUFFOLK COUNTY.

(187 Mass. 509.)

A plaintiff in an equity case has no absolute right to proceed with the trial while he is in contempt of court for

NOTE.—For another case in this series as to dismissal of suit because of plaintiff's refusal to comply with directions of court, see *Craft Refrigerator Mach. Co. v. Quinipiac Brewing Co.* 25 L. R. A. 856.

As to right to strike out defendant's answer

refusal to obey an order which can be enforced by mandamus.

(March 8, 1905.)

RESERVATION by the Supreme Judicial Court for Suffolk County for the opinion of the full bench of a petition for a writ of mandamus to compel the justices of the Superior Court to proceed with the trial of an action. *Dismissed.*

Petitioner filed his original bill seeking to enjoin the sale by the Carpenter-Morton Company of certain varnish stains, and to secure an accounting. Defendants filed a cross bill. Complainant's bill was dismissed, and under the cross bill he was enjoined from selling varnish stains. He disobeyed this injunction, and was adjudged in contempt, and a penalty laid upon him for the benefit of the defendants. Upon the accounting before the master, a finding was made in plaintiff's favor, to which both parties filed exceptions. Plaintiff requested the court to proceed with the hearing of the exceptions and upon its refusal sued out this writ.

Further facts appear in the opinion.

Messrs. Edgar O. Aohorn and Walter B. Grant, for petitioner:

The refusal to proceed is contrary to the petitioner's vested constitutional rights to a certain, free, prompt, and complete remedy for all injuries to his property, and that he shall not be deprived of it except by due process of law.

Bill of Rights, arts. 1, 10, 11, 12; U. S. Const. 5th Amend.

Due process of law is its regular administration, through courts of justice, by a timely and regular course of proceeding to judgment and execution.

Den ex dem. Murray v. Hoboken Land & Improv. Co. 18 How. 272, 15 L. ed. 372; *Rees v. Watertown*, 19 Wall. 107, 22 L. ed. 72; *Baker v. Kelley*, 11 Minn. 480, Gil. 358; *Dwight v. Williams*, 4 McLean, 586, Fed. Cas. No. 4,218; *Westervelt v. Gregg*, 12 N. Y. 202, 62 Am. Dec. 160; *Rowan v. State*, 30 Wis. 129, 11 Am. Rep. 559; *Huber v. Reily*, 53 Pa. 112; *State ex rel. Warfield v. Becht*, 23 Minn. 413.

Mandamus is the proper remedy.

Chase v. Blackstone Canal Co. 10 Pick. 246; *Re Strong*, 20 Pick. 484; High, Mandamus, § 250, p. 189; *People ex rel. Green v. De La Guerra*, 43 Cal. 225; *Carpenter v. Bristol County*, 21 Pick. 258; *Ex parte Morgan*, 114 U. S. 174, 29 L. ed. 135, 5 Sup. Ct. Rep. 825; *Ex parte Bradstreet*, 7 Pet.

as a punishment for contempt, see *Hovey v. Elliott*, 39 L. R. A. 449, Affirmed in 42 L. ed. U. S. 215.

As to right to defend suit for divorce where 69 L. R. A.

647, 8 L. ed. 815; *Re Washington & G. E. Co.* 140 U. S. 91, 35 L. ed. 339, 11 Sup. Ct. Rep. 673; *Ex parte Schollenberger*, 96 U. S. 369, 24 L. ed. 853; *Ex parte Russell*, 13 Wall. 664, 20 L. ed. 632; *People v. Common Pleas Judges*, 1 Cow. 576.

The superior court having refused to let the case proceed according to the fixed rules of procedure of that court, the petitioner had no remedy by appeal, and none except by writ of mandamus.

Chicago & A. R. Co. v. Wiswall, 23 Wall. 507, 23 L. ed. 103.

A court cannot deprive a party of his right of "due process of law" in the adjudication of his property rights, regardless of whether he is in contempt or not.

1 Dan. Ch. Pl. & Pr. 5th ed. p. 505; *Ricketts v. Mornington*, 7 Sim. 200; *Futroze v. Kennard*, 2 Giff. 110; *Fry v. Ernest*, 9 Jur. N. S. 1151; *Wilson v. Bates*, 3 Myl. & C. 197; *People ex rel. Crymble v. Horton*, 46 Ill. App. 434; *Ward v. Ward*, 70 Vt. 430, 41 Atl. 435; *Ferguson v. Elgin County*, 15 Ont. Pr. Rep. 399; *Hovey v. Elliott*, 167 U. S. 409, 42 L. ed. 215, 17 Sup. Ct. Rep. 841.

A court cannot order plaintiff to perform the impossible, and then hold him in contempt, and deprive him of his legal rights for failure to obey.

Walton v. Walton, 54 N. J. Eq. 607, 35 Atl. 289; *Hogue v. Hayes*, 53 Iowa, 377, 5 N. W. 541; *Ex parte Overend*, 122 Cal. 201, 54 Pac. 740; *Moseley v. People*, 101 Ill. App. 564; *Cooke v. Tanswell*, 8 Taunt. 131.

Mr. G. W. Anderson, for respondents:

While the party in contempt has a right to defend himself against other parties who are prosecuting the case, he will not be permitted to ask for the favor of the court, nor to take any aggressive proceedings against his adversary.

Fletcher, Eq. Pl. & Pr. §§ 417, 559; *Rapalje*, Contempts, § 135; *Brinkley v. Brinkley*, 47 N. Y. 40; 7 Am. & Eng. Enc. Law, 2d ed. pp. 69 *et seq.*; *Miller*, Eq. Proc. § 243; *Robinson v. Owen*, 46 N. H. 38; *Gordon v. Gordon*, 141 Ill. 160, 21 L. R. A. 387, 33 Am. St. Rep. 294, 30 N. E. 446; *Atchison, T. & S. F. R. Co. v. Jennison*, 60 Mich. 232, 27 N. W. 6; *People ex rel. Gaynor v. McKane*, 78 Hun. 154, 28 N. Y. Supp. 981; *Wells, F. & Co. v. Oregon R. & Nav. Co.* 9 Sawy. 601, 19 Fed. 20.

Knowlton, Ch. J., delivered the opinion of the court:

This is a petition for a writ of mandamus to compel the justices of the superior court

defendant has failed to pay alimony as ordered by court, see *Gordon v. Gordon*, 21 L. R. A. 387.

to proceed with the hearing of a suit in equity, upon exceptions to a master's report, and thereafter upon the merits. We treat the reservation as a report of the questions of law which arise upon the record and the agreement of the parties, under Rev. Laws, chap. 156, § 7. We do not think that the slight change in this section from the language of Pub. Stat. 1882, chap. 150, § 8, was intended to change the meaning of the provision, and it has always been held that a justice of the supreme judicial court, sitting at the trial of an action at law, might report questions of law to the full court, without deciding them.

The petitioner, who is the plaintiff in that suit, is in contempt of the court for a violation of an injunction. The principal question is whether a plaintiff who is in contempt has an absolute right to proceed in the trial,—such that it is the legal duty of the court, upon his request, to permit him to go on. The authorities agree upon the familiar doctrine that a party in contempt is not in a position to ask the court for any favor or indulgence. 1 Dan. Ch. Pl. & Pr. 5th Am. ed. 504, 505, and notes; *Hovey v. Elliott*, 167 U. S. 409, 42 L. ed. 215, 17 Sup. Ct. Rep. 841, and cases cited; *Re Wickham*, L. R. 35, Ch. Div. 272; *Clark v. Dew*, 1 Russ. & M. 103; *Ricketts v. Mornington*, 7 Sim. 200; *Rogers v. Paterson*, 4 Paige, 450. In *Hovey v. Elliott*, 167 U. S. 409, 42 L. ed. 215, 17 Sup. Ct. Rep. 841, many cases were reviewed; and it was held that, when a defendant in equity has filed an answer and prepared a defense, the plaintiff cannot have his answer stricken from the files, and the case go to judgment against him, because of his subsequent contempt. It was decided that such a proceeding, if enforced, would be a taking of property without due process of law. The case of *Walker v. Walker*, 82 N. Y. 260, which shows a different view, was criticized, and held to be without substantial support in the cases therein referred to. But the decision is not in conflict with the contention of the present respondents, that a plaintiff, while he is in contempt, cannot proceed to a trial upon the merits. The early English cases are conflicting on this point, but those that are relied upon by the petitioner (see *Wilson v. Bates*, 3 Myl. & C. 197; *Cattell v. Simons*, 5 Beav. 396; *Chatterton v. Thomas*, 36 L. J. Ch. N. S. 592) seem to be practically overruled by *Re Wickham*, L. R. 35 Ch. Div. 272, which holds that a plaintiff who disobeys an order for the payment of costs on a preliminary matter will not be allowed to proceed with his case. The principle is analogous to that which precludes a plaintiff who is nonsuited in an action at law from prosecuting a second suit until he has paid the costs. Rev. 69 L. R. A.

Laws, chap. 203, § 11. And it is inconsistent with the petitioner's contention that a plaintiff who has failed to do that which properly is required of him in the case may insist upon a trial as a matter of right. If a plaintiff prays for a decree against his adversary, we are of opinion that the principles stated in the cases first cited should be applied to a request to proceed with the case to a final judgment, as well as to requests for preliminary favors. It is plain that misconduct of a plaintiff that is treated as a contempt often may be of such a kind as would make it impossible to go on with the case without great injustice to the defendant. Suppose, for illustration, that a plaintiff disobeys an order to produce books and papers which the defendant is entitled to have in evidence, or refuses to answer interrogatories or questions put to him as a witness on the stand. It would be absurd to say that while in contempt for disobedience of an order of this kind a plaintiff would have a right to have the trial proceed. The statement of the law in *Brinkley v. Brinkley*, 47 N. Y. 40-49, is that "a party in contempt . . . will not be permitted to ask for the favor of the court, nor to take any aggressive proceedings against his adversary." The following cases also tend to support this proposition with greater or less force: *Rogers v. Paterson*, 4 Paige, 450; *Hazard v. Durant*, 11 R. I. 195; *Walker v. Walker*, 82 N. Y. 260; *Pickett v. Ferguson*, 45 Ark. 177-191, 55 Am. Rep. 545; *Allen v. Georgia*, 166 U. S. 138, 41 L. ed. 949, 17 Sup. Ct. Rep. 525; *Robinson v. Owen*, 46 N. H. 38. In *Gordon v. Gordon*, 141 Ill. 160-163, 21 L. R. A. 387, 33 Am. St. Rep. 294, 30 N. E. 446, the court said: "Where a complainant is in contempt, there may be cogent reasons for holding that his proceedings shall be stayed so long as he remains in contempt, under the well-known maxim that 'he who seeks equity must do equity.'" In the opinion in *Atchison, T. & S. F. R. Co. v. Jennison*, 60 Mich. 232, 27 N. W. 6, are found these words: "A complainant in a court of equity can always be compelled by that court to perform any conditions . . . which the court has a right to exact, by refusing to allow him to proceed in his cause until he does what he ought to do." In *People ex rel. Crymble v. Horton*, 46 Ill. App. 434, the court held that a defendant was not precluded from his right to defend by being in contempt, and added: "Had the suit been at his instance, and in such suit he, acting as one asking for relief, had been in contempt, a different question would have been presented." We are of opinion that a plaintiff who is in contempt of court cannot go on with his case against the defendant as a matter of right.

In many cases it would be plainly wrong to permit him to do so. It is conceivable that in others his objectionable conduct may be of such a kind, and the circumstances of the case may be such, that the court, in the exercise of its discretion, properly may permit him to go on. In a case like the present the court ought not to issue a writ of mandamus to compel the superior court to proceed with the trial.

It is contended that the last decree, ordering the plaintiff to pay the sum of \$1,000 to the defendants, was erroneous. This part of the decree was intended to give the defendants compensation for their damages caused by the plaintiff's violation of the injunction. It has been said that, in the absence of statutory authority, the court cannot assess a party's damages for a breach of an injunction in a proceeding of this kind, and order them paid by the party in contempt. *Swift v. State*, 63 Ind. 81; *Morris v. Whitehead*, 65 N. C. 637; *Re Pierce*, 44 Wis. 411; *State ex rel. Lanning v. Lonsdale*, 48 Wis. 348, 4 N. W. 390; *Eads v. Brazelton*, 22 Ark. 499, 79 Am. Dec. 88. On the other hand, similar orders have been made without the authority of a statute. *Wells, F. & Co. v. Oregon R. & Nav. Co.* 9 Sawy. 601, 19 Fed. 20; *Re North Bloomfield Gravel Min. Co.* 11 Sawy. 590, 27 Fed. 795; *United States ex rel. D. & N. O. R. Co. v. Atchison, T. & S. F. R. Co.* 16 Fed. 853. In New York and Wisconsin, and probably in some other states, there are statutes in regard to this subject. We do not find it necessary to determine whether this part of the order is regular, for, if it is not, there is a valid adjudication that the plaintiff is in contempt. The decree referred to is in such a form that the first part of it is complete in itself, as an adjudication that the plaintiff is in contempt, and is separable from the last part, ordering the payment of damages.

We have considered the case on the merits, without passing on the question whether the petitioner has exhausted his rights in other forms of proceeding, so as to be entitled to make an application for this extraordinary remedy.

Petition dismissed.

Joseph HELLEN
v.

City of MEDFORD.

(188 Mass. 42.)

1. The statutory right to have dam-

NOTE.—As to legislative power to authorize the taking of land by eminent domain without compensation, see also, in this series, *Abendroth v. Manhattan R. Co.* 11 L. R. A. 634.

As to right to authorize temporary use of

ages for land the fee of which is taken for public use assessed and paid in money is a substantial right which, after the proceedings have progressed so far that the fee has passed, cannot be impaired by the passage of a statute authorizing the abandonment of the land, and directing that the fee shall revert in the former owner, and the fact thereof be considered in reduction of the damages to be awarded.

2. Waiver of the right to have the whole damages for land the fee of which is taken for public use assessed and paid in money will be effected by the agreement of the former owner of the land that, if the proceedings are abandoned for his benefit, and the title reverted in him, his damages will be very light, if any.

(April 28, 1905.)

R EPORT by the Superior Court for Middlesex County for the opinion of the Supreme Judicial Court of a petition for the assessment of damages for land taken by eminent domain after the direction of a verdict in favor of petitioner Hellen for \$1,000 and interest, and dismissing the claim of petitioner Cutter. *Judgment for Hellen upon the verdict, and for Cutter for substantial damages.*

The facts are stated in the opinion.

Messrs. Stephen H. Tyng and M. Lendsley Sanborn for petitioner.

Messrs. J. M. Hallowell and H. H. Kimball, for respondent:

Petitioner is estopped from denying the constitutionality of the statute of abandonment (Stat. 1900, chap. 196), and from claiming any more damages than he can recover under the agreement made between him and the city.

Retrospective laws which do not impair the obligation of contracts, or partake of the nature of *ex post facto* laws, are not condemned or forbidden by any part of the Constitution of the United States.

Watson v. Mercer, 8 Pet. 88, 8 L. ed. 876; *Baltimore & S. R. Co. v. Nesbit*, 10 How. 395, 13 L. ed. 469.

The landowner acquires his vested right under the statute when the highway is once completely established, and the damages of the land once settled by the mode pointed out by law.

Harrington v. Berkshire County, 22 Pick. 263, 33 Am. Dec. 741; *New Bedford v. Bristol County*, 9 Gray, 346; *Corey v. Wrentham*, 164 Mass. 18, 41 N. E. 101.

There is no provision in the Constitution which prevents the lawmaking power from changing the form of his remedy before the

a public highway by a railroad company without compensation to abutting owner for destruction of access, see *McKeon v. New York, N. H. & H. R. Co.* 61 L. R. A. 780.

landowner has taken advantage of the method already prescribed.

The city enters into no contract with the petitioner when it files its taking.

Danforth v. Groton Water Co. 178 Mass. 472, 86 Am. St. Rep. 495, 59 N. E. 1033.

He has no vested right under the statute until he has established his damages in the mode pointed out by the law.

Butler v. Palmer, 1 Hill, 324; *Bennet v. Hargus*, 1 Neb. 419; *Untermeyer v. Freund*, 7 C. C. A. 183, 20 U. S. App. 32, 58 Fed. 205; *Dent v. Holbrook*, 54 Cal. 145; *Grim v. Weissenberg School District*, 57 Pa. 433, 98 Am. Dec. 237; *Pritchard v. Savannah Street & R. Resort R. Co.* 87 Ga. 294, 14 L. R. A. 721, 13 S. E. 493.

A statutory right to a lien is not a vested right.

Woodbury v. Grimes, 1 Colo. 100; *National Bank v. Williams*, 38 Fla. 305, 20 So. 931; *Holcomb v. Boynton*, 151 Ill. 294, 37 N. E. 1031; *Bangor v. Goding*, 35 Me. 73, 56 Am. Dec. 688; *Frost v. Ilsley*, 54 Me. 345; *John S. Hanes & Co. v. Wadey*, 73 Mich. 178, 2 L. R. A. 498, 41 N. W. 222.

A party has no vested right to costs.

Taylor v. Keeler, 30 Conn. 324; *Billings v. Segar*, 11 Mass. 340; *Com. v. Cambridge*, 4 Met. 35; *Ellis v. Whittier*, 37 Me. 548.

Where a statutory remedy for a right created by the same statute is repealed, but the repealing statute provides a substantially similar remedy, the right may be prosecuted under the repealing statute.

Knoup v. Piqua Branch of State Bank, 1 Ohio St. 603; *Debolt v. Ohio L. Ins. & T. Co.* 1 Ohio St. 563; *Mitchell v. Eyster*, 7 Ohio, pt. 1, p. 257; *Wilson v. Herbert*, 41 N. J. L. 454, 32 Am. Rep. 243.

The legislature may take away one remedy for a cause of action already arisen and substitute another, although such change of remedy may affect the interests of individuals; and it does not matter that the law is retrospective if it is just.

Simmons v. Hanover, 23 Pick. 188; *Upham v. Raymond*, 132 Mass. 186; *Jewett v. Phillips*, 5 Allen, 150; *Bigelow v. Pritchard*, 21 Pick. 169; *Loring v. Aline*, 9 Cush. 68; *Anding v. Levy*, 57 Miss. 51, 34 Am. Rep. 435; 26 Am. & Eng. Enc. Law, 2d ed. pp. 747-749; *Forster v. Forster*, 129 Mass. 559.

There is no constitutional right to a person whose land is taken to obtain the market value of the land. The only right under the Constitution is to obtain reasonable or adequate compensation.

Beale v. Boston, 166 Mass. 53, 43 N. E. 1029; *Wall v. Platt*, 169 Mass. 398, 48 N. E. 270.

Statutes authorizing discontinuance or abandonment are common.

Lynch v. Stone, 4 Denio, 356; *Burnett v. Lynch*, 60 L. R. A.

Com. 169 Mass. 417, 48 N. E. 758; *Lewis, Em. Dom.* 2d ed. chap. 29.

Hammond, J., delivered the opinion of the court:

Under the authority of Stat. 1882, chap. 154, § 3, p. 111, the park commissioners of Medford took certain land, and on November 29, 1899, filed a certificate as required by the 4th section. No entry ever was made upon the land. The taking was simply on paper. By virtue of the proceedings, however, the respondent became the owner in fee of the land, and was bound to pay to those whose estate had been taken the damages respectively suffered by them. Stat. 1882, chap. 154, §§ 3, 6, pp. 111, 113; *Hay v. Com.* 183 Mass. 294, 67 N. E. 334. At the time of the taking the land was owned by the petitioner Hellen in fee, subject to an outstanding leasehold estate for years owned by one Cutter. It does not appear that the damages ever were estimated or determined by the commission. Several months after the taking, and while the parties were trying to come to some agreement as to the damages, and before any agreement had been reached or any proceedings had been taken in court, Stat. 1900, chap. 196, p. 138, was enacted. It provided that any part of the land or rights in land taken and described in the certificate of November 29, 1899, might in the manner set forth in the statute be abandoned; that such abandonment should "revest the title to such lands or rights as if they had never been taken, in the persons, their heirs and assigns, in whom it was vested at the time of taking;" and also that the abandonment might "be pleaded in reduction of damages in any suit on account of said takings." All of the land was duly abandoned in accordance with the terms of the statute, and to this petition that fact was pleaded in reduction of damages. The lessee, Cutter, upon a citation from the petitioner, appeared in the suit, and claimed damages for the loss of his leasehold estate. At the trial the court refused to rule as requested by the petitioners that Stat. 1900, chap. 196, p. 138, was unconstitutional, and submitted certain questions to the jury, who found, in substance, that the fair market value of the land at the time of the taking was \$13,000; that the damage to Hellen by reason of the taking and abandonment was \$1,000; that the damage to Cutter by the taking was \$1,000, but, as reduced by the abandonment, nothing; and also that Hellen, by his agent, agreed that, if the property was abandoned by the respondent for his benefit, his damages would be very small. The judge thereupon ordered a verdict for the petitioner Hellen for \$1,000 and interest, and at the

request of the petitioner the case was reported to this court.

The first question is whether Stat. 1900, chap. 196, p. 138, is constitutional. In considering this question certain well-established rules must be borne in mind. Speaking generally, the power to take land for public use by right of eminent domain is limited not only as to quantity, but as to the nature of the interest taken, by the public necessity. It is said that "the right, being based upon necessity, cannot be any broader than the necessity." Cooley, Const. Lim. 7th ed. 808. It therefore generally happens that in cases of land taken under the exercise of this right only an easement is taken, the fee remaining in the owner. A familiar example of this is to be found in the case of land taken for a highway. In such a case, where the easement is lawfully abandoned or discontinued as no longer necessary, the fee is in the owner, free from the easement; but, as stated by Shaw, Ch. J., in *Harrington v. Berkshire County*, 22 Pick. 263, 267, 33 Am. Dec. 741, "the enlarged enjoyment which the owner has thereby is not derived from the public, but is incident to the ownership which has always subsisted from the laying out of the highway." And in the case of such a lawful abandonment or discontinuance before the assessment of damages there can be no doubt that the fact of such an ending of the easement can be put in evidence on the question of damages. But the ground of the admissibility of this fact is not that the thing once taken from the owner has been restored to him, but that the evidence tends to show the nature and extent of the thing taken. The thing taken is the use of the land for a highway so long as the public necessity requires, and the sum to which the owner is entitled is the damage by reason of such taking. And that is the rule of damage all the way through, as well at the time of the trial as at the time of the taking. The evidence of a lawful ending of the easement before the trial, whether by discontinuance or otherwise, is admissible, therefore, to make more certain the nature of the easement taken, but not to show that the right to damages has been changed. It is manifest that the lawful ending of such an easement by the public authorities impairs no right of the landowner as to damages. It tends only to define this right as it at first existed.

It is pretty generally conceded, however, in the various state courts, that in some cases it is competent for the state to take for public use the land in fee, so that not even a possibility of reverter is left in the former owner. The idea seems to be that in some cases "the public purposes cannot be fully accomplished without appropriating

the complete title, and [that] where this is so in the opinion of the legislature the same reasons which support the legislature in their right to decide absolutely and finally upon the necessity of the taking will also support their decision as to the estate to be taken." Cooley, Const. Lim. 7th ed. 809, and cases cited in the notes. This principle is thus stated by Field, Ch. J., in *Burnett v. Com.* 169 Mass. 417, 48 N. E. 758: "When land is taken for a public use, it is ordinarily within the discretion of the legislature to determine whether it shall be taken in fee, so that when the public use is determined the title will remain in the body taking it, or whether it shall be taken only to the extent necessary for the public use, and so long as that use continues." As hereinbefore stated, in the case before us the fee was taken, leaving not even the possibility of a reverter in the former owner. Stat. 1882, chap. 154, §§ 3, 4, 6, pp. 111-113. For other instances of a taking of a fee, see *Dingley v. Boston*, 100 Mass. 544; *Page v. O'Toole*, 144 Mass. 303, 10 N. E. 851; *Titus v. Boston*, 161 Mass. 209, 36 N. E. 793. At the time Stat. 1900, chap. 196, p. 138, was enacted, the fee having passed to the respondent, the petitioners were entitled, under the Constitution and the statutes then in existence, to have their damages paid in money. This was a vested right. It is urged by the respondent that this vested right consisted of a constitutional right to reasonable compensation, and of the statutory right to have it assessed and paid in money; and that, while the constitutional right could not be impaired by the legislature, the statutory right might be changed at will, provided always that the constitutional right to reasonable compensation was not impaired. And it is urged that the statutory right does not become vested until it has been fully pursued and damages assessed. See *Harrington v. Berkshire County*, 22 Pick. 263, 33 Am. Dec. 741. While it is true that every state has complete control over the remedies it offers to suitors; while it may abolish one class of courts and create another, may abolish old remedies and substitute new, or may abolish even without substitution if a reasonable remedy remains (Cooley, Const. Lim. 7th ed. pp. 515, 516, and cases cited in the notes thereto); and, while, as stated by Parker, Ch. J., in *Com. ex rel. Springfield v. Highway Comrs.* 6 Pick. 501, 508, "there is no such thing as a vested right in a particular remedy,"—yet a substantive vested right cannot be impaired under the guise of a change in the remedy. The statute in question did not undertake to define the nature of the thing originally taken, but to change the right to damages. Before the passage of the statute the petitioners were entitled to have their

damages assessed and paid in money. This was a substantive right. After the statute they were deprived of this right, and were obliged to take land instead of money. This was a change, not only in the remedy, but in the thing that the petitioners were entitled to have. It is of no consequence whether the substantive right vests by virtue of a provision in the Constitution or in a statute, provided it is vested. The remedy may be changed, but the right to money cannot be changed. As to that, no matter how the remedy be changed, the result reached must be, in substance, the same. This conclusion is not inconsistent with the decision in *Harington v. Berkshire County*, 22 Pick. 263, 33 Am. Dec. 741, upon which the petitioners rely. We are of opinion, therefore, that the statute is unconstitutional as applicable to this case.

The next question is whether the petitioner Hellen is in a situation to avail himself of that point. The jury have found that he agreed that, if the property was abandoned

by the respondent for his benefit, his damages would be very small, if any, and that \$1,000 would be a reasonable sum for him under that agreement. It is not contended that the finding was not warranted by the evidence, and the fair inference is that the abandonment was made under that agreement. Under these circumstances, the case is within the well-known principle that, where a constitutional provision is designed for the protection of property rights of a person, it is competent for him to waive the protection, and to consent to such action as would be invalid if taken against his will (Cooley, Const. Lim. 7th ed. 250, 251, and cases cited in the notes); and he must be held to have waived his right to insist upon the unconstitutionality of the statute. It does not appear, however, that Cutter waived his rights.

The result is that *as to Hellen there should be judgment on the verdict, and as to Cutter judgment for \$1,000, with interest*; and it is so ordered.

NEW YORK COURT OF APPEALS.

Mary KELLEY, Admr., etc., of Ellen Neville, Deceased, *Appt.*,
v.

BUFFALO SAVINGS BANK, *Respt.*

(180 N. Y. 171.)

1. Ordinary care, under the circumstances of each particular case, is the measure of the duty of a savings bank in paying money out

of a depositor's account after his death, upon production of the bank book and the presentation of a draft purporting to bear his signature, when the bank has no actual notice of the depositor's death, and nothing has transpired to charge it with knowledge of that fact.

2. Failure of the officers of a savings bank to make a physical comparison of the signature on a draft presented with a depositor's bank book with his signa-

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V. Contributory negligence of the depositor.

a. *In general*, 340.

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I. General rule requiring reasonable care by the bank.

Undoubtedly the cases show that the exercise of reasonable care in making a payment of a savings-bank account, as to the identity of the payee the genuineness of the paper offered, and otherwise as to the right or authority of the person presenting the depositor's pass book to receive payment, will form an excuse to the savings bank for loss resulting from the fraudulent representations of the claimant in regard to any of these matters; similarly, in the ordinary case not controlled by unusually stringent bank regulations forming part of the contract between the bank and the depositor, neglect on the part of the bank officials to use

ture on file will render it liable for paying out money on a forged draft, in the absence of some unusual and pertinent excuse which will justify such failure.

3. A finding that there is no such disparity or difference between signatures on drafts presented to a savings bank and that of the depositor on file as to create a doubt or misgiving concerning the genuineness of the signatures in the mind of a competent and reasonably careful bank officer when presented by a person unknown to him, and that, therefore, the bank is not guilty of negligence in failing to make a comparison, is a conclusion of law reviewable by the appellate court, and not a finding of fact.

(December 30, 1904.)

A PPEAL by plaintiff from a judgment of the Appellate Division of the Supreme Court, Fourth Department, affirming a judgment of the Erie County Circuit in defendant's favor in an action brought to recover a savings-bank deposit. *Reversed.*

Statement by **Werner, J.:**

The action is brought by the administratrix of Ellen Neville, deceased, to recover

reasonable, or ordinary (which for this purpose is assumed to be the same degree), care, and prudence, and diligence will make the bank responsible for the loss to the depositor in the payment of his account to one not entitled to it. This rule has been laid down in the cases following, besides the large number of decisions which depend upon the former, and assume the rule to exist without expressing it: *Sullivan v. Lewiston Inst. of Savings*, 56 Me. 507, 96 Am. Dec. 500; *Kimball v. Norton*, 59 N. H. 1, 47 Am. Rep. 171; *Brown v. Merrimack River Sav. Bank*, 67 N. H. 549, 68 Am. St. Rep. 700, 39 Atl. 336; *Appleby v. Erie County Sav. Bank*, 62 N. Y. 12; *Israel v. Bowery Sav. Bank*, 9 Daly, 507; *People v. Third Ave. Sav. Bank*, 98 N. Y. 661; *Smith v. Brooklyn Sav. Bank*, 101 N. Y. 58, 64 Am. Dec. 653, 4 N. E. 123; *Kummel v. Germania Sav. Bank*, 127 N. Y. 488, 13 L. R. A. 786, 28 N. E. 398; *Wall v. Emigrant Industrial Sav. Bank*, 64 Hun, 249, 19 N. Y. Supp. 194; *Tobin v. Manhattan Sav. Inst.* 6 Misc. 110, 26 N. Y. Supp. 14, Affirming 3 Misc. 628, 23 N. Y. Supp. 1165; *Gifford v. Rutland Sav. Bank*, 63 Vt. 108, 11 L. R. A. 794, 25 Am. St. Rep. 744, 21 Atl. 340; *KELLEY v. BUFFALO SAV. BANK*, *CHASE v. WATERBURY SAV. BANK*, and *LANGDALE v. CITIZENS' BANK*. In *Hayden v. Brooklyn Sav. Bank*, 15 Abb. Pr. N. S. 297, a case very much like *KELLEY v. BUFFALO SAV. BANK* in its facts, although the headnote states that payment by the bank is good if it has exercised "reasonable care and diligence," there is no mention of that rule in the opinion, which holds that a finding from the evidence that the bank officials acted upon "due inquiry" was not incorrect. In *Schoenwald v. Metropolitan Sav. Bank*, 57 N. Y. 418, Reversing 1 Jones & S. 440, the rule of reasonable care is entirely ignored, but, as appears below, as well as in *KELLEY v. BUFFALO SAV. BANK*, that case has been substantially overruled.

60 L. R. A.

from defendant bank the amount of certain deposits, which, with interest up to the time of the commencement of the action, were said to have amounted to upwards of \$2,100. The material facts, as found by the trial court, and unanimously affirmed by the appellate division, are substantially as follows: On the 30th day of January, 1871, the plaintiff's intestate, Ellen Neville, then about eighteen or nineteen years of age, opened an account with the defendant bank. A bank book was issued to her in her name, and she signed her name in the signature book kept by the defendant for purposes of identification. At the time when this account was opened there were in force certain rules adopted by the defendant, which were posted in a conspicuous place in its banking room, and also printed in each pass book issued by it. One of these rules provided that "the secretary will endeavor to prevent frauds, but all payments made to persons producing the deposit books or duplicates thereof shall be good and valid payments to the depositors respectively." Another rule provided that "on the decease of any depositor the amount standing to

II. *The application of the rule of reasonable care as affected by the bank's by-laws.*

a. *In general.*

But this rule is frequently modified, in one way or the other, by the by-laws of the bank existing at the time of the first deposit, which become a part of the contract between the bank and the depositor, either expressly or by necessary implication. For the most part the modification, by the contract of the parties, of this rule of reasonable care, is in the direction of allowing the bank greater latitude in making payments to persons presenting the pass book of the depositor for payment; but in a few cases, as will be seen below, the contract may be so binding upon the bank as to prevent the exercise of reasonable care forming a sufficient excuse for payment to a fraudulent claimant of the fund. An instance of the difference of construction which may be put upon the same facts of contract, in regard to the liability of the bank for payment to unauthorized persons, which contract, as intended by the bank, was to relieve it from responsibility for payment to anyone presenting the book of the depositor, is seen in *KELLEY v. BUFFALO SAV. BANK*, where the bank claimed to be discharged by the payment, under the by-law in question. The prevailing opinion of the court held that the bank was bound to the use of reasonable care in spite of the by-law, and the opinion of Vann, J., concurred in the reversal of the court below but upon the ground, merely, that another by-law bound the bank absolutely to payment to the depositor's legal representatives after his death.

A by-law of a savings bank, when subscribed by the depositor, that "the institution will not be responsible for loss sustained when the depositor has not given notice of his book being lost or stolen, if such book be paid in whole or

the credit of the deceased shall be paid to his or her legal representatives when legally demanded." During the lifetime of Ellen Neville she made 16 deposits to the credit of this account, presented her book to the defendant 15 times for the purpose of having interest credited thereon, and drew two checks upon said account, one dated September 22, 1873, for \$335.98, and the other dated July 7, 1877, for \$23.31. These were presented with her pass book, and she received the money thereon. She died on or about the 1st day of December, 1878, at the age of about twenty-five or twenty-six years, and at the time of her death there remained to her credit on said account the sum of \$884.43. This is the amount, with compound interest, which the plaintiff seeks to recover in this action. Ellen Neville left her surviving, her sister, the plaintiff, another sister, named Kate, and her mother. At the time when this account was opened they all lived together in the city of Buffalo. Each of Ellen's sisters had a bank account of her own. Nearly twenty-three years after Ellen's death, and on the 22d of May, 1901, the

plaintiff applied for and received letters of administration. About ten years ago the mother and sister Kate became inmates of St. Francis' Asylum for the Aged and Infirm of Buffalo, where they remained until the time of their deaths, which occurred about two or three years, respectively, before the trial. When they entered this asylum they paid to it the sum of \$1,000. When Ellen died, on December 1, 1878, her bank book was in the house where the whole family then lived, and was taken possession of by her mother or her sister Kate or the plaintiff. Subsequent to Ellen's death the bank book was presented to the defendant by the mother or the sister Kate or the plaintiff for the purpose of having interest credited thereon on ten different occasions between the 1st of January, 1879, to and including July 1, 1883, and on the 4th day of March, 1882, the pass book was presented by some person unknown to the defendant (such person so presenting said book being the mother, the sister Kate, or the plaintiff), and a deposit of \$70 was duly made and entered therein. Subsequent to Ellen's death the moneys to the

in part on presentation," is a material part of the contract between the parties; but it does not relieve the bank from the duty of acting in good faith and with reasonable care in making a payment on the depositor's account. *Brown v. Merrimack River Sav. Bank*, 67 N. H. 549, 68 Am. St. Rep. 700, 39 Atl. 336; *Cornell v. Emigrant Industrial Sav. Bank*, 9 N. Y. S. R. 72.

And, notwithstanding a by-law to the effect that payments to persons producing the pass book should discharge the bank, it is bound to exercise reasonable care and diligence, in order to protect the depositor (*Wall v. Emigrant Industrial Sav. Bank*, 64 Hun, 249, 19 N. Y. Supp. 194), and continues liable for the moneys deposited, if with the exercise of such care it could have prevented the perpetration of the fraud. *Tobin v. Manhattan Sav. Inst.* 6 Misc. 110, 26 N. Y. Supp. 14, Affirming 3 Misc. 628, 23 N. Y. Supp. 1165; *Israel v. Bowery Sav. Bank*, 9 Daly, 507.

It is not error to charge the jury, in an action for an account paid to a fraudulent claimant, that the by-laws printed in the pass book given to the plaintiff when he became a depositor constituted a contract between him and the bank, and governed their relations, and that a payment, made in good faith in the exercise of reasonable care and diligence, to a person presenting the pass book, even though it were obtained by fraud, was a valid payment.

But the savings-bank officers owe to a depositor active diligence to detect fraud and forgery, upon making a payment to one who presents the pass book, although the by-laws provide that the bank will not be responsible for fraud. *Kummel v. Germania Sav. Bank*, 127 N. Y. 438, 13 L. R. A. 786, 28 N. E. 398.

And it seems to be against the policy of the law to allow a savings bank to discharge itself from all obligation to exercise ordinary care as to the identity of the persons presenting

pass books, by a by-law to the effect that the "bank will not be responsible for frauds committed on the officers by producing the pass book and drawing money without the knowledge or consent of the owner." *Salling v. German Sav. Bank*, 15 Daly, 386, 7 N. Y. Supp. 642.

And, even in spite of a stipulation to the effect that the mere possession of the book shall be sufficient authority to warrant payments to its possessor, the bank must exercise ordinary care. *Flicker v. Emigrants' Industrial Sav. Bank*, 33 Misc. 92, 67 N. Y. Supp. 148.

In an important decision (distinguished in *KELLEY V. BUFFALO SAV. BANK*) where the by-law provided that the bank will use its best efforts to prevent fraud, but all payments made to persons producing the deposit book shall be deemed good and valid payments to the depositors respectively, it was held that the bank, because it had stipulated to use its "best efforts" to prevent fraud, was not entitled to a charge to the jury that, if its officers had exercised ordinary care and diligence and paid the money in good faith, it was excused. This was notwithstanding the ruling in *Appleby v. Erie County Sav. Bank*, 62 N. Y. 12 (*infra*, IV. c), which demanded only ordinary care, since the contract of the bank called only for its "endeavor." *Allen v. Williamsburgh Sav. Bank* 69 N. Y. 314.

This is in marked contrast with *LANGDALE V. CITIZENS' BANK*, where, although the by-law, on which the argument of irresponsibility of the bank is based, promises the employment by the bank of "every effort" to prevent fraud, it is held that the bank's official is not bound to compare the signatures of the order presented with that at hand upon the books of the bank, in order to discover the fraud.

In *Kimball v. Norton*, 59 N. H. 1, 47 Am. Rep. 171, an agent deposited money in a savings bank, signing, as agent, a certificate which provided that the account might be withdrawn

credit of this account were paid out by the defendant on five separate drafts or written orders drawn in the name of Ellen Neville, as follows: December 28, 1878, \$41.43; June 2, 1880, \$50; July 30, 1881, \$70.45; August 14, 1883, \$56.62; September 1, 1883, \$937. No part of these moneys was paid to the legal representative or representatives of Ellen Neville, but the payments referred to were made to her mother or to one of her sisters, and the signatures on these five drafts or orders, purporting to be the signatures of Ellen Neville, were not her signatures, but were made by her mother or one of her said sisters. The findings relating to the conduct of the bank officials in the payments of these drafts are as follows: "That by a critical examination and comparison of the said signatures on each of the aforesaid drafts or orders with the true signature of said Ellen Neville, entered and signed as aforesaid in the book of signatures, it would have been apparent to a competent bank officer that neither of the signatures to said drafts or orders was the genuine signature of said Ellen Neville. That, at the respec-

tive times at which such drafts or orders were presented to the defendant for payment, the defendant made no critical examination or physical comparison of the signatures thereon with that of the said Ellen Neville entered and signed in the book of signatures of depositors kept by the defendant aforesaid. That said drafts or orders were paid by defendant on presentation of the same with the pass book, and the defendant made no effort, by a critical examination or physical comparison, to ascertain the genuineness of the signatures of any of said drafts or orders, or to ascertain the identity of the person presenting the same. That there does not exist such a disparity or difference between the signature of said Ellen Neville upon the signature book of the defendant and the several signatures upon said five checks, or any or either of them, as to create doubt or misgiving concerning the genuineness of said five signatures, or any or either of them, in the mind of a competent and reasonably careful bank officer, when presented by a person unknown to him with a bank book, and therefore the defendant

by the person who might present the book, or according to the charter and by-laws, as set forth in a book of deposit delivered to the depositor, and these by-laws provided that, "as it will be impossible for the officers of the corporation to identify every depositor, the production of the book of deposit will be held to show that the person producing the same is legally authorized to receive the deposit; and the corporation will not be responsible for loss," etc. It was held that this stipulation between the bank and the depositor did not relieve the bank from the duty of acting in good faith and with reasonable care, when the agent fraudulently presented the book and obtained payment. Such a stipulation between the parties "does not mean that the bank is absolved from all obligation of caution. A depositor is a beneficiary of a fund held by the bank as trustee. The trustee is incorporated for the purpose of exercising care in the management and preservation of deposits. This object would not be accomplished by care in the investment of the fund, and recklessness in paying a deposit to a wrongful possessor of a book. . . . The by-law and agreement are to be construed according to the authorized business and organic object of the institution. The terms of deposit cannot be understood to make the books payable to bearer, like bank bills, without imputing to the trustee a deliberate and studied attempt to expose beneficiaries to a great and unnecessary peril of loss, and to deprive them of important security which the trustee was chartered to furnish."

The fact of the by-law, as in this case, beginning with the statement that the bank officials will be unable to identify every depositor, so that the presentation of the book alone will be deemed sufficient authority for payment, puts cases involving such stipulations in a class by themselves, according to some decisions.

So it is laid down that a by-law of this 69 L. R. A.

character, stating also the reason for it, namely that "the officers may be unable to identify every depositor," contains a limitation upon its effect and meaning, and shows that the rule is only applicable to cases where the officers are unable, by the exercise of reasonable care and diligence, to identify; and that, if they can perceive the want of identity by reasonable care, they must use that which is reasonable care under all the circumstances, or be responsible to the depositor. *Ladd v. Augusta Sav. Bank*, 96 Me. 516, 58 L. R. A. 288, 52 Atl. 1012.

Where, however, a by-law practically identical with those last considered ended in a statement that "in all cases a payment upon presentation of a deposit book shall be a discharge to the corporation for the amount so paid," and the fraudulent claimant presented not only the deposit book, but also a forged order purporting to be signed by the depositor, it was held that the argument that the by-law was intended to protect the bank against the risk of mistake as to the personal identity of its depositors, and that therefore (as in the last case, *Ladd v. Augusta Sav. Bank*, 96 Me. 516, 58 L. R. A. 288, 52 Atl. 1012) it did not apply to a case where there was no mistake as to identity, but the payment was made upon a forged order purporting to be signed by the depositor, would be perhaps conclusive in favor of the depositor if it were not for the clause providing that the presentation of the book should be a discharge of the bank "in all cases;" in both cases the purpose of the by-law was to authorize the bank to rely upon the presentation of the book as its security against fraud; and if the bank, using reasonable care, and in good faith, paid the account upon the presentation of the book, the bank was discharged. *Levy v. Franklin Sav. Bank*, 117 Mass. 448.

And in a later Massachusetts case, going further, it was held that since the by-laws of

exercised due care and caution, and was not guilty of negligence, in paying the five checks in question, nor in paying any or either of them." These findings of fact were followed by the legal conclusion that the complaint should be dismissed, and the judgment entered thereon has been unanimously affirmed by the appellate division.

Mr. Harry D. Williams, for appellant:

The defendant should be held liable for the breach of its express agreement that, "on the decease of any depositor, the amount standing to the credit of the deceased shall be paid to his or her legal representatives when legally demanded."

Mahon v. South Brooklyn Sav. Inst. 175 N. Y. 69, 96 Am. St. Rep. 603, 67 N. E. 118; *Podmore v. South Brooklyn Sav. Inst.* 48 App. Div. 218, 62 N. Y. Supp. 981.

The bank was bound to take notice of the depositor's death.

Hoffman v. Union Dime Sav. Inst. 41 Misc. 517, 85 N. Y. Supp. 16, 95 App. Div. 329, 88 N. Y. Supp. 686; *Marlett v. Jackman*, 3 Allen, 287; *Christie v. Royal Bank*, 1 Dunlop, B. & M. 745; *Weber v. Bridgman*.

the bank, subscribed by the depositor, provided that, "as the officers of the institution may be unable to identify every depositor, the institution will not be responsible for any loss sustained when a depositor has not given notice of his book being stolen or lost;" and the plain object of the by-law was to exonerate the bank from loss occasioned by the inability of its officers to identify the depositor, and to throw upon the depositor the risk of keeping his book safely, when the account was paid in good faith and without negligence, upon presentation of the book,—this was exactly the case which the by-law was intended to provide for; and the depositor could not recover without a violation of the terms of the contract which the bank made with him. *Goldrick v. Bristol County Sav. Bank*, 123 Mass. 320.

Similarly, it has been held, without special regard, apparently, to the question of reasonable care, but more by the force of a strongly worded contract, that where the by-law printed in the deposit book provided, "If any person shall present a deposit book at the office of this corporation, and allege himself or herself, untruly, to be the depositor named therein, and shall thereby obtain from the officers of this corporation the amount deposited, or any part thereof, and the actual depositor shall not have given notice at the office of his or her book having been lost or taken from him or her, this corporation will not be responsible for the loss so sustained by any depositor,"—this provision was reasonable and necessary for the protection of the bank, and was a complete defense to an action for the amount of a deposit withdrawn by a stranger presenting the book through the mail, with a forged check. *Burrill v. Dollar Sav. Bank*, 92 Pa. 134, 37 Am. Rep. 669.

In an interesting New Jersey case, involving the construction of a similar by-law, where the defense to an action for a savings-bank account was payment to a woman who repre-

113 N. Y. 600, 21 N. E. 985; *Farmers' Loan & T. Co. v. Wilson*, 139 N. Y. 284, 36 Am. St. Rep. 696, 34 N. E. 784.

The fact of unauthorized payment having been established, the burden was on the defendant of showing affirmatively some valid reason for such payment.

Abramowitz v. Citizens' Sav. Bank, 17 Misc. 298, 40 N. Y. Supp. 385; *Allen v. Williamsburgh Sav. Bank*, 69 N. Y. 317; *Farmer v. Manhattan Sav. Inst.* 60 Hun, 462, 15 N. Y. Supp. 235.

Messrs. Marshall & Rebadow, for respondent:

Before the by-law relating to payments to personal representatives can have any application, the bank must have actual notice of the depositor's death; or at least circumstances must have come to its knowledge sufficient to put it upon inquiry, and require further investigation in the exercise of reasonable diligence.

If the bank pays without knowledge of the drawer's death the money cannot be recovered back.

Edwards, Bills & Notes, 2d ed. p. 546; *Tate v. Hilbert*, 2 Ves. Jr. 118; *Donlan v.*

sented herself to be one of the plaintiffs, and presented the book, whereupon the bank officers used due care to identify the payee, but the by-laws, printed in the plaintiffs' book, provided that deposits "shall be drawn out only by the depositors in person, or by their written order, or by some person legally authorized, and only upon production of the depositor's book, that such payments may be entered therein, and all payments to persons who present the deposit book shall be valid payments to discharge the bank,"—it was thought by the supreme court that by these terms only three classes of persons could lawfully draw a depositor's money: (1) The depositor, upon the presentation of his book; (2) a person presenting the book with the written order of the depositor to draw the money; (3) any person lawfully authorized to receive the money on presentation of the book; and hence a payment to a stranger, even if with due care, was no discharge to the bank; for the last clause of the by-law, that "all payments to persons who present the deposit book shall be valid payments to discharge the bank and its officers," meant payments to such persons as were legally entitled to receive payment under the conditions previously specified in the by-law,—that is, one of the three classes named. But this decision of the supreme court was later reversed by the court of errors and appeals, which declared that the proper construction of the word "payment" as it was used in the last clause of the by-law in question was the turning over of money by the holder of it to any one of a designated class of persons; and that that class was not one inclusive merely of the three classes mentioned earlier in the by-law, but it was the class of "persons who present the deposit book." So a payment made by the bank in good faith and in the exercise of due care, to any person who produces the pass book, operates to discharge the bank, without regard

Provident Inst. for Savings, 127 Mass. 183, 34 Am. Rep. 358; *Cosgriff v. Hudson City Sav. Inst.* 24 Misc. 4, 52 N. Y. Supp. 189; *Riley v. Albany Sav. Bank*, 36 Hun, 513, Affirmed in 103 N. Y. 669.

Defendant was only required to use ordinary care and diligence, and, having performed its duty in that respect, it is relieved from liability.

Reed v. McCord, 160 N. Y. 330, 54 N. E. 737; *McGuire v. Bell Teleph. Co.* 167 N. Y. 208, 52 L. R. A. 437, 60 N. E. 433; General Savings Bank Act, Laws 1875, § 408; *Appleby v. Erie County Sav. Bank*, 62 N. Y. 12; *People v. Third Ave. Sav. Bank*, 98 N. Y. 661; *Wall v. Emigrant Industrial Sav. Bank*, 64 Hun, 252, 19 N. Y. Supp. 194; *Hales v. Seamen's Bank for Savings*, 28 App. Div. 409, 51 N. Y. Supp. 140.

Werner, J., delivered the opinion of the court:

Upon the foregoing facts the trial court dismissed the complaint. At the appellate division the judgment entered upon that decision was unanimously affirmed. This court must therefore assume that every

fact found is based upon sufficient evidence (*Marden v. Dorothy*, 160 N. Y. 39, 46 L. R. A. 694, 54 N. E. 726; *Reed v. McCord*, 160 N. Y. 330, 54 N. E. 737; *People ex rel. Manhattan R. Co. v. Barker*, 152 N. Y. 417, 46 N. E. 875), and the judgment must be sustained unless the conclusion of law upon which it is predicated is erroneous, or other fatal errors affect the rulings made upon the trial.

The immediate question presented by this appeal is whether, upon the record before us, the plaintiff is entitled to recover; and, as the decision of this question necessarily involves an inquiry into the duties and responsibilities of savings banks toward their depositors, the case is one of more than ordinary professional interest and practical importance. Savings banks are prominent factors in our modern business life. Many of them count their deposits by the millions, and number their depositors by the thousands. Many, if not most, of these depositors are persons in the humbler walks of life, living in widely scattered sections of their respective communities, visiting the banks

to whether the person is entitled to draw the money. *Cosgrove v. Provident Inst. for Savings*, 64 N. J. L. 653, 46 Atl. 617, Reversing 64 N. J. L. 39, 44 Atl. 936.

This is to be contrasted with a case in the New York court of appeals, *Smith v. Brooklyn Sav. Bank*, 101 N. Y. 58, 54 Am. Dec. 653, 4 N. E. 123. There the by-laws provided that "all payments made by the bank upon the presentation of the pass book, and duly entered therein, will be regarded as binding upon the depositor; money may also be drawn upon the written order of the depositor or his attorney when accompanied by the pass book." It was held that, although it might have been intended by the bank in framing the by-law that the phrase "all payments" should mean any sum of money delivered by it to any person who might, for the time being, have in his possession the pass book, yet, in order to make that understanding obligatory upon the customer, it was also necessary that he should have a similar understanding, or that the by-law should have been expressed in language incapable of any other fair construction; the phrase "all payments" could not be construed to mean any sums which the bank might choose to disburse, regardless of the person to whom they were made; so payment could be legally made only to the depositor or his authorized representative, and, in order to constitute any other transaction a payment, it is essential to its validity that it should be authorized by the person entitled to demand it. The by-law seemed to contemplate but two modes of payment, both requiring the presentation of the pass book, one providing for payment to the depositor personally, and the other for payment in his absence to a third person, presenting with the pass book a written order of the depositor. Hence, when the bank paid an account to a stranger presenting the pass book, but without any written order of the depositor, genuine or

forged, if the bank were excused for making such a payment to a stranger having only the pass book, the provision authorizing the payment to a stranger having both book and order would be unmeaning.

It was declared, also, that the case was not affected by the decisions in *Schoenwald v. Metropolitan Sav. Bank*, 57 N. Y. 418, and similar cases where the language of the by-law provided plainly for payment to other persons than the depositor.

The by-law may be so loosely or liberally drawn, on the other hand, as to afford little protection to the bank for payment, even if made with due care, to one not entitled to it.

So although the bank book itself had printed upon its cover: "Caution to depositors. This book should be preserved with great care. If it should be lost give immediate information to this office,"—when it also contained a copy of one of its by-laws, to the effect that "payment on deposits shall be made only to the depositor or to his or her order, or the depositor's legal representatives, on the presentation of the depositor's book;" and payment was made to a person who presented the bank book with a forged order,—under these circumstances the court held that the forged authority was no authority at all; and the presentation of the book alone is of no greater effect, for the book was not negotiable and might be presented by a thief, as was the case; in addition, the book itself denied the legality of the payment, for the by-laws as well as the printed caution pointed out how the money should be drawn, and such a book ought not to be clothed with the character of a blank power of attorney. So, although it was said that there was great difficulty in conducting this kind of business if more than the book was required as an authority for payment, that many of the depositors could not be identified by their handwriting, and that it was quite impracticable to

infrequently having no personal acquaintance with bank officials or employees, and no convenient or satisfactory means of immediate identification when their identity is questioned. These conditions are in striking contrast with those which prevail in the intercourse between the officers and employees of discount banks and their patrons. The majority of the latter are persons actively engaged in business, making daily, or at least frequent, visits to their respective banks. Their signatures are familiar to the officers and employees of the banks, and if, now and then, there is need of identification, it can usually be furnished without much difficulty. These considerations clearly indicate the difference between the two classes of banks, as well as the necessity for the law which permits savings banks to adopt reasonable rules, adapted to the nature of their business, which rules, when properly adopted and promulgated, are binding upon them, their depositors, and those who succeed to their interests. Outside of these special rules, however, there are many questions affecting the interests of savings banks and

their depositors which must be determined by broad and comprehensive legal rules of general application. One of these questions arises out of the relations between savings banks and the legal representatives of deceased depositors. What degree of care must a savings bank exercise in paying money out of a depositor's account after his death, upon the production of his bank book, and the presentation of a draft purporting to bear his signature, when the bank has had no actual notice of the depositor's death, and nothing has transpired to charge it with knowledge of that fact? That is the question which underlies all other questions in this case.

In view of what has been said concerning the relations of savings banks and their depositors towards each other, it becomes obvious that any general rule that would require savings banks to act in such circumstances at their peril, without regard to the degree of care exercised, would ultimately cast as great a burden upon depositors and their legal representatives as upon the banks, and would disastrously affect the beneficent work which

know them personally or their places of residence, which were constantly shifting, yet without some agreement to that effect these inconveniences could not annul the application of the principles of the common law. And even the general practice in the city, of paying in this way, could not justify the payment, because the bank declared that the money was payable to the depositor or his order or his legal representatives on the presentation of the book; and, further, such a practice could not of itself alter the general law. *Eaves v. People's Sav. Bank*, 27 Conn. 229, 71 Am. Dec. 59.

And when the by-laws printed in the pass book provided that the depositor, in order to draw, must present the book at the bank, if he drew it personally, or that an absent depositor could draw his deposit on his order or check, properly witnessed; and when the book, with a forged order, was presented by a stranger without the authority of the depositor, but the order was without witnesses as the by-law required,—it was held that the bank was liable for the amount to the depositor, for the money was paid out in violation of the contract between the bank and the depositor. It could not be pretended that the money was paid out in conformity to the by-law in regard to payment, since the order was not only forged, but it was also not witnessed. *People's Sav. Bank v. Cupps*, 91 Pa. 315.

In *CHASE v. WATERBURY SAV. BANK* the by-law (§ 15) on which the defendant bank relied was strongly stated in order to afford immunity to the bank, and nominally released it from "any" liability on account of "any" fraud practised on it; and, in holding that the bank was still bound to the exercise of ordinary care, the decision is apparently contrary to that of *Levy v. Franklin Sav. Bank*, 117 Mass. 448, *supra*, although the Connecticut court declares that the intent of the bank was not to release

it from responsibility for losses which by the exercise of ordinary care it could prevent.

b. *By-law providing for payment to the depositor's representative after his death.*

The application to the rule of reasonable care of a by-law (in addition to that providing that all payments to persons producing the deposit books shall be valid payments to discharge the bank) to the effect that after the death of a depositor his account "shall be paid to his legal representative" presents the question of the construction of two inconsistent terms of the same contract, and is the subject of difference of opinion in *KELLEY v. BUFFALO SAV. BANK*.

In that case the prevailing opinion (distinguishing *Mahon v. South Brooklyn Sav. Inst.* 175 N. Y. 69, 96 Am. St. Rep. 603, 67 N. E. 118) is to the effect that the provision as to the payment upon the death of the depositor does not prevail, so as to charge the bank, unless the bank has notice of the death; while the opinion of Vann, J., maintains that the lack of notice will not protect the bank, and that under the by-law involved the bank is absolutely liable.

Several cases have been decided which are nearly in point.

In *Hunter v. Wallace*, 14 U. C. Q. B. 205, the deposit was made according to an arrangement to the effect that any person producing the pass book should be entitled to receive the amount of the account; and upon a payment, after the depositor's death, of which the bank had notice, to a mere connection of the depositor, who pretended to be entitled to receive it, it was held that, whatever the special agreement was between the depositor and the bank officer, it was terminated by the death of the depositor, and the bank was bound, when its officer became aware of the death, to retain the money until some one legally authorized should

such institutions are designed to accomplish. If it were the duty of savings banks to establish at all hazards the identity of every person presenting a depositor's bank book and draft, it would be quite as impossible for them to continue business as it would be for some persons to avail themselves of the best-known and most generally approved method of investing and accumulating the fruits of frugal and patient economy. The same would be true of any other rule so onerous in its operation that such institutions could not do business without great inconvenience both to them and their depositors. A single illustration will suffice to demonstrate this. Take the case of a large savings bank, with so many accounts that it is impossible for the paying teller to know each depositor. It would be utterly impracticable to do business if each application for a withdrawal of money had to be delayed until a searching inquiry could be made as to the regularity of the transaction. But even if such a course were possible, so far as the bank were concerned, what would be the effect upon the poor and un-

known depositor, whose place of residence may be remote from the banking house, and who may have no acquaintance with anyone who would be of the slightest assistance in identifying him? He would have no way of getting money that rightfully belonged to him, or, at least, might find his efforts in that direction so burdensome as to amount to the same thing. This is not an extreme illustration, but one that is fairly typical of the relations between great savings banks located in large centers of population, with many depositors, whose accounts are small, and whose deposits are made at rare intervals. Upon reflection it becomes obvious, therefore, that the only practicable general rule to which savings banks can be safely held in such dealings is the rule of ordinary care, leaving it to be applied in the light of the special circumstances that characterize each separate case. This is the rule that has been laid down by this court in a variety of similar cases. *Schoenwald v. Metropolitan Sav. Bank*, 57 N. Y. 418; *Appleby v. Erie County Sav. Bank*, 62 N. Y. 12; *Kummel v. Germania Sav. Bank*,

demand it, and was, of course, in the meantime bound to the exercise of ordinary care.

So under by-laws providing, in the first place, that all payments to any person producing the pass book should be valid payments, where the bank, having notice of the depositor's death, negligently paid to a third person, undeniably the rule stated was materially qualified, if it was not made entirely inapplicable, by another and later by-law providing that on the death of a depositor the amount standing to his credit should be paid to his legal representative, and hence the question of negligence in the bank should not be taken from the jury. *Farmer v. Manhattan Sav. Inst.* 60 Hun, 462, 15 N. Y. Supp. 235.

And (following *Farmer v. Manhattan Sav. Inst.*) it was held in *Podmore v. South Brooklyn Sav. Inst.* 48 App. Div. 218, 62 N. Y. Supp. 961, when the usual by-law to the effect that all payments to persons producing pass books should be valid immediately follows another providing, as before, that on the death of a depositor his account shall be paid to his legal representative, the one first mentioned (and coming later in the by-laws) applies only to payments made during the life of the depositor, or, at most, without notice of his death. And upon appeal to the court of appeals this judgment was affirmed in 175 N. Y. 69, 96 Am. St. Rep. 603, 87 N. E. 118, the court saying that the exclusion of evidence offered by the defendant bank to show that the bank exercised due care in making the payment was proper, for the reason that the rule of diligence invoked by the bank applied only to the case of a living depositor, and not to the case of a dead one, who was unable to protect himself.

The real effect of this case is borne out by a recent case in the appellate division, which, being based upon practically the same facts as *KELLEY v. BUFFALO SAV. BANK*, would seem to have been overruled by the latter. This case 69 L. R. A.

declares that a bank, although without knowledge of the depositor's death, paying out his account to the depositor's attorney in fact, must make it good to the administrator. *Hoffmann v. Union Dime Sav. Inst.* 95 App. Div. 329, 88 N. Y. Supp. 686. Affirming on this point 41 Misc. 517, 85 N. Y. Supp. 16.

For treatment of the question of limits of the rule of reasonable care as applied to payment after the depositor's death, *vide infra*, IV. e.

III. The binding effect of the by-laws upon the depositor.

a. Assent by the depositor.

In most cases the depositor, when the first deposit is made, is required to subscribe the rules and by-laws of the institution, so that there can be no question of his being bound by them. In most cases, also, the by-laws are printed at length in the deposit book, and the attention of the recipient is then called to them at the time the book is given, which will have the same effect.

But, nevertheless, even if the attention of the depositor is not specifically called to the rules in his book, he assents to them when he receives the book containing them, he becomes legally chargeable with knowledge of them, and they become a part of his contract with the bank. *Heath v. Portsmouth Sav. Bank*, 46 N. H. 78, 88 Am. Dec. 194; *Hayden v. Brooklyn Sav. Bank*, 15 Abb. Pr. N. S. 297; *Schoenwald v. Metropolitan Sav. Bank*, 57 N. Y. 418, Reversing 1 Jones & S. 440.

And where the by-laws required that each depositor should subscribe the rules and agree to be bound by them, but one depositor was not present and did not sign them, by holding the book having the by-laws printed in it as his voucher, and continuing to make deposits, he

127 N. Y. 488, 13 L. R. A. 786, 28 N. E. 398.

In the case of *Allen v. Williamsburgh Sav. Bank*, 69 N. Y. 314, the wife of a depositor had wrongfully secured possession of his pass book, forged his signature to a draft, and obtained payment from the bank. But there the bank had adopted a special by-law requiring it to use its best efforts to prevent fraud, and this was construed to bind the bank to a higher degree of care than that enjoined by the general rule.

It is to be observed that all of the cases above cited present instances of payments to the wrong persons during the lifetime of the depositors, and it is true that, in construing certain rules so generally adopted by savings banks as to have acquired almost the binding force of statutes, it has been held by this court that there is a difference between the relations of a savings bank and a living depositor, on the one hand, and the relations of such a bank and the legal representatives of a deceased depositor, on the other hand. The rules referred to are among the by-laws adopted

and promulgated by the defendant bank, and are as follows: "The secretary will endeavor to prevent frauds, but all payments made to persons producing the deposit books, or duplicates thereof, shall be good and valid payments to the depositors respectively." "On the decease of any depositor the amount standing to the credit of the deceased shall be paid to his or her legal representatives when legally demanded." In the recent case of *Mahon v. South Brooklyn Sav. Inst.* 175 N. Y. 69, 96 Am. St. Rep. 603, 67 N. E. 118, we had occasion to discuss the effect of these two rules; and, as bearing upon the defense that the bank had exercised due diligence in paying out money upon the account of a deceased depositor, we said: "The rule of diligence invoked by the defendant bank applies only to the case of a living depositor. When, through a depositor's carelessness, his bank book gets into the hands of a third person, who presents it to the bank, the latter may show its care and diligence in making payment to the person presenting the pass book, and thus protect itself against a second demand for

became bound by the rules. *Ladd v. Augusta Sav. Bank*, 96 Me. 516, 58 L. R. A. 288, 52 Atl. 1012.

When, also, the depositor was present, but was not compelled to subscribe the rules, and they provided that the depositor must so subscribe and by that act be considered as assenting to the by-laws, it was held that the fact that the bank took the deposit without requiring his assent by subscribing the by-laws was not conclusive that he did not assent to them, that being only one method of assent; and by receiving and holding the book containing the by-laws, of which he had actual knowledge, he must be taken to have actually assented to them, except that one which he knew was not complied with. *Gifford v. Rutland Sav. Bank*, 63 Vt. 108, 11 L. R. A. 794, 25 Am. St. Rep. 744, 21 Atl. 340.

And when an illiterate depositor subscribed the by-laws, but the bank had no notice of his inability to read, it had the right to assume that he had read them and knew their contents, and he was bound by them, as was his legal representative after his death. *Donlan v. Provident Inst. for Savings*, 127 Mass. 188, 34 Am. Rep. 358.

Where the by-laws, as contained in the deposit book given the depositor at the time of her first deposit, were later amended so as to make the responsibility of the bank for payments to fraudulent claimants less stringent, but no notice of the change was imputable to the depositor; and after the change several payments were made to a fraudulent claimant,—although the bank contended that the by-law later added became incorporated into the contract between the parties, under the general statute which provided that the deposits might be withdrawn in such manner as the by-laws directed, and under another by-law which was in force at the time of the first deposit, to the effect that changes might be made in the by-laws, and ex- 69 L. R. A.

pressing the depositor's agreement to abide by the regulations of the institution as expressed in the by-laws, it was decided that the power to change the by-laws did not empower the bank to change the contract which the parties had made (thus really begging the question, since the question was, What was the contract?); and authority to make such a material change in the contract, without the knowledge of the depositor, could not be inferred from her agreement to abide by the regulations of the institution. *Klimins v. Boston Five Cents Sav. Bank*, 141 Mass. 88, 55 Am. Rep. 441, 6 N. E. 242.

Where a bank had a standing rule to the effect that anyone presenting a pass book should be taken to be the depositor, or to have a genuine order from him if he presented an order, and that payment to him should be good against the depositor; but there was no evidence that this rule, although one of general notoriety in regard to all the savings banks in the city, had been brought to the attention of the depositor,—this was not binding upon him, when a by-law, which undoubtedly was binding upon both parties, provided that the account should be paid to the depositor, or to his order, or to his legal representative. *Eaves v. People's Sav. Bank*, 27 Conn. 229, 71 Am. Dec. 59.

Under the New York statute of 1875, chap. 371, § 23, a savings bank depending upon its by-laws for its defense in an action by a depositor to recover moneys paid out by it to a fraudulent claimant, must show affirmatively that it has complied with the provision of that statute directing that the bank shall put up in some conspicuous place, where its business is transacted, the regulations for payments of deposits, and that they shall be printed in the pass book; and it is not an excuse for failure to comply with the law that the regulations were printed in the pass book, when the deposit-

payment by the careless depositor. But the by-law which is designed to protect the bank in such a case must be read in connection with the other by-law, which provides that, after the depositor's death, payment must be made 'to his or her legal representatives.' This latter by-law is for the protection of the depositor, who can no longer protect himself, and therefore the bank is bound to see that payment was made to the proper person. Payment to any other person is made at the bank's peril." That case is now relied upon by the appellant. As applied to the facts there established, the language just quoted was precise and correct, because the bank had knowledge of the depositor's death, and assumed to pay out the money credited to her account to one who claimed it by virtue of an alleged gift *causa mortis*, which the trial court found had never been made; and the unanimous affirmance of that finding of fact by the appellate division left this court no alternative but to apply the rule there laid down. In that case the finding of fact clearly established the absence of ordinary care, and the de-

cision reached by this court was the only logical sequence of the finding. The language of the opinion is general and comprehensive, but of that it is enough to say that judicial discussion is to be limited to what is actually decided. *People ex rel. Metropolitan Street R. Co. v. State Tax Comrs.* 174 N. Y. 417, 63 L. R. A. 884, 67 N. E. 69.

In the case at bar the situation is different. While there is no direct finding to the effect that the officers of the respondent bank had no knowledge of Ellen Neville's death, that is the direct and inevitable implication of the other findings; and thus the question that remains to be discussed is whether the findings as to what the officers of the bank actually did, support the legal conclusion that they were not guilty of negligence in making payments to the persons who presented the decedent's pass book and drafts purporting to have been signed by her. The substance of the findings upon that subject is that a critical examination and comparison of the signatures on the several drafts referred to with the true signature of the

or did not read them. *Kress v. East Side Sav. Bank*, 50 N. Y. S. R. 273, 21 N. Y. Supp. 652.

In the case of a savings bank organized under the Michigan general banking law, by which the profits belong to the stockholders, and not to the depositors, the by-laws of which provided that, "while the officers of this institution will do their utmost to prevent fraud, yet, as they will be unable to identify every depositor, this institution will not be responsible for loss sustained when a book has been mislaid, stolen, or lost, if, before the cashier is notified thereof, such book be paid;" and that the owner is required to give immediate notice of the loss of the book; but there was nothing to indicate that the depositor's attention had been called to the by-laws, or that he had even read them,—it was held that the decision cited by the bank, in *Maine, Massachusetts, and New York*, were in regard to savings banks which were created and managed for the benefit of the depositors, instead of the stockholders, and the conditions are so unlike those in Michigan that the decisions are not controlling in that state, where the officers of the bank are the agents of the stockholders and not of the depositors, so that the relation of debtor and creditor subsisted between the bank and the depositor, and the general rule would apply that the by-laws of the corporation are binding upon none but its members and officers; hence, a by-law passed by the bank is not a by-law of a depositor, and, if the effect of it is to change the relation of the creditor to the debtor so as to relieve the obligation of the debtor to the creditor, the creditor must have his attention called to the by-law in such a way that he shall understand its effect before he is bound by it. *Ackenhausen v. People's Sav. Bank* 110 Mich. 175, 33 L. R. A. 408, 64 Am. St. Rep. 338, 68 N. W. 118.
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b. What is a reasonable by-law.

In several instances judicial decisions have been made as to the validity of the by-laws of savings banks, as affected by their reasonableness.

So in *Hayden v. Brooklyn Sav. Bank*, 15 Abb. Pr. N. S. 297, a regulation providing, as the by-laws usually do, that payments to persons producing the pass book should be good and valid payments to the depositor, was approved. (But in *Kelly v. Emigrant Industrial Sav. Bank*, 2 Daly, 227, half the court held that a by-law to the effect that "payments to persons producing the pass book shall be valid payments to discharge the bank" was void as not within the powers of a savings bank, granted by its charter.)

By-laws requiring the depositor, at the time his deposit book is given him, to sign the book kept for that purpose, and providing that he shall by that act be considered as assenting to and being bound by the by-laws, and also that the bank will not be responsible for loss sustained when a depositor has not given notice that his book has been lost or stolen, if it is paid on presentment,—were sustained as reasonable and binding on the depositor, in *Gifford v. Rutland Sav. Bank*, 63 Vt. 108, 11 L. R. A. 794, 25 Am. St. Rep. 744, 21 Atl. 340.

This is similar to the by-law held to be reasonable in *LANGDALE v. CITIZENS' BANK*.

A more stringent rule is approved in *Burrill v. Dollar Sav. Bank*, 92 Pa. 134, 37 Am. Rep. 669, providing, in exact terms, that "if any person shall present a deposit book at the office of this corporation, and allege himself or herself, untruly, to be the depositor named therein, and shall thereby obtain from the officers of this corporation the amount deposited, or any part thereof, and the actual depositor shall not have given previous notice at the office of his or her book having been lost or taken from

decendent would have disclosed the fact that the signatures on the drafts were not genuine; that the officers of the bank made no critical examination or physical comparison of the signatures on the drafts with the genuine signature of the decendent, entered and signed in the bank's signature book; and that the officers of the bank made no effort, by a critical examination or physical comparison, to ascertain the genuineness of the signatures on the drafts, or to ascertain the identity of the person presenting the same. The use of the disjunctive "or" in these findings separates that portion of them which relates to a critical examination of the signatures from that which relates to a physical comparison thereof, and, fairly construed, they import that no physical comparison of the signatures was made by the officers of the bank. These two findings are not necessarily inconsistent with each other, but they are so divergent as to entitle the appellant to the benefit of the one most favorable to her. *Redfield v. Redfield*, 110 N. Y. 671, 18 N. E. 373. Whether the failure to make a physical

him or her, this corporation will not be responsible for the loss.

IV. Limits of the application of the rule requiring reasonable care.

a. In general.

The standard of care which will determine the bank's liability for payment to a fraudulent claimant is that degree of care which persons of average prudence exercise, and not the degree of care ordinarily exercised by the bank in the conduct of its business. *Brown v. Merrimack River Sav. Bank*, 67 N. H. 549, 68 Am. St. Rep. 700, 39 Atl. 336.

It is necessary, however, for the depositor, in an action for the amount of his deposit, to give proof of facts tending to show a failure to exercise reasonable care and prudence in disbursing the money; and where the record presents no proof of such facts upon which negligence by the bank's officials can possibly be predicated, there is no question for submission to the jury, and a nonsuit is proper. *Israel v. Bowery Sav. Bank*, 9 Daly, 507.

Where the plaintiff testified that she had not received the money which the defendant alleged had been drawn by her, a nonsuit was improperly allowed, since the plaintiff was entitled to go to the jury on the question whether the bank had exercised proper care in making the payments alleged by it to have been made to the plaintiff, under the usual by-law providing that "the treasurer will endeavor to prevent frauds, but all payments made to persons producing the pass book shall be deemed valid payments." *Fox v. Onondaga County Sav. Bank*, 25 N. Y. S. R. 672, 7 N. Y. Supp. 17.

If there is nothing to arouse suspicion in the appearance or demeanor of a person presenting a pass book for payment, the fact that the whole deposit is demanded at once is not, as a matter 69 L. R. A.

comparison of the signatures in the case at bar was consistent with the exercise of ordinary care on the part of the defendant bank may depend upon peculiar facts which are not found in the record before us. The finding quoted in the foregoing statement of facts, to the effect that there was no such disparity or difference between the signature of said Ellen Neville upon the signature book of the defendant and the several signatures upon five checks as to create doubt or misgiving concerning the genuineness of said five signatures in the mind of a competent and reasonably careful bank officer, when presented by a person unknown to him, with the bank book, and that therefore the bank exercised due care and caution, and was not guilty of negligence, is really a conclusion of law, and not a finding of fact. It is possible that there may be special cases in which it may not be necessary for bank officers to make a physical comparison between one signature on file with a bank and another upon a draft or check presented to it for payment, but, if so, there must exist some unusual and pertinent ex-

of law, a circumstance to cause inquiry or suspicion. *Geltelsohn v. Citizens' Sav. Bank*, 17 Misc. 574, 40 N. Y. Supp. 662, Reversing 17 Misc. 57, 39 N. Y. Supp. 840.

b. Payment upon fraudulent claim of identity merely.

In many of the earlier cases involving the liability of savings banks for payments to fraudulent claimants all the means of identification of the applicant required by the bank were, first, the possession of the bank book, and correct responses to questions put to him at the time of the payment, without any requirement that the applicant make, at the time, a signature to be compared with the true signature of the depositor, kept on file. In the case of illiterates, who constitute a large proportion of the customers of most savings banks, this is impossible, but the practice is now very general of demanding the signature of an unknown applicant.

In *Smith v. Brooklyn Sav. Bank*, 101 N. Y. 58, 54 Am. Dec. 653, 4 N. E. 123, it was laid down that a pass book is not negotiable paper, and its possession, in itself, as bearing upon the question of the bank's negligence in paying a deposit, constitutes no evidence of a right to draw money upon it; it merely imports a liability of the bank to the depositor for the moneys deposited, and an agreement to repay them at such time and in such manner as he shall direct.

Since that case, however, it has been declared by an inferior court, under a particular by-law, that it is error for the court to charge that possession of a bank book by a stranger constitutes no evidence of the right to draw money upon it, since this completely ignores the rule under which the deposit is received, providing that the pass book shall be the evidence of the depositor's property in the in-

cuse that is not discoverable in the findings now before us, tending to show that the failure to make such a comparison is not at variance with the requirements of ordinary care. We think the finding most favorable to the appellant, to wit, that the defendant made no physical comparison of the signatures upon the five drafts with the signature of Ellen Neville in the defendant's signature book, does not support the conclusion of law to the effect that the complaint should be dismissed, and for that reason the judgment herein should be reversed.

This view of the case renders it unnecessary to pass upon the exceptions to rulings that may not be repeated upon another trial, nor upon the extent of the appellant's rights in case she should recover a judgment, and it should appear that, as one of the surviving sisters of Ellen Neville, she has already received a part of the fund which she now seeks to get in her representative capacity.

The judgment herein should be reversed, and a new trial granted, with costs to abide the event.

Cullen, Ch. J., and O'Brien, Bartlett, Haight, and Martin, JJ., concur.

Vann, J., concurring:

I concur for reversal, but upon a more radical ground. While the defendant

could have adopted a rule that would cover a payment made in good faith to a person in possession of the pass book of a deceased depositor, it had not done so when the payments in question were made. As its rules then stood, such a payment bound the depositor while he was alive, but did not bind his estate after he was dead, for they expressly provided that "on the decease of any depositor the amount standing to the credit of the deceased shall be paid to his or her legal representatives when legally demanded." This rule is absolute, and a part of the contract. It is the law of the case made by the parties. The language is that of the bank, and hence, if ambiguous, is to be construed in favor of the depositor, who is not responsible for the ambiguity. If we add to it, in effect, the proviso, "But payment to one presenting the pass book of a deceased depositor shall be good unless the bank has notice of the death," we make a new contract. I repeat, as applicable to the case in hand, what we recently said in another case: "This latter by-law is for the protection of the depositor, who can no longer protect himself, and therefore the bank is bound to see that payment was made to the proper person. Payment to any other person is made at the bank's peril." *Mahon v. South Brooklyn Sav. Inst.* 175 N. Y. 69, 72, 96 Am. St. Rep. 603, 67 N. E. 118.

stitution, and the presentation of the book shall be sufficient authority to the bank to make any payment to the holder of it. *Geitelsohn v. Citizens' Sav. Bank*, 17 Misc. 574, 40 N. Y. Supp. 662, Reversing 17 Misc. 57, 39 N. Y. Supp. 840. (As to matters of evidence, see *infra*, VI.)

Unless, at the time of the payment, some fact or circumstance is brought to the attention of the bank's officers calculated to excite suspicion and inquiry by an ordinarily careful person, the bank will be discharged by payment of the account of a depositor, who is personally not known to the officers of the bank and who cannot write, to a person who presents the book and answers correctly all the questions contained in the signature book. *Geitelsohn v. Citizens' Sav. Bank*, 17 Misc. 574, 40 N. Y. Supp. 662, Reversing 17 Misc. 57, 39 N. Y. Supp. 840.

Yet it cannot be said, as a matter of law, that a bank exercised ordinary care and diligence in protecting the depositor, when the depositor could not read or write, and the teller merely asked the person presenting the book her age, whether she was married, her name, her husband's name, and where she was born; and it was held that a verdict denying that the bank exercised such reasonable care and diligence should not be disturbed. *Abramowitz v. Citizens' Sav. Bank*, 17 Misc. 297, 40 N. Y. Supp. 385.

Where the depositor subscribed the by-laws, which provided that "the institution will not be responsible for loss sustained when a depositor has not given notice of his book being stolen or

lost, if such book be paid in whole or in part on presentment;" and the book was stolen, and the account drawn by a person pretending to be the depositor, who had not given notice of the theft,—it was held, on the one hand, a payment to the wrong person upon presentment of the book, even before notice of loss, if it were presented under such circumstances or in such a manner as would tend to excite suspicion, or put a man of ordinary prudence upon inquiry, would not exonerate the institution, whose officers should be held to the exercise of reasonable care and diligence; but, if using such care and diligence, but lacking the present means of identifying the depositor, they pay, upon presentation of the book by one apparently in the lawful possession of it as its owner, the institution has a right to rely upon the contract of the depositor safely to keep the evidence of his claim, or to make known its loss before it is presented for payment, and is accordingly not liable to the depositor for the amount of the deposit. *Sullivan v. Lewiston Inst. of Savings*, 56 Me. 507, 96 Am. Dec. 500.

But under this rule reasonable care is not exercised by the bank when its officers make a payment to a person unknown to them, who merely presents the bank book of a depositor, when they have not in a place convenient for reference the signature of the depositor, and do not exact from the applicant a signature made at the time, for comparison, and require no further proof of identity. *Ladd v. Augusta Sav. Bank*, 96 Me. 516, 58 L. E. A. 288, 52

CONNECTICUT SUPREME COURT OF ERRORS.

Mary A. CHASE

v.

WATERBURY SAVINGS BANK, *Appt.*

(77 Conn. 295.)

1. An assignment that the court erred "in charging the jury as certified to in the printed record," without pointing out the error complained of, raises no question which the appellate court is bound to review.
2. A depositor in a savings bank, by accepting and using a deposit book, assents to and is bound by the rules printed therein regulating the method of withdrawing money.
3. A regulation printed in the deposit books of a savings bank, relieving the bank from liability for any fraud that may be practised on its officers in withdrawing money by means of forged certificates, does not relieve the bank from its duty to exercise ordinary care to prevent payment to the wrong person.
4. Negligence of a depositor in a savings bank in failing to keep his deposit book where it will not fall into the hands of persons who will fraudulently withdraw the deposit does not relieve the bank from liability in case it is guilty of negligence in paying out a deposit to one not authorized to receive it.
5. A depositor in a savings bank is not estopped to hold the bank responsible in case it negligently pays the deposit to an unauthorized person by the

Atl. 1012. (As for the obligation to require a signature for comparison, see *infra*, IV. g.)

And proof that the paying teller of a savings bank personally knew the depositor, and yet paid over his account to a stranger presenting his pass book, without any inquiry, is sufficient to sustain a finding that the bank did not exercise ordinary care and caution under the circumstances, but was guilty of negligence. *Geitelsohn v. Citizens' Sav. Bank*, 20 Misc. 84, 45 N. Y. Supp. 90, affirming 19 Misc. 422, 44 N. Y. Supp. 89.

But it was sufficiently established, to support a verdict for a bank, that it exercised all necessary care in making a payment to one producing a pass book, upon proof by a bank officer, testifying from a book of the bank, without which witness admitted that he would not have remembered the transaction at all, that the individual answered correctly the questions put to her, and that all the formalities required in paying out the money were complied with. *Hales v. Seamen's Bank*, 28 App. Div. 407, 51 N. Y. Supp. 140.

c. Payment upon impersonation of the depositor, combined with forgery.

Where the fraudulent applicant presents with the book a receipt or withdrawal slip signed with the name of the depositor, the care required of the bank's officials would seem naturally to be greater in proportion to the ease of verifying the applicant's claim of identity with the depositor.

Under the usual by-law provisions that the

fact that he also is negligent in the care which he takes of his bank book.

6. Whether or not a savings bank is negligent in failing to preserve the signatures of depositors for comparison, in paying money on forged orders without comparing the signatures, and in issuing a duplicate book without requiring adequate proof of the destruction of the original one, are questions for the jury.

(November 11, 1904.)

APPEAL by defendant from a judgment of the Superior Court for Litchfield County in plaintiff's favor in an action brought to recover a savings-bank deposit. *Affirmed.*

The facts are stated in the opinion.

Mr. Nathaniel R. Bronson, for appellant:

Payment on presentation of the pass book was sufficient.

Eaves v. People's Sav. Bank, 27 Conn. 229, 71 Am. Dec. 59; *Schoenwald v. Metropolitan Sav. Bank*, 57 N. Y. 418; *Levy v. Franklin Sav. Bank*, 117 Mass. 448; *Donlan v. Provident Inst. for Savings*, 127 Mass. 183, 34 Am. Rep. 358; *Goldrick v. Bristol County Sav. Bank*, 123 Mass. 321; 5 Cyc. Law & Proc. p. 608; *McCaskill v. Connecticut Sav. Bank*, 60 Conn. 308, 13 L. R. A. 737, 25 Am. St. Rep. 323, 22 Atl. 568; 2

bank will endeavor to prevent fraud, but that all payments to persons producing pass books shall be valid payments to discharge the bank, when the evidence does not show any effort on the part of the bank to ascertain whether the person presenting the book was entitled to its custody, and no questions appear to have been asked, although the teller was requested to prepare the draft signed by the person to whom the payment was made, and did so, the bank assumes the obligation of ordinary care, and must employ it in all cases where a demand is made, as, for instance, by a simple test, made by an examination of the signature of the depositor, if he can write, or an interrogation as to the number of the book, or as to the residence and antecedents of the person presenting the draft, which would perhaps be a sufficient compliance with the obligation assumed by the bank, if nothing suspicious appears as a result of the examination. *Cornell v. Emigrant Industrial Sav. Bank*, 9 N. Y. S. R. 72.

And, notwithstanding an agreement between a depositor and a savings bank, contained in the by-laws printed in the pass book, that all payments made to any person producing the proper pass book shall be good and valid payments, the bank continues liable for the moneys deposited, if, with the exercise of ordinary care, it could have prevented the perpetration of fraud upon it by the person presenting the pass book. So where the evidence showed that there was a marked difference between the signature of the depositor in the signature book kept by

Morse, Banks & Banking, § 620, p. 1030; *Cosgrove v. Provident Inst. for Savings*, 64 N. J. L. 653, 46 Atl. 617; *Smith v. Brooklyn Sav. Bank*, 101 N. Y. 63, 54 Am. Dec. 653, 4 N. E. 123; *Hayden v. Brooklyn Sav. Bank*, 15 Abb. Pr. N. S. 297; *Burrill v. Dollar Sav. Bank*, 92 Pa. 134, 37 Am. Rep. 669; *Allen v. Williamsburgh Sav. Bank*, 69 N. Y. 314; *Israel v. Bowery Sav. Bank*, 9 Daly, 507; *Mitchell v. Home Sav. Bank*, 38 Hun, 257; *Hales v. Seamen's Bank for Savings*, 28 App. Div. 407, 51 N. Y. Supp. 140; *Gifford v. Rutland Sav. Bank*, 63 Vt. 113, 11 L. R. A. 749, 25 Am. St. Rep. 744, 21 Atl. 340; *Heath v. Portsmouth Sav. Bank*, 46 N. H. 78, 88 Am. Dec. 194; *Sullivan v. Lewiston Inst. of Savings*, 56 Me. 507, 96 Am. Dec. 500; *Appleby v. Erie County Sav. Bank*, 62 N. Y. 12; *Reinstein v. Watts*, 84 Me. 139, 24 Atl. 719; *Wall v. Provident Inst. for Savings*, 3 Allen, 96; *First Nat. Bank v. First Nat. Bank*, 151 Mass. 283, 21 Am. St. Rep. 450, 24 N. E. 44; *Gloucester Bank v. Salem Bank*, 17 Mass. 33; *First Nat. Bank v. First Nat. Bank*, 4 Ind. App. 355, 51 Am. St. Rep. 221, 30 N. E. 808; 2 Am. & Eng. Enc. Law, p. 110.

the bank and the signature to the forged withdrawal slip on which the payment was made; and, also, there was no evidence that there had been any comparison made between them at the time of the payment,—there was sufficient evidence to go to the jury on the question whether ordinary care had been used by the bank. *Tobin v. Manhattan Sav. Inst.* 6 Misc. 110, 26 N. Y. Supp. 14, affirming 3 Misc. 628, 23 N. Y. Supp. 1165.

In *Kummel v. Germania Sav. Bank*, 127 N. Y. 488, 13 L. R. A. 780, 28 N. E. 398, the rule provided that the bank would not be responsible for any fraud committed on the officers in producing the pass book and drawing money without the knowledge or consent of the owner; and when a payment was made to one presenting the book and a receipt, and the applicant was asked by the cashier where he lived, and gave different answers, but was not asked any further questions, and was then paid the money,—it was held that the question of the bank's negligence was clearly for the jury, since it affirmatively appeared that the cashier did not avail himself of the means at hand to identify the person presenting the pass book and the forged receipt.

In a case, however, where the clerk making the payment "judged from the first that the signature to the receipt was not exactly right," asked the person presenting it if he could not write a more fluent hand, receiving from the applicant the explanation that he was not feeling well, and then put to him questions appearing upon the signature book, which were correctly answered, it was held that the question was involved in more doubt; but that, since the signature was such as to lead the clerk, an interested witness, to judge that it was not right; and since the two signatures were before the court and jury for comparison, upon which the variance might have been so great as, of itself, to put a prudent person on

Mr. Frank W. Etheridge, for appellee:

If, by by-laws or stipulations with depositors, an incorporated savings bank can discharge itself from the legal responsibility of its public employment and the duties it was created to perform, it is to be presumed that the by-laws and stipulations made by the bank were not designed thus to defeat the intention with which the legislature passed the act of incorporation, and such by-laws and stipulations do not relieve the bank from the duty of exercising reasonable care.

Kimball v. Norton, 59 N. H. 1, 47 Am. Rep. 173.

A payment to the wrong person upon presentation of a deposit book, if it is presented under such circumstances or in such a manner as would tend to excite suspicion, or put a man of ordinary prudence upon inquiry, will not exonerate the bank, even where there is a by-law of the bank (assented to by the depositor, authorizing such payment.

Sullivan v. Lewiston Inst. of Savings, 56 Me. 507, 96 Am. Dec. 502; *Gifford v. Rutland Sav. Bank*, 63 Vt. 108, 11 L. R. A. 794,

inquiry,—the question was considered to be one for the jury. *Ibid.*

It is error to refuse to allow the jury to pass upon the question whether the bank was guilty of negligence in making a payment to one presenting a pass book, when an officer of the bank admitted, in his testimony, that, after making a comparison of the signature of the depositor in the signature book and the forged draft check upon which the payment was made, he could readily distinguish the forgery; and that, when the fraudulent claimant presented the book, he thinks he did not ask him the questions set down opposite the name of the depositor in the signature book; and that, on account of a rush of business, if a signature presented was a tolerably good one the bank officers paid it without asking any questions; and this is error in spite of a by-law by which the "bank will not be responsible for frauds committed on the officers by producing the pass book and drawing money without the knowledge or consent of the owner." *Saling v. German Sav. Bank*, 15 Daly, 386, 7 N. Y. Supp. 642.

So the court refused to disturb a finding of negligence in a savings-bank officer making a payment to a person presenting the pass book with a forged check signed with the name of the depositor, when, being doubtful of the genuineness of the signature after comparing it with the signature upon the signature book, he required the person presenting it to indorse the depositor's name upon the check, and paid it without further inquiry; the bank should have taken steps to test the identity of the individual, in compelling him to produce some evidence or other person to identify him. *Hager v. Buffalo Sav. Bank*, 10 Misc. 455, 31 N. Y. Supp. 448.

A verdict for the plaintiff, in an action against a savings bank for the amount of a deposit paid to a stranger presenting the book, will not be disturbed where the depositor could

25 Am. St. Rep. 744, 21 Atl. 340; *Ladd v. Augusta Sav. Bank*, 96 Me. 516, 58 L. R. A. 288, 52 Atl. 1012; *Allen v. Williamsburgh Sav. Bank*, 69 N. Y. 314.

Even if plaintiff was negligent, her negligence did not excuse the bank officers from the exercise of reasonable care in the adoption of suitable means of preventing such mistake, and in making payments to wrong persons.

Ladd v. Augusta Sav. Bank, 96 Me. 512, 58 L. R. A. 288, 52 Atl. 1012; *Brown v. Merrimack River Sav. Bank*, 67 N. H. 549, 68 Am. St. Rep. 700, 39 Atl. 336; *Geitelsohn v. Citizens' Sav. Bank*, 17 Misc. 574, 40 N. Y. Supp. 662; *Ladd v. Androscoggin County Sav. Bank*, 96 Me. 520, 52 Atl. 1016; *People's Sav. Bank v. Cupps*, 91 Pa. 315.

A party setting up an estoppel must show that he exercised good faith and diligence in endeavoring to ascertain the truth.

Morgan v. Farrel, 58 Conn. 427, 18 Am. St. Rep. 282, 20 Atl. 614; *Bigelow, Estoppel*, 480; *Moore v. Bowman*, 47 N. H. 499; *Odlin v. Gove*, 41 N. H. 465, 77 Am. Dec. 773.

merely make his mark, and the person paid made a mark which was observed by the bank's officers to be different from the mark made by the depositor in the signature book, whereupon the stranger returned with another man who identified him as a depositor, but not as the depositor in question, and the bank made no further effort to ascertain the truth of the statements made, although the place of business of the depositor was around the corner from the bank. *Rosen v. State Bank*, 32 Misc. 231, 65 N. Y. Supp. 666.

And where there were circumstances calculated to raise suspicions of the identity of the applicant, the marked difference between the signature of the depositor and of the applicant arresting the attention of the bank's officials, who required him to identify himself, which he attempted to do, these facts were ample to sustain a finding of negligence in the bank's officers. *Wegner v. Second Ward Sav. Bank*, 76 Wis. 242, 44 N. W. 1096.

But it has been held, in so many words, that the proposition that a mere difference in the signatures requires a submission of the case to the jury on the question of the negligence of the bank's officers is not sound. *Ferguson v. Harlem Sav. Bank*, 43 Misc. 10, 86 N. Y. Supp. 825.

Accordingly, under the usual by-law regulation that the bank would endeavor to prevent fraud, but that payments to persons producing the pass book should be valid payments to discharge the bank, where it was proved by an officer of the bank, and uncontradicted, that a few irregularities in the signature to the draft aroused his suspicion, that he then asked all the test questions required for identification, and that the fraudulent claimant correctly answered all of them, whereupon the payment was made, the bank had a right to rely upon the appearances thus presented; and hence a verdict should have been directed for the defendant bank *Ibid.*
69 L. R. A.

Bankers are presumed to know the signatures of their depositors.

Weisser v. Denison, 10 N. Y. 68, 61 Am. Dec. 733; *Hardy v. Chesapeake Bank*, 51 Md. 562, 34 Am. Rep. 325; *National Park Bank v. Ninth Nat. Bank*, 46 N. Y. 77, 7 Am. Dec. 310; *Allen v. Williamsburgh Sav. Bank*, 69 N. Y. 314; *Frank v. Chemical Nat. Bank*, 84 N. Y. 209, 38 Am. Rep. 501.

The rights of the parties are founded upon contract, and the questions of contributory negligence and estoppel are not properly in the case.

Brown v. Merrimack River Sav. Bank, 67 N. H. 549, 68 Am. St. Rep. 700, 39 Atl. 336.

The measure of the bank's duty is good faith and reasonable care, and, failing in this, it still continues liable to the depositor, where it has made payment to the wrong person, notwithstanding such person presented the book at such time.

Sullivan v. Leuiston Inst. of Savings, 56 Me. 507, 96 Am. Dec. 500; *Ladd v. Augusta Sav. Bank*, 96 Me. 510, 58 L. R. A. 288, 52 Atl. 1012; *Kimball v. Norton*, 59 N. H. 1, 47 Am. Rep. 171; *Brown v. Merrimack River Sav. Bank*, 67 N. H. 549, 68 Am. St. Rep.

Where the applicant presented the book, and, pretending to be the depositor, wrote a check for the amount, which was carefully compared by the teller with the signature of the depositor in the book kept for that purpose, and the payment was then made, it was held in the leading New York case that a nonsuit after the refusal to allow the plaintiff to go to the jury on the question whether the alleged failure to discover any discrepancy between the genuine signature and the disputed one was negligence was not error. If, however, the two signatures were so dissimilar that when they were compared the discrepancy would be easily discovered by a person competent for the position of teller, then the failure to discover it would be evidence of negligence which should have been passed upon by the jury; but it would not be evidence of negligence if the difference was not marked and apparent, or if it would require a critical examination to detect it, and especially if the discrepancy was one as to which competent persons might easily differ in opinion. But, nevertheless, the bank will not be discharged by a payment upon the production of the pass book, irrespective of the exercise of ordinary care and diligence upon the part of the teller in discovering the dissimilarity in the signatures and instituting further inquiry. *Appleby v. Erie County Sav. Bank*, 62 N. Y. 12.

And where the defendant's officer testified that he compared the signature of the draft ticket presented with the pass book, and then asked the person presenting it his name, where he was born, in what ship he came to this country, and his mother's maiden name, all of which he answered correctly according to the signature book, and the officer then paid the amount demanded, upon the strength of the comparison and these answers, the majority of the court held that this evidence, not being rebutted or contradicted in any way, presented no

700, 39 Atl. 336; *Appleby v. Erie County Sav. Bank*, 62 N. Y. 12; *Allen v. Williamsburgh Sav. Bank*, 69 N. Y. 314; *Gearns v. Bowery Sav. Bank*, 135 N. Y. 557, 32 N. E. 249; *Tobin v. Manhattan Sav. Inst.* 6 Misc. 110, 26 N. Y. Supp. 14.

Whenever the depositor is able to write, no bank can claim to be in the exercise of reasonable care unless, before payment, it makes comparisons of signatures.

Handwriting is, and has been for ages, the test of identity.

Allen v. Williamsburg Sav. Bank, 69 N. Y. 314; *Boone v. Citizens' Sav. Bank*, 84 N. Y. 83, 38 Am. Rep. 498; *Smith v. Brooklyn Sav. Bank*, 101 N. Y. 63, 54 Am. Dec. 653, 4 N. E. 123; *Kummel v. Germania Sav. Bank*, 127 N. Y. 488, 13 L. R. A. 786, 28 N. E. 398.

Rules do not dispense with the exercise of ordinary care on the part of the officers of the bank.

Appleby v. Erie County Sav. Bank, 62 N. Y. 17; *Kummel v. Germania Sav. Bank*, 127 N. Y. 491, 13 L. R. A. 786, 28 N. E. 398; *Israel v. Bowery Sav. Bank*, 9 Daly, 507; *Ladd v. Augusta Sav. Bank*, 96 Me. 510, 58

L. R. A. 288, 52 Atl. 1012; *Sullivan v. Lewiston Inst. of Savings*, 56 Me. 507, 96 Am. Dec. 500; *Allen v. Williamsburgh Sav. Bank*, 69 N. Y. 314.

A bank neglecting to obtain the signature of a customer is presumed to be familiar with his signature.

Weisser v. Denison, 10 N. Y. 68, 61 Am. Dec. 731.

It makes unlawful payment at its peril.

Tobin v. Manhattan Sav. Inst. 6 Misc. 110, 26 N. Y. Supp. 14.

Hall, J., delivered the opinion of the court:

From April 1, 1887, to September 26, 1900, the plaintiff made in person 25 deposits in the defendant's savings bank, which, with dividends added at the rate declared by the bank, amounted at the time of the trial, in March, 1904, to \$3,230. The plaintiff has neither herself withdrawn any part of said sum, nor has she given any order for any payment to others. Upon four occasions between December 31, 1901, and March 3, 1902, the plaintiff's daughter Mrs. Keith, who, with her husband, lived with

question of fact for the jury, but only one of law for the court, on the issue of the negligence of the bank in making the payment. *Wall v. Emligrant Industrial Sav. Bank*, 64 Hun, 249, 19 N. Y. Supp. 194.

And, going still further, it is held that there is no evidence on which to go to the jury on the question of negligence in the savings-bank officers, where the usual test questions are put to the person presenting the pass book and draft, and are all answered correctly, except that the occupation of the depositor is given as "stone mason" when it was originally given as "stone cutter" (but here there is no mention in the report of a physical comparison of the signature of the draft with that in the signature book), when it appears that the genuine depositor had made six separate deposits after the alleged fraudulent draft, which was shown in the pass book at all those times. *Ferguson v. Harlem Sav. Bank*, 92 N. Y. Supp. 261.

Where a deposit was made in the name of another person than the depositor, and the person presenting the book, after the death of the depositor, was questioned as to various matters apparently identifying him, answered the description of the depositor, and made a signature which was compared by the official representing the bank with the genuine signature of the depositor on file, and was thought by him to resemble it sufficiently; and the finding of a referee was that the official had used reasonable and ordinary care and diligence in making the payment,—the latter was entitled to the protection given to such a payment by the bank's by-laws. *People v. Third Ave. Sav. Bank*, 98 N. Y. 661.

It was also held that when the deposit was made with false descriptions of the depositor's name, occupation, and age, his administrators were properly defeated, where the bank official acted in good faith, and with ordinary care and diligence, in making the payment to one an-

swering the description, and the questions were put to him satisfactorily, and his signature was thought by the bank's representative to correspond sufficiently to that of the depositor. *Ibid.*

In *Gifford v. Rutland Sav. Bank*, 63 Vt. 108, 11 L. R. A. 794, 25 Am. St. Rep. 744, 21 Atl. 340, the majority of the court held that, where a bank had not been notified of the loss of the book, and the depositor was not personally known to any officer of the bank, not having been present when the deposit was made, and the applicant was also unknown to them, but came with the book apparently lawfully in his possession, and on inquiry answered correctly that the money was originally sent for deposit by letter, that being a fact not likely to come to the knowledge of persons not having to do with and interested in the deposit, and although he wrote awkwardly the middle initial of the depositor's name, and comment was made upon it by the bank officer making the payment, the bank was not bound to require the thief to identify himself further than he did by producing the book, there being no circumstances which the court considered suspicious.

Where the evidence as to the diligence used by the bank teller to identify the person presenting the book was not very definite or positive, but he admitted that he testified rather from his usual way of transacting such business than from recollection of what inquiries he made, and there were proved the presentation of the book, the presence of the husband of the depositor, and his assent to the payment, no circumstances of suspicion being shown to be apparent, the signing of the initials of the depositor, and a memorandum made by the teller at the time showing that he "tested" the validity of the claim,—it was held that the evidence, on the whole, would sustain a finding of a referee that the teller made the

the plaintiff, obtained money from the bank, amounting in all to \$500, by presenting the plaintiff's bank book, of which she had fraudulently obtained the possession, and by presenting with the bank book forged orders purporting to have been signed by the plaintiff, directing payment to be made to Mrs. Keith of the sums named in the orders. Early in April, 1902, Mrs. Keith confessed to her mother that she had drawn money upon the bank book, but claimed that she could obtain no more without an order from the plaintiff, and offered to write to the bank and secure a reply which would satisfy the plaintiff, and a few days later read to her mother what purported to be a letter from the bank to the effect that no further money could be drawn on the plaintiff's account without an order from the plaintiff, and that it would be all right. Thereafter the plaintiff kept her bank book locked up in a more secure place, but did not then notify the bank that her daughter had thus wrongfully obtained possession of the bank book and drawn the money. On the 16th of April, 1902, Mrs. Keith presented at the bank to Mr. Merriman, the defendant's

bookkeeper, a forged letter of that date, purporting to have been signed by the plaintiff, addressed to the treasurer of the bank, representing that the plaintiff had accidentally destroyed her bank book, and requesting that a new one be issued in its place, and further stating that the plaintiff was an invalid, and had sent her daughter Mrs. Keith to get the new book, and had inclosed an order for money. Mr. Merriman informed Mrs. Keith that a new book could not be issued until a bond had been given to the bank, and prepared and gave to Mrs. Keith a form of a bond, with instructions to have it executed by the plaintiff and some responsible person as surety. On the following day Mrs. Keith presented the bond to Mr. Merriman at the bank, with the plaintiff's name as principal, and the name of another person as surety signed thereto. Both signatures were forgeries. In the absence of the treasurer of the bank, and without inquiring as to the responsibility or existence of the person whose name appeared as surety on the bond, and without submitting the matter to the "board of direction," or to "a committee appointed for that pur-

payment after "due inquiry." *Hayden v. Brooklyn Sav. Bank*, 15 Abb. Pr. N. S. 297.

For a case denying the responsibility of the bank for payment to an applicant who sent the book with a forged order through the mail, the decision being based upon a strong by-law, without special regard to the degree of care required of the bank, see *supra*, II.—*Burrill v. Dollar Sav. Bank*, 92 Pa. 134, 37 Am. Rep. 669.

d. Payment upon forged orders alone.

In considering the question of what degree of care must be exercised by the bank in cases where the pass book is presented by one who does not pretend to be the depositor, with a forged order purporting to be executed by the latter, the inquirer is met by the difficulty presented by the construction of by-laws governing the transaction and intended to limit the liability of the bank for payment to fraudulent claimants, which by-laws frequently make no provision for irresponsibility in case of payment to a fraudulent claimant whose fraud consists simply in the production of a forged order purporting to be signed by the depositor, and not in pretending to be the depositor himself.

Thus, where the bank had no by-law limiting its liability in case a depositor's bank book should be lost or stolen, and the bank, without notice of such loss, made a payment to a person who falsely impersonated the depositor and presented the book, and did pay out the account upon a forged order, no question of negligence either of the depositor or of the bank officials was involved, and the liability of the bank rested solely on the contract found in the bank's regulations providing that "money deposited may be withdrawn, in whole or in part, by the depositor, or by any other person duly authorized, at any time without notice." *Ladd v. Androscoggin County Sav. Bank*, 96 Me. 520, 52 Atl. 1016.

Where the bank's rule provided only for

payment to the depositor or his order, payment upon a forged order was not good payment, since a forged authority is no authority at all. *Eaves v. People's Sav. Bank*, 27 Conn. 229, 71 Am. Dec. 59.

Similarly, where the by-law involved was, "as the officers of this institution may be unable to identify every depositor transacting business at the bank, the institution will not be responsible for loss sustained where the depositors have not given notice that their books have been stolen or lost," it was held (following *Kimins v. Boston Five Cents Sav. Bank*, 141 Mass. 33, 55 Am. Rep. 441, 6 N. E. 242) that this exonerated the bank for payment to one who falsely impersonated the depositor, but not for payment to one who falsely claimed to act under authority from the depositor; and hence payment to one presenting the book with a forged order purporting to be signed by the depositor was not excused. *Kingsley v. Whitman Sav. Bank*, 182 Mass. 252, 94 Am. St. Rep. 650, 65 N. E. 161.

But where one of the rules of the bank was to the effect that, "as the officers of the institution may be unable to identify every depositor, the corporation will not be responsible for loss sustained, where a depositor has not given notice of his book being stolen or lost, if such book be paid in whole or in part on presentment;" and "in all cases a payment upon presentment of a deposit book shall be a discharge to the corporation for the amount so paid;" and the fraudulent claimant presented not only the deposit book, but also a forged order purporting to be signed by the depositor it was held that the argument that the by-law was intended solely to protect the bank against the risk of mistake as to the personal identity of its depositors, and therefore that it did not apply to a case where there was no mistake as to identity, but the payment was made upon a forged order purporting to be signed by the

pose," Mr. Merriman issued and delivered to Mrs. Keith a new book, in the name of the plaintiff, with the balance due upon the first book transferred thereto, and at the same time paid to Mrs. Keith \$300 upon a forged order presented by her, dated April 16, 1902, purporting to have been signed by the plaintiff, and directing said sum to be paid to Mrs. Keith upon the amount due upon the first book. Six payments, amounting to \$1,700, were made by the bank to Mrs. Keith upon presentation of said second book with forged orders of the plaintiff; the last payment having been made on the 27th of October, 1902. The plaintiff had no knowledge of the existence of said second book, nor of the payment of any of the money drawn by her daughter thereon, until informed of these facts by the bank on the 1st of November, 1902, when she immediately obtained from her daughter the second book, and \$20 of the money which she had fraudulently drawn. Said second book was issued and all the payments upon both bank books were made, by the bank in good faith, and upon the belief that the letter and orders purporting, to have been signed by the

plaintiff were genuine; and the plaintiff gave no notice to the defendant that Mrs. Keith had fraudulently obtained possession of the first book, and that said letter and orders were forgeries, until November 1, 1902.

The following statement was printed in the plaintiff's bank book:

"Take Care of This Book. If you lose it or mislay it give immediate notice to the bank, as, if it gets into improper hands, you may be defrauded."

Among the by-laws printed in plaintiff's book were these:

"Art. 13. Dividends and money withdrawn shall be paid only to the depositor, or to the depositor's order, or legal representative; but neither the principal nor interest of any deposit shall be paid to any person, unless the depositor's book of entries made by an officer of the corporation or of the direction shall be presented that such payments may be entered therein, or unless the depositor shall prove to the satisfaction of the board of direction, or a committee appointed for that purpose, that such book has been lost or destroyed, in which case

depositor, would be, perhaps, conclusive in favor of the depositor if it were not for the last clause, providing that the presentation of the book should be a discharge of the bank "in all cases." In either case the purpose of the by-law was to authorize the bank to rely upon the presentation of the book as its security against fraud; and if the bank, using reasonable care, and in good faith, paid the account upon presentation of the book, the bank was discharged. *Lery v. Franklin Sav. Bank*, 117 Mass. 448.

Where the rules and by-laws provided that "the secretary will use his best efforts to prevent frauds; but all payments to persons presenting the deposit book shall be deemed good and valid payments to depositors respectively," when a payment was made to a man presenting the book with an alleged forged order very much like the signature made at the time of the deposit, by the depositor, who was a woman, in the book kept for that purpose, it was held that, the rules allowing payment to anyone producing the pass book, no order for payment was required, and the question of the genuineness of the signature was wholly immaterial, and, this question being the only one given to the jury on the trial, a new trial was necessary. *Schoenwald v. Metropolitan Sav. Bank*, 57 N. Y. 418, Reversing 1 Jones & S. 440. This decision, however, has been practically overruled upon this point by *Allen v. Williamsburgh Sav. Bank*, 69 N. Y. 315, which, like the *Schoenwald Case*, is treated and distinguished in *KELLEY v. BUFFALO SAV. BANK*.

The by-law provided, in that case, that "the bank will use its best efforts to prevent fraud, but all payments made to persons producing the deposit books shall be deemed good and valid payments to depositors respectively," and the depositor's wife fraudulently applied to the bank for the money, presenting the pass book and a check with the forged signature of the depositor; and the jury were charged that

the only question for them to determine was whether the bank used its best efforts to secure the payment to the proper person. And, in affirming a judgment for the plaintiff, the court distinguished and limited *Schoenwald v. Metropolitan Sav. Bank*, 57 N. Y. 418, *supra*, in which, it was said, no special attention was given to the clause in the rules to the effect that the secretary would use his best efforts to prevent fraud. There the signature to the order used for the purpose of obtaining payment was very much like the signature of the depositor upon the signature book. From some statements in the *Schoenwald Case*, however, the court sharply dissented,—for instance, that to the effect that "a bank had a right to make the payment on the simple production of the pass book," the fact being that the depositor was a woman and the book was produced by a man, which fact at once notified the bank that it was not the depositor who applied for the payment; and in such a case it could not be that the bank officers should not be called to the exercise of inquiry and care. The officers of savings banks, acting under rules like those under discussion, are bound to the exercise of care and diligence, up to the standard fixed for the bank by those rules, and, the book being produced by a person of the opposite sex from the depositor's, it was then necessary to rely upon an order from the depositor, and the bank could no longer depend upon the rule that the production of the pass book was enough to allow the payment. The case of *Appleby v. Erie County Sav. Bank*, 62 N. Y. 12, *supra*, was also distinguished upon the ground that the decision there, affirming the refusal of the trial court to give to the jury the question of the negligence of the bank, because the difference between the two signatures was not marked enough to the trial court to require it, was grounded upon the reason that the appellate court did not have the opportunity which the

the depositor or his legal representative shall lodge with the treasurer a written discharge."

"Art. 15. This bank will not be responsible to any depositor, or to his heirs or assigns, for any fraud that may be practised upon any of the officers of this institution by forged signatures, or by presenting a depositor's book, and drawing money without the knowledge or consent of the owner. And all entries of money paid, made in the depositor's book by an officer of the institution, shall be deemed good and valid evidence of money paid, and shall exonerate this bank from any liability on account of any fraud practised in drawing the money of any depositor."

The above facts appear to have been proved at the trial beyond controversy.

Whether the officers of the bank exercised reasonable care in issuing the second book, and in making the payments to Mrs. Keith upon the first and second book upon the forged orders, and whether the plaintiff was negligent in failing to keep her first bank book in a safe place, and in not notifying the bank that her daughter had fraudulently

drawn money on the first book when she learned of it, in April, 1902, were among the disputed questions of fact at the trial.

The only properly assigned reasons of appeal are the denial of the defendant's motion for a new trial upon the ground that the verdict was against the evidence, and the failure of the trial judge to charge the jury in accordance with the specific requests set forth in the appeal. The last reason of appeal, that "the court erred in charging the jury as certified to in the printed record," is not a proper assignment of error. It fails to point out the particular errors complained of in a charge covering 12 pages of the printed record, and therefore raises no question which this court is bound to review. Gen. Stat. 1902, § 802; *Hayden v. Fair Haven & W. R. Co.* 76 Conn. 355-365, 56 Atl. 613; *Simmonds v. Holmes*, 61 Conn. 1-9, 15 L. R. A. 253, 23 Atl. 702.

The substance of the several requests contained in the appeal may be fairly stated as these four requests to charge: First, that article 15 of the by-laws was sufficient authority to the bank for the payments

trial court had to inspect the signatures, and also upon the ground that there the person presenting the book was of the same sex as the depositor. *Allen v. Williamsburgh Sav. Bank*, 69 N. Y. 314.

It was also held that, because the bank had stipulated to use its best efforts to prevent fraud, it was proper to refuse to charge that, if the bank's officers exercised ordinary care and diligence, and paid in good faith, it was excused; in the *Appleby Case*, 62 N. Y. 12, *supra*, also, the contract of the bank did not call for its best efforts, but only for its "endeavor." *Ibid.*

In regard to the sufficiency of the facts put in evidence to show negligence in the defendant bank, in a case where the thief produced the book and a check with the forged signature of the depositor, and the cashier paid it after comparing the signature with that of the depositor in the signature book, it was held, upon the question whether the cashier used reasonable care in the comparison, that what the jury were to determine was what degree of significance would be attached to the differences observed in the signatures, not by a common person, but by a skilled person such as the cashier was; from his examination and cross-examination a jury could judge not only of what was the effect upon his mind caused by his comparing the signatures, but of what would have been the effect if he had given due attention to what the dissimilarities indicated. *Fricke v. German Sav. Bank*, 24 Jones & S. 468, 4 N. Y. Supp. 627.

And if, at the time of the payment of a savings-bank account, a fact or circumstance is brought to the attention of the bank's officers which is calculated and ought to excite the suspicion and inquiry of an ordinarily careful person as to the identity or authority of the person making the demand, it is the duty of the bank to institute such an inquiry, and 69 L. R. A.

failure to do so presents a question as to the bank's negligence, for the consideration of the jury. And such a fact or circumstance is brought to the attention of the bank's officers when a person unknown to the bank's officers presents the pass book, together with a forged paper, apparently a power of attorney, signed with the name of the depositor in his individual capacity, and giving the holder authority to draw all funds to the credit of the depositor as executor of an estate mentioned in the instrument, when the funds actually deposited are to the credit of the depositor as administrator of another estate; since the forged paper, although it correctly gives the number of the pass book, does not relate at all to the deposit in question, and confers no authority on the person presenting it to draw the money, this furnishes sufficient grounds for suspicion, and the question of the defendant bank's negligence, in an action for the amount paid, should be submitted to the jury. *Gearns v. Bowery Sav. Bank*, 135 N. Y. 557, 32 N. E. 249.

But where the by-laws provided that payments to persons presenting the book, whether with or without an order or letter of attorney, purporting to be signed by the depositor, should be deemed good payments to depositors respectively, and discharge the bank; and payments were made to a man who presented with the book orders purporting to be signed by the depositor (who was a woman); and upon the trial both parties moved for a direction of a verdict; and the court made a finding in favor of the defendant,—it was held that, it being necessary to take the view of the evidence most favorable to the defendant, there was nothing in the evidence or in the attendant circumstances to put the bank upon such notice as to require it to exercise diligence other than such as would have been required by its rule in cases where only the deposit book was produced; and hence the finding was not disturbed. *Winter v.*

made to Mrs. Keith; second, that the plaintiff's failure to notify the bank that Mrs. Keith had fraudulently drawn money on her deposit book when she first learned of that fact prevented the plaintiff from recovering the sums paid by the bank to Mrs. Keith; third, that, if Mrs. Keith obtained possession of the deposit book through the carelessness of the plaintiff in her manner of keeping it, the plaintiff could not recover the money paid by the bank to Mrs. Keith by reason of her possession of the book; fourth, that the jury would not be justified in finding negligence on the part of the bank from the mere fact that signatures of depositors were not kept for the purpose of comparison, and that the fact that Mrs. Keith was a daughter of the plaintiff might be considered as partially excusing the officers of the bank for not having exercised greater caution.

By accepting from the bank and using, as she did, the deposit book, in which articles 13 and 15 of the by-laws were printed, the plaintiff assented to these regulations, and they became a part of the contract of deposit for the protection of the bank and

the depositor, and binding alike upon both. *Eaves v. People's Sav. Bank*, 27 Conn. 229-231, 71 Am. Dec. 59; *Donlan v. Provident Inst. for Savings*, 127 Mass. 183, 34 Am. Rep. 358; *Appleby v. Erie County Sav. Bank* 62 N. Y. 12. By the language of article 13, in the absence of any modifying agreement the bank was authorized to pay deposits and dividends only to the depositor or his attorney, or, in case of his death, to his legal representative; and the bank could not avoid liability for payment made upon a forged order to one who had fraudulently obtained possession of the deposit book, even by showing that such payment was made in good faith, and in the exercise of ordinary care, and in accordance with the general practice among savings banks. *Eaves v. People's Sav. Bank*, 27 Conn. 229-231, 71 Am. Dec. 59. It was evidently for the purpose of relieving the bank from so great a liability that the provisions of article 13 were modified by those of article 15. It was undoubtedly learned from experience that the depositors of a savings bank were so numerous that they could not all be personally

Williamsburgh Sav. Bank, 68 App. Div. 193, 74 N. Y. Supp. 140.

Where the husband of the depositor presented the book at the savings bank, which declined to pay until assured by the husband that he acted as agent for the wife, whereupon he was given a check, payable to wife's order, upon a national bank, which refused to pay it without the wife's indorsement, and the husband then returned to the savings bank and stated that he was authorized to do business for his wife, when an indorsement was written on the check by a bank officer in this form: "Ellen Clark, as

his
authorized by William X Clark. Witness,
mark

Frank Russell;" and upon this indorsement the national bank paid the money to the husband,—it was held that the savings bank was liable to the depositor for the payment, and hence that a judgment in her favor should not be disturbed; but upon entirely different grounds, one of the two justices saying that the question of the defendant's negligence in delivering the check to the fraudulent claimant was properly submitted to the jury, upon the evidence in the case, the deposit being marked in the pass book "special," and the evidence showing that notice was given to the bank by the depositor to pay to no one but herself; the other justice, however, declared that the savings bank, by giving only a check payable to the real depositor, which could not be paid without the depositor's indorsement, protected her against payment to any other person; but the national bank, in paying the check without the indorsement of the payee, was not authorized to charge the amount against the savings bank, for the savings bank was not bound by the indorsement, as to which its agent only witnessed and became responsible for the genuineness of the mark, and did not guarantee that the husband was authorized by the depositor to act for her; and hence 60 L. R. A.

the plaintiff was entitled to recover against the savings bank because the national bank had no right to charge against the savings bank's account the money paid on the check, and the savings bank had a good cause of action against the national bank. *Clark v. Saugerlies Sav. Bank*, 62 Hun, 346, 17 N. Y. Supp. 215.

In a case in which the liability of the bank for making the payment was simply assumed by the court, where a depositor's attorney drew out all her account upon presentation of the pass book and a forged order, and later deposited in the bank to her credit a less sum, and gave her the new pass book, it was held that, after drawing out the sum deposited by her attorney to her credit, she might recover from the bank the sum which he fraudulently drew before. The bank, being negligent in making the payment, always remained her debtor for the sum her attorney drew out, and that indebtedness could not be discharged by a payment on a forged order and a fraudulent surrender of the pass book; so when the additional sum was deposited by the attorney the bank owed her the sum of the two amounts, and the attorney still owed to the bank the amount he fraudulently drew. *Underhill v. Foughkeepsie Sav. Bank*, 32 Hun, 432.

e. Payment without either impersonation or forgery.

The reasonable care the lack of which renders the bank responsible for payments to fraudulent claimants may fall to be exercised in other matters than mere identification of the person presenting the pass book or a check or order, or than scrutiny and comparison of the signature on the paper presented. So when there is no impersonation of the depositor, and no pretense of presenting genuine paper signed by him, payment by the bank, to one who mere

known to its officers, that many of them were unaccustomed to writing, that they frequently kept their bank books where they were accessible to others, and that therefore in some instances competent officers, in the exercise of proper care and caution, would fail to detect forgeries and prevent imposition by persons presenting deposit books. It was clearly to protect itself against losses from such impositions, and not from losses which it was its duty to prevent, and which by the exercise of ordinary care it could prevent, that article 15 was adopted. By its provisions the bank was not relieved from its duty to exercise ordinary care to prevent payment to the wrong person, even though such person presented a deposit book, and in accepting this regulation the depositor agreed to bear the loss of a payment to the wrong person presenting the deposit book only to the extent that the bank acted reasonably. *Ferguson v. Harlem Sav. Bank*, 43 Misc. 10, 86 N. Y. Supp. 825; *Kummel v. Germania Sav. Bank*, 127 N. Y. 488, 13 L. R. A. 786, 28 N. E. 398; *Sullivan v. Lewiston Inst. of Savings*, 56 Me. 507, 96 Am. Dec.

ly pretends to be legally authorized to draw upon the account in question, will be at the peril of the institution.

Payment upon the production of a pass book by the father of the owner of a deposit, when the bank officers know him to be the depositor's father, but he is not his general guardian, is no protection to the bank, which in so paying does not exercise the ordinary care necessary in making payments, notwithstanding stipulations in the by-laws, binding upon the depositor, to the effect that the possession of the book shall be sufficient authority to warrant payments to the possessor. *Ficken v. Emigrants' Industrial Sav. Bank*, 33 Misc. 92, 67 N. Y. Supp. 143.

And in a case where an agent deposited money in a savings bank in the name of the principal, signing, as agent for the owner, a certificate which provided that the account might be withdrawn by the person who might present the book, or according to the charter and by-laws as set forth in the book of deposit delivered to the depositor; and these by-laws in the deposit book provided that, "as it will be impossible for the officers of the corporation to identify every depositor, the production of the book of deposit will be held to show that the person producing the same is legally authorized to receive the deposit; and the corporation will not be responsible for loss sustained when the book of deposit is so produced and the money paid entered thereon, unless the depositor has given notice to the treasurer that said book has been lost or stolen,"—it was held that this stipulation between the bank and the depositor did not relieve the bank from the duty of acting in good faith and with reasonable care, when the agent, without the knowledge of the depositor, abstracted the book and presented it to the bank, which took it in pledge knowing that the pledgor was not the apparent owner of the book, and without re-

500; *Ladd v. Augusta Sav. Bank*, 96 Me. 510, 58 L. R. A. 288, 52 Atl. 1012; *Gifford v. Rutland Sav. Bank*, 63 Vt. 108, 11 L. R. A. 794, 25 Am. St. Rep. 744, 21 Atl. 340; *Brown v. Merrimack River Sav. Bank*, 67 N. H. 549, 68 Am. St. Rep. 700, 39 Atl. 336; *Wegner v. Second Ward Sav. Bank*, 76 Wis. 242, 44 N. W. 1096. The by-law in question was therefore not a sufficient authority to the bank for payments negligently made to Mrs. Keith, and the court did not err in not charging the jury in accordance with the first request.

Nor did the trial court err in not charging in accordance with the second and third requests. Article 15 furnished a complete defense against liability for payments to Mrs. Keith made by the bank in the exercise of reasonable care. The second and third requests must therefore rest upon the claim that, under the doctrine of contributory negligence or of estoppel, the defendant would not be liable even for payments negligently made, if it also appeared that the plaintiff was negligent in not notifying the bank of the fraudulent acts of Mrs. Keith, or in not taking proper care of her bank

quiring him to produce evidence of his authority from the depositor, such as an assignment, order, or proof of delivery; and hence the depositor was entitled to the possession of the book discharged from the pledge. The stipulation between the parties (the court says) "does not mean that the bank is absolved from all obligation of caution. A depositor is a beneficiary of a fund held by the bank as trustee. The trustee is incorporated for the purpose of exercising care in the management and preservation of deposits. This object would not be accomplished by care in the investment of the fund, and recklessness in paying a deposit to a wrongful possessor of a book. . . . The by-law and agreement are to be construed according to the authorized business and organic object of the institution. The terms of deposit cannot be understood to make the books payable to bearer, like bank bills, without imputing to the trustee a deliberate and studied attempt to expose beneficiaries to a great and unnecessary peril of loss, and to deprive them of important security which the trustee was chartered to furnish." *Kimball v. Norton*, 59 N. H. 1, 47 Am. Rep. 171.

And similarly, in two decided cases payments were made under similar circumstances, but after the death of the depositor.

In *Hunter v. Wallace*, 14 U. C. Q. B. 205, the bank representative knew of the death of the depositor. According to his testimony the deposit was made with the express understanding that any person producing the pass book should be entitled to receive the amount of the deposit, and, upon payment, after the death of the depositor, to one of his connections, who later absconded, it was held that whatever the agreement was between the depositor and the bank's officer when the money was deposited, it was terminated by the death of the depositor, and the bank was bound, when its officer became aware of the death, to retain the money

book. If the question whether the plaintiff was negligent in these matters were a material one in this case, it may well be doubted whether the jury would have been justified in finding, upon the facts, that the exercise of reasonable care by the plaintiff to prevent the bank from being imposed upon required her to give notice in April, 1902, of her daughter's fraudulent acts, or to keep her bank book more securely than she did before she learned that her daughter had wrongfully obtained possession of it and drawn money upon it. The plaintiff knew that, by the by-laws of the bank, "neither the principal nor interest of any deposit" would be paid to any person "unless the depositor's book" should be presented. Upon learning of her daughter's acts she at once put the book where her daughter could not get possession of it. Can it be said that ordinary care required the plaintiff to anticipate that her daughter, without having possession of the deposit book, might continue to draw her money,

by procuring, as she did, by fraud and forgery, a new book to be issued? As to the plaintiff's alleged carelessness in leaving her bank book where Mrs. Keith could obtain possession of it, it appears that she kept it locked with other valuable papers in a bookcase drawer in the hallway on the second floor of her dwelling, with the key in her own sleeping room. Can depositors in savings banks be reasonably required, under ordinary circumstances, to take greater precautions in keeping their bank books? And especially could the plaintiff be reasonably expected to take greater precautions to prevent her own daughter from obtaining possession of the book before she learned that she had wrongfully drawn money upon it?

But without deciding whether there was sufficient evidence to go to the jury upon the question of the plaintiff's negligence had that been a material inquiry in this case, we hold that the bank would not have been exonerated from liability for payments neg-

until some one legally authorized should demand it.

*So in *Hoffmann v. Union Dime Sav. Inst.* 95 App. Div. 829, 88 N. Y. Supp. 686, Affirming upon this point 41 Misc. 517, 85 N. Y. Supp. 16 (treated *infra*, IV. f), where a depositor had given her attorney a power of attorney, which he presented after her death with the pass book, and the bank paid without knowledge of the death, it was held, in spite of the by-law's provision for discharge for payments to persons producing the pass book with or without a letter of attorney, that, since the by-laws also provided that on the death of any depositor the amount standing to his credit should be paid only to his legal representative, the payment must be made good to the administrator. This decision, however, as based simply upon the by-law, seems to have been overruled (except in the opinion of Vann, J.) by *KELLEY v. BUFFALO SAV. BANK.* (See also, *Farmer v. Manhattan Sav. Inst.* 60 Hun, 462, 15 N. Y. Supp. 235, and *Podmore v. South Brooklyn Sav. Inst.* 48 App. Div. 218, 62 N. Y. Supp. 961, Affirmed in 175 N. Y. 69, 96 Am. St. Rep. 603, 67 N. E. 118, in the following subdivision.)

f. Payment after the death of the depositor.

When the fraud is perpetrated after the depositor has died, the rule of liability of the bank for its negligence varies, depending in the first place upon the question whether or not the bank had notice of the death.

So, under by-laws providing in the first place that the officers will endeavor to prevent frauds, but all payments made to any person producing the proper deposit pass book shall be good and valid payments, where the bank, having notice of the depositor's death and the appointment of an administrator in another state, paid over the amount to a third person, who had presented the book and an affidavit from the administrator that he had been discharged and that the holder of the book was entitled to receive the money; and the bank assented to a collusive judgment be-
69 L. R. A.

ing taken against itself for the amount,—the judgment, being collusive, did not protect the bank in its payment, and in an action brought by an ancillary administrator of the depositor, later appointed in this state, it was error to refuse to allow the plaintiff to go to the jury on the question of the bank's negligence in paying the account, as it did. The representations of the administrator, after he was discharged from his trust, to the effect that the payee was entitled to receive the money, could have no greater effect than the representations of a stranger; and, whatever might have been the position of the parties if the rule of the bank stood alone, that all payments to persons producing the pass book should be valid, undeniably the rule, if it was not made entirely inapplicable, was materially qualified by the later rule providing that on the death of a depositor the amount standing to his credit should be paid to his legal representative. *Farmer v. Manhattan Sav. Inst.* 60 Hun, 462, 15 N. Y. Supp. 235.

The same result is reached, on different grounds, in *Hunter v. Wallace*, 14 U. C. Q. B. 205, *supra*, IV. e.

And in a case discussed, quoted, and distinguished in *KELLEY v. BUFFALO SAV. BANK.*—*Mahon v. South Brooklyn Sav. Inst.* 175 N. Y. 69, 96 Am. St. Rep. 603, 67 N. E. 118, Affirming 48 App. Div. 218, 62 N. Y. Supp. 961,—when one by-law printed in a pass book, "although the institution will endeavor to prevent frauds and impositions, yet all payments to persons producing the pass book issued by it shall be valid payments to discharge the institution," immediately followed another providing that "on the decease of any depositor, the amount standing to the credit of the deceased shall be paid to his or her legal representatives,"—it was held that the one first mentioned applied only to payments made during the life of the depositor, or, at most, without notice of his death, and not when the bank knew that he was dead. Hence, the exclusion of evidence, offered by the defendant bank, to show that the bank exercised due care in mak-

lently made by its officers to Mrs. Keith, even if the jury could have properly found from the evidence that the plaintiff was guilty of the claimed negligence. This is not an action based upon the negligence of the defendant, in which the plaintiff was required to prove that she exercised due care. It is an action to recover money deposited by the plaintiff with the defendant, and which the defendant contracted, as declared in the deposit book, to repay to the plaintiff, or to her order, or to her legal representative, upon presentation of the book. *Eaves v. People's Sav. Bank*, 27 Conn. 229-231, 71 Am. Dec. 59. From its absolute undertaking to pay to the depositor or his order, article 15 relieves the bank in cases of payments made in good faith and in the exercise of ordinary care to persons presenting the book, even though such payments are made upon forged orders. As we have already shown, no greater protection than this was intended to be afforded the bank by the provisions of article 15.

ing the payment, was proper, for the reason that the rule of diligence invoked by the bank applied only to the case of a living depositor, and not to the case of a dead one, who was unable to protect himself.

The prevailing opinion in *KELLEY v. BUFFALO SAV. BANK*, however (while holding the bank liable on account of negligence in failing to compare the signatures in its possession), distinguishes the Mahon Case upon the ground of the presence in it of knowledge of the fact of the death, there being no notice of it in the *KELLEY CASE*, the bank paying the amount of the deposit to a member of the same family.

In *Hoffmann v. Union Dime Sav. Inst.* 95 App. Div. 329, 88 N. Y. Supp. 686, Affirming 41 Misc. 517, 85 N. Y. Supp. 16 (mentioned *supra*, IV. e) the bank was held to be liable, though without knowledge of the depositor's death, for payment to a fraudulent claimant, when the by-laws contained the same by-law occurring in the Mahon Case and the *KELLEY CASE*, providing that on the death of the depositor the amount should be paid to his representative; but this case is not now authority, according to the *KELLEY CASE*.

In a Massachusetts case, however, going in the other direction, when the bank book was presented to the bank by a stranger after the death of the depositor, and after the executor had issued the usual probate citations, and it was paid in good faith by the bank, which had no actual notice of the death; and it appeared that the depositor had subscribed the by-laws printed on the bank book, providing that the institution would not be responsible when the depositor had not given notice of the book being stolen or lost, and for the consequences of any mistake in identity, if it paid to the wrong person upon presentation of the book,—it was held that the by-laws applied equally to the depositor and to his legal representatives; that the citation in the probate court did not affect the bank with any notice of the death of the depositor: and hence that there could be no re-

Even if the plaintiff was negligent, as claimed, that did not excuse the bank officers from exercising ordinary care to prevent one who they knew was not a depositor from obtaining money upon a forged order, nor relieve the bank from liability for payments negligently made to the wrong person. The question of contributory negligence is not involved in the case. If the bank officers failed to exercise ordinary care in making the payments to Mrs. Keith upon forged orders, the bank was liable to the plaintiff for the sums so paid. If the officers exercised such care, the bank was relieved from liability by the provisions of article 15 of its by-laws. *Geitelsohn v. Citizens' Sav. Bank*, 17 Misc. 574, 40 N. Y. Supp. 662; *Brown v. Merrimack River Sav. Bank*, 67 N. H. 549, 68 Am. St. Rep. 700, 39 Atl. 336; *Ladd v. Augusta Sav. Bank*, 96 Me. 520, 52 Atl. 1016; *People's Sav. Bank v. Androscoggin County Sav. Bank*, 96 Me. 520, 52 Atl. 1016; *People's Sav. Bank v. Cupps*, 91 Pa. 315.

covery by the depositor's executor. *Donlan v. Provident Inst. for Savings*, 127 Mass. 183, 34 Am. Rep. 358.

In *Hayden v. Brooklyn Sav. Bank*, 15 Abb. Pr. N. S. 297, and *People v. Third Ave. Sav. Bank*, 98 N. Y. 661 (treated *supra*, IV. c), involving the question merely of the requisite degree of care to be exercised by the bank in the identification of the person presenting the pass book, although the payments were made after the death of the depositor, this fact is not treated as in any way affecting the decision.

g. The obligation to compare the signatures

It has hitherto probably not been suspected that a savings bank could be discharged in a case not governed by extraordinarily stringent by-laws, from liability for a payment to a fraudulent claimant presenting a forged check, if it does not avail itself of the means ready and at hand to discover the fraud, upon a comparison of the check's signature with the signature of the genuine depositor in the books of the bank.

From scores of decisions hitherto presented this question would appear not to be disputable; but in some cases it has seemed to be necessary to lay down the law in accordance with the general notion.

Thus, the supreme court of Maine has declared, in regard to what is reasonable care, to be exercised by the bank, that it has been decided that officers of a savings bank having many thousands of depositors, who make a payment to a person unknown to them, who claims to be a depositor, and presents the bank book of such depositor, when they have not in their possession, convenient for ready reference and comparison, that depositor's signature, and do not obtain from the person presenting the book his signature for comparison, and do not require any further proof of identity than the possession of the bank book, have not pursued reasonably safe methods of doing business, and have not exercised reasonable care to prevent loss; and, if a comparison of the signature of

If the alleged negligence of the plaintiff had been proved, it would not have estopped her from claiming that the orders were forged, if the defendant was also negligent in not ascertaining that fact. If the bank officers were thus negligent, the facts would fail to show any such equity in the defendant as would enable it to invoke the principle of equitable estoppel against the plaintiff. *Morgan v. Farrel*, 58 Conn. 413-427, 18 Am. St. Rep. 282, 20 Atl. 614.

The trial court rightly declined to instruct the jury as to the effect upon the question of defendant's negligence of the particular facts referred to in the fourth request. The question was one of reasonable care under all the circumstances, and these facts, with others, were properly left to the consideration of the jury in determining whether the defendant had exercised that degree of care.

The plaintiff claimed that it appeared from the evidence that the defendant was

guilty of negligence in failing to make proper examinations and comparisons of the handwriting and signatures of the orders and the letter for the purpose of ascertaining whether they were genuine, in not having the signature of the plaintiff for reference and comparison, and in issuing a new bank book to Mrs. Keith without requiring proper proof of the destruction of the first one, or attempting to ascertain whether the signatures to the bond presented by Mrs. Keith were genuine. The question whether the bank officers were guilty of negligence in making these payments in the manner they did was one of fact, and was fairly submitted to the jury and decided against the defendant.

An examination of the evidence fails to convince us that the trial court erred in denying the defendant's motion for a new trial upon the ground that the verdict was against the evidence.

There is no error.

the person falsely presenting the book with the genuine one of the depositor on file would have prevented the imposition, then such payment is no defense to an action by the depositor. *Ladd v. Augusta Sav. Bank*, 96 Me. 516, 58 L. R. A. 288, 52 Atl. 1012.

And, according to the New York court of appeals, the savings bank will not be discharged by a payment upon the production of the pass book, irrespective of the exercise of ordinary care and diligence upon the part of the teller in discovering the dissimilarity in signatures and instituting further inquiry. *Appleby v. Erie County Sav. Bank*, 62 N. Y. 12.

Thus, where it affirmatively appears that the paying officer did not avail himself of the means at hand to identify the person presenting the pass book and the forged receipt, the question of the bank's negligence is clearly for the jury. *Kummel v. Germania Sav. Bank*, 127 N. Y. 488, 13 L. E. A. 786, 28 N. E. 398.

The decision in *LANGDALE v. CITIZENS' BANK*, freeing the bank from the obligation to compare the signatures in its possession if the pass book is presented by a person apparently rightfully in possession of it, and unless there are "circumstances to excite suspicion," is a new doctrine, therefore; and the decision is further remarkable because of the agreement made by the bank with the depositor that the bank would use its "best efforts" to prevent fraud. This amounts, therefore, to a declaration that the "best efforts" which the bank covenants to use in order to prevent loss to the depositor do not include a mere reference to a signature on file in order to discover whether the signature presented bears any resemblance to it.

In *KELLEY v. BUFFALO SAV. BANK*, however, is found a contrary decision, which would seem on the authorities to carry more weight; and there it is laid down firmly that a failure to compare, in the absence of some unusual and pertinent excuse, will make the bank responsible for the payment.

And, upon the question whether the officer used reasonable care in the comparison, it is held that what the jury are to determine is what degree of significance would be attached 69 L. R. A.

to the differences observed in the signatures, not by a common person, but by a skilled person such as the cashier was; so that they might judge not only of what was the effect upon his mind caused by his comparing the signatures, but of what would have been the effect if he had given due attention to what the dissimilarities indicated. *Fricke v. German Sav. Bank*, 24 Jones & S. 468, 4 N. Y. Supp. 627. (See *supra*, IV. d.)

V. Contributory negligence of the depositor. a. In general.

While an action against a savings bank by a depositor for the amount of an account paid to a fraudulent claimant is necessarily one founded upon the contract, entered into by the bank at the time of the deposit, to pay to the real owner of the account, the element of negligence in making the payment, in theory, can enter into the action on the contract only upon the supposition that the bank contracted not to be negligent in making any payments, but to use reasonable care, or its best efforts, as the case might be, to avoid imposition and consequent damage to the depositor.

Similarly, logically, the element of contributory negligence can enter into the discussion only upon the theory that the bank, in making the contract not to be negligent, only agreed to this upon the condition, generally unexpressed, that the depositor should not be negligent in providing a stranger with the material for perpetrating the fraud, either by allowing him to obtain possession of the book which by the contract was to constitute the evidence of the right to draw upon the account; or by affording him information which, being such as only the depositor would naturally possess, would enable the fraudulent claimant to convince the bank's officials of his identity with the depositor; or by making the deposit in the name of another person; or by failing to give the bank notice, in good season, of the loss or theft of the book immediately after discovering the fact.

In a case where the evidence showed that the depositor received a letter requesting in-

GEORGIA SUPREME COURT.

William LANGDALE, *Plff. in Err.*,
v.
CITIZENS' BANK OF SAVANNAH.

(121 Ga. 105.)

- *1. A depositor in a savings bank is bound by the reasonable rules of the bank, to which he assents by an agreement in writing.
2. A rule providing that "every effort will be made to protect depositors against fraud, but payment made to a person presenting pass book shall be good and valid on account of the owner, unless the pass book has been lost and notice in writing given to [the] bank before such payment is made," is reasonable, and binding upon depositors.
3. Under the terms of such a rule,

*Headnotes by CANDLER, J.

(October 17, 1904.)

formation as to certain personal matters, which would enable its possessor to answer the test questions usually put to one applying at a savings bank for money, in order to identify him, and the depositor answered the letter, giving the desired information, this amounted to contributory negligence which, as a matter of law, would bar an action by the depositor for money paid by the savings bank to one who represented himself to be the depositor, and in answer to the test questions put to him gave the answers so obtained. *Wall v. Emigrant Industrial Sav. Bank*, 64 Hun, 249, 19 N. Y. Supp. 194.

And where the account was begun in the name of another than the real depositor, but not in trust for anyone, and the person in whose name the deposit was made discovered the fact, stole the bank book, and drew the money, it was held that the depositor was guilty of such gross negligence as not to entitle him to any favorable consideration by the court, and, inasmuch as the bank acted in good faith and without negligence in protecting the rights of the depositor, since the signature of the fraudulent claimant, upon which he drew the money, was his genuine signature, and, upon the face of the records of the bank and all information possessed by its officers, he was the person entitled to the money, it was wholly unlike the case of money being drawn from a bank on a forged check or order, for there the bank officers are bound, at their peril, to know that the signature on which they pay out the funds of a depositor is genuine. *Arkofsky v. State Sav. Bank*, 91 Minn. 440, 103 Am. St. Rep. 519, 98 N. W. 326.

So, also, where the deposit was made in the name of someone else than the depositor, and, after the real depositor's death, the person presenting the book, whether or not he was the same person as the one in whose name the money was deposited, was questioned as to various matters apparently identifying him, answered to the description of the depositor, and made a signature which was compared by the official representing the bank with the genuine signature of the depositor on file, and was thought by the official to resemble the genuine

where a pass book is presented by a person other than the depositor to whom it belongs, together with a forged check bearing a signature similar to that of the depositor, and there is nothing to arouse the suspicion of the teller or put him upon inquiry as a reasonably prudent man as to the genuineness of the check, and the bank in good faith pays the check, believing the person presenting it to be the depositor, it is not liable in a suit by the depositor to recover the money so paid.

4. The principle announced in the preceding headnote is not affected by another rule of the bank prescribing that depositors must always present their pass books when depositing or withdrawing money, and that, "If not present personally, an order properly signed and witnessed must accompany the presentation of the book in case of withdrawal."

one sufficiently,—a finding by a referee in favor of the bank was not disturbed on appeal. *People v. Third Ave. Sav. Bank*, 98 N. Y. 661.

And the fact that he is illiterate and cannot read the by-laws printed on his pass book is no excuse to the depositor for not keeping his book safely as the rules demanded. *Burrill v. Dollar Sav. Bank*, 92 Pa. 134, 37 Am. Rep. 669.

On the other hand, in the same jurisdiction as that in which two of the last cited cases were decided, it has been declared since that the rule of contributory negligence of the depositor has no application to such a case, in spite of the holding in *Wall v. Emigrant Industrial Sav. Bank*, 64 Hun, 249, 19 N. Y. Supp. 194. *Geitelsohn v. Citizens' Sav. Bank*, 17 Misc. 574, 40 N. Y. Supp. 662.

So if the case is one of mispayment contrary to the published rules there can be no question of contributory negligence in the case. *Peoples' Sav. Bank v. Cupps*, 91 Pa. 315.

And when the lack of care of the depositor is not the legal cause of the injury, but merely the occasion of it, or merely an antecedent condition, the only question is whether the bank used reasonable care, and the question of contributory negligence is not involved in it. *Brown v. Merrimack River Sav. Bank*, 67 N. H. 549, 68 Am. St. Rep. 700, 39 Atl. 336.

b. *Failure to give notice to the bank.*

When the depositor, having discovered that his pass book is missing, fails to let the bank officials know of the fact without delay, he is generally guilty of the very negligence which the by-laws are intended to guard against.

Under a by-law providing that "payments to persons producing the pass book shall be valid payments to discharge the bank," a depositor discovering the loss of his book is bound, at his peril, to notify the bank promptly of the fact; and payment to a thief presenting the pass book with a forged order, two days after the loss and after it is suspected by the owner, who has in the meantime an opportunity to inform the bank of it, discharges the bank from liability, on the ground of contributory negligence in the depositor. *Kelly v. Emigrant Industrial Sav. Bank*, 2 Daly, 229.

ERROR to the City Court of Savannah to review a judgment in favor of defendant in an action brought to recover money which plaintiff had deposited with defendant. *Affirmed.*

The facts sufficiently appear in the opinion.

Mr. Jacob Gazan, for plaintiff in error:

A rule required that, if not present personally, an order properly signed and witnessed must accompany the presentation of the book in case of withdrawal.

The depositor was not personally present when the \$50 were withdrawn; nor was the order "properly signed and witnessed."

The payment was contrary to the rule, and the bank is liable.

2 Morse, Banks & Banking, 4th ed. § 620e; *Ladd v. Augusta Sav. Bank*, 96 Me. 516, 58 L. R. A. 288, 52 Atl. 1012; *Kummel v. Germania Sav. Bank*, 127 N. Y. 488, 13 L. R. A. 788, 28 N. E. 398; *People's Sav. Bank v. Cupps*, 91 Pa. 315.

The money was paid without any effort being made to protect the depositor against fraud, and solely because the pass book was presented; and the bank is liable.

24 Am. & Eng. Enc. Law, 2d ed. p. 1259 (2); 2 Morse, Banks & Banking, 4th ed.

Naturally, however, when the failure to give notice was due to the depositor having been shot by the thief who presented the book and obtained the payment, and his having been disabled until after the payment, there could be no question of negligence on his part. *Wegner v. Second Ward Sav. Bank*, 76 Wis. 242, 44 N. W. 1096.

And where the person presenting the book was not required to identify himself, and no comparison was made of his signature with that of the depositor on file, the neglect of the depositor in not reporting the loss of the book was not the legal cause of the injury complained of, but only the occasion of it, or merely an antecedent condition; and hence the question of contributory negligence was not involved. *Brown v. Merrimack River Sav. Bank*, 67 N. H. 549, 68 Am. St. Rep. 700, 39 Atl. 336.

c. Failure to keep the pass book safely.

Where the case is one of payment contrary to the published rules of the bank, there can be no question of contributory negligence in the depositor in not keeping his book safely. *People's Sav. Bank v. Cupps*, 91 Pa. 315; *Geltesohn v. Citizens' Sav. Bank*, 17 Misc. 574, 40 N. Y. Supp. 662.

But it has been held that if the officers of the savings bank, using care and diligence, but lacking present means of identifying the person presenting the book, pay to one apparently lawfully in possession of the pass book as its owner, they have a right to rely upon the contract of the depositor safely to keep the evidence of his claim, or to make known its loss before it is presented for payment. *Sullivan v. Lewiston Inst. of Savings*, 56 Me. 507, 98 Am. Dec. 500.
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§ 620e; *Allen v. Williamsburgh Sav. Bank*, 69 N. Y. 314.

A by-law that "the institution will not be responsible for loss sustained when the depositor has not given notice of his book being lost or stolen" does not relieve the bank from the duty of acting in good faith and with reasonable care.

Brown v. Merrimack River Sav. Bank, 67 N. H. 549, 68 Am. St. Rep. 700, 39 Atl. 336; *Kimball v. Norton*, 59 N. H. 1, 47 Am. Rep. 171; 24 Am. & Eng. Enc. Law, 2d ed. p. 1258b.

Active vigilance to detect fraud and forgery is due by savings-bank officers to a depositor on paying the deposit to one presenting the pass book.

Kummel v. Germania Sav. Bank, 127 N. Y. 488, 13 L. R. A. 786, 28 N. E. 398; *Brown v. Merrimack River Sav. Bank*, 67 N. H. 549, 68 Am. St. Rep. 700, 39 Atl. 336; *Ladd v. Augusta Sav. Bank*, 96 Me. 516, 58 L. R. A. 288, 52 Atl. 1012; *Allen v. Williamsburgh Sav. Bank*, 69 N. Y. 314; *Boone v. Citizens' Sav. Bank*, 84 N. Y. 83, 38 Am. Rep. 498; *Smith v. Brooklyn Sav. Bank*, 101 N. Y. 63, 54 Am. Dec. 653, 4 N. E. 123.

Whether or not the bank was negligent in paying to one who had stolen the pass book,

VI. Matters of evidence.

Under the principle that a savings bank must exercise ordinary care in making payments, it is necessary for the depositor, in an action for the amount of his deposit, involving the validity of such payments, to give proof of facts tending to show a failure to exercise reasonable care and prudence in disbursing the money. So where the record presents no proof of such facts upon which negligence by the bank officials can possibly be predicated, there is no question for submission to the jury, and a motion to dismiss should be granted. *Israel v. Bowery Sav. Bank*, 9 Daly, 507.

And under the New York statute (Laws of 1875, chap. 371, § 23) a savings bank depending for its defense upon its provisions, in an action by a depositor to recover moneys paid out by it to a fraudulent claimant, must show affirmatively that it has complied with the provision of that statute directing that the bank shall put up the regulations for payments of deposits, in some conspicuous place, and that they shall be printed in the pass book; and it is no excuse for noncompliance that the regulations are printed in the pass book, when the depositor did not read them. *Kress v. East Side Sav. Bank*, 50 N. Y. S. R. 273, 21 N. Y. Supp. 652.

And, as bearing on the question whether the depositor had colluded in the presentation of the book and withdrawal of the account, it is proper to admit the evidence of the plaintiff, the depositor's administrator, that the depositor, dying soon after the payment, was nearly penniless. *Brown v. Merrimack River Sav. Bank*, 67 N. H. 549, 68 Am. St. Rep. 700, 39 Atl. 336.

L. B. B.

and who presented it at the bank, personating plaintiff, and signing his name to the check, the bank having no notice of the theft, is a question for the jury.

Wegner v. Second Ward Sav. Bank, 76 Wis. 242, 44 N. W. 1096; *Farmer v. Manhattan Sav. Inst.* 60 Hun, 462, 15 N. Y. Supp. 235; *Allen v. Williamsburgh Sav. Bank*, 69 N. Y. 314; *Saling v. German Sav. Bank*, 15 Daly, 386, 7 N. Y. Supp. 642.

The bank having paid on the faith of the book being presented, and not because of any similarity in the signatures, it must be justified in making the payment on that ground or lose.

2 *Herman, Estoppel*, p. 947; *Fenn v. Ware*, 100 Ga. 666, 28 S. E. 238; *People's Sav. Bank v. Smith*, 114 Ga. 185, 39 S. E. 920; *Atlanta Trust & Bkg. Co. v. Close*, 115 Ga. 939, 42 S. E. 265; *Choice v. State*, 31 Ga. 425.

Messrs. Adams & Adams, for defendant in error:

The signing of the book was the token of an agreement to abide by the rules, and was not put there for comparison.

The agreement that payment made to a person presenting the book shall be good is absolute and unconditional, in the absence of bad faith on the part of the bank.

Stonestreet v. Harrison, 5 Litt. (Ky.) 161; *First Nat. Bank v. Foster*, 9 Wyo. 157, 54 L. R. A. 549, 61 Pac. 466, 63 Pac. 1056.

The bank book must be produced in order to draw the deposit, and production of the book shall be authority to the bank to pay the person producing it.

If the bank pays to one having the book, there being no circumstances to excite suspicion and base an imputation of negligence on the part of the bank, the payment is good.

2 *Morse, Banks & Banking*, § 620, * 959; 5 *Cyc. Law & Proc.* p. 608; *Schoenwald v. Metropolitan Sav. Bank*, 57 N. Y. 418; *Levy v. Franklin Sav. Bank*, 117 Mass. 448; *Goldrick v. Bristol County Sav. Bank*, 123 Mass. 320; *Burrill v. Dollar Sav. Bank*, 92 Pa. 134, 37 Am. Rep. 669; *Donlan v. Provident Inst. for Savings*, 127 Mass. 183, 34 Am. Rep. 358; *Sullivan v. Lewiston Inst. of Savings*, 56 Me. 507, 96 Am. Dec. 500; *Cosgrove v. Provident Inst. for Savings*, 64 N. J. L. 653, 46 Atl. 617.

If it had occurred to Mr. Farr that there was something suspicious about this matter, and he had looked at the signature in the book, such examination would have been calculated to confirm the right of the party to draw, and not to excite suspicion.

Rogers, Expert Testimony, pp. 177, 178.

Candler, J., delivered the opinion of the court:

There is practically no dispute as to the 69 L. R. A.

material facts of this case. The defendant in the court below was a banking corporation, conducting under authority of its charter a savings department, depositors in which were paid interest on their deposits. The savings department was governed by certain rules and regulations, and depositors were required, upon opening their accounts, to sign an agreement to abide by these rules, of which the following are material to the present discussion: "A depositor must always present his or her pass book when depositing or withdrawing. If not present personally, an order properly signed and witnessed must accompany the presentation of the book in case of withdrawal." "Every effort will be made to protect depositors against fraud, but payment made to a person presenting pass book shall be good and valid on account of the owner, unless the pass book has been lost and notice in writing given to this bank before such payment is made." The plaintiff was a depositor in the savings department, and as such had assented to the rules mentioned. The cashier of the bank cautioned him to take good care of his pass book, and not let it "lie around loose," pointing out to him the rules on the subject. A check for \$50 was drawn against the plaintiff's account, and was cashed. He claims that the check was a forgery, and brings this suit to recover from the bank the amount for which it was drawn. From the plaintiff's testimony it appears that his pass book was kept locked in a trunk, and never, so far as he knew, left his possession. Presumably, however, it was stolen, and afterwards returned, for the evidence of the bank cashier is undisputed that the person who drew the money on the check presented the pass book, and the first knowledge that the plaintiff seems to have had that the \$50 had been withdrawn from the bank was when, on a subsequent occasion, he took the book to the bank for the purpose of withdrawing money, and noticed the entry of the alleged forged check. The admittedly genuine signature of the plaintiff, as well as the signature to the check alleged to have been forged, both appear in the record; and, while no member of this court claims to be a handwriting expert, it is obvious that the signatures bear a general similarity to each other.* When the

*A comparison of the genuine and spurious signatures as they appear in the record discloses that they are no more similar than the handwriting of any two laboring men might naturally be supposed to be. There was no attempt in the spurious signature to copy the genuine, but the signatures stand with the distinguishing characteristics of the writing of the two persons who executed the signatures apparent upon them. No one familiar with handwriting would, with the genuine signature

check for \$50 was presented for payment, the cashier did not compare the signature with the genuine signature of the plaintiff on the books of the bank, but paid the check on the strength of the possession of the pass book and the similarity of the appearance of the person presenting the check to that of the plaintiff as he recollected him. The depositors in the savings department of the defendant numbered more than 2,000, the great majority of whom were persons who did not do a general banking business, who were not frequently seen at the bank, and who were, therefore, not familiar to the bank officials and employees. The plaintiff was a motorman in the employment of a street railroad company, and the person drawing the check was apparently also a street railroad employee. The testimony for the defendant was positive to the effect that there was nothing to put the cashier, who paid the money, on notice that the check was not genuine, or to arouse his suspicion that the person presenting it was not the plaintiff. As to this the evidence for the plaintiff was, in the nature of things, silent. On this state of facts the case went to the jury, who found for the defendant. The plaintiff made a motion for a new trial, which was overruled, and he accepted.

The motion for a new trial contains numerous grounds, but in its last analysis the case turns upon the single question whether, under the circumstances already narrated, and in view of the rules of the defendant bank, it was the duty of the cashier to make a comparison of the signature to the alleged forged check with the genuine signature of the plaintiff on the books of the bank, or if, there being nothing to reasonably excite his suspicion as to the honesty of the transaction, he was authorized to pay the money by reason of the presentation of the pass book and an apparently genuine check. So far as we are aware, no case has ever been decided by this court which is in point on this subject, and we are therefore compelled to rely upon standard text-books and cases adjudicated by other courts for authority for the ruling now made. There are many points of marked difference between savings banks

and ordinary banks which receive deposits subject to check and pay no interest thereon. In the nature of the relationship between the savings bank and its depositors, the rules governing that relationship enter into the contract of deposit, and especially is this so when the depositor agrees in writing that he shall be bound by these rules. It is a common rule of such banks that the depositor shall produce his bank book in order to draw his deposit, or any part of it, and that production of the book shall be authority to the bank to pay the person producing it. "This is regarded as a reasonable and binding regulation, and if the bank pay to one having the book, there being no circumstances to excite suspicion and base an imputation of negligence on the part of the bank, the payment is good." 2 Morse, Banks & Banking, § 620; *Schoenwald v. Metropolitan Sav. Bank*, 57 N. Y. 418; *Levy v. Franklin Sav. Bank*, 117 Mass. 448; *Goldrick v. Bristol County Sav. Bank*, 123 Mass. 320; *Burrill v. Dollar Sav. Bank*, 92 Pa. 134, 37 Am. Rep. 669; *Donlan v. Provident Inst. for Savings*, 127 Mass. 183, 34 Am. Rep. 358; *Cosgrove v. Provident Inst. for Savings*, 64 N. J. L. 653, 46 Atl. 617. In the case of *Sullivan v. Lewiston Inst. of Savings*, 56 Me. 507, 96 Am. Dec. 500, which is very closely in point, it was held: Officers of savings institutions are required to exercise reasonable care and diligence only in making payments on account of deposits. And if, using such care and diligence, but lacking present means of identifying the claimant of the deposit, they make a payment upon presentation of the book by one apparently in the lawful possession of it as owner, the institution has a right to rely upon the contract of the depositor safely to keep the evidence of his claim, or to make known its loss before it is presented for payment, and the depositor is bound by the payment.

The reason for such a rule is at once apparent when the nature of savings institutions is considered. Deposits are not subject to check, and most of the depositors are seen but occasionally at the bank, rendering identification of the depositor more difficult

in mind, have honored the spurious one. Therefore, the decision of the court amounts to a holding that production of the pass book with no suspicious circumstances to put the bank officers on guard is sufficient to justify the payment of checks by a savings bank, and that such bank is not bound to know the signatures of its depositors, and that the rule applicable in case of other banks by which the signature is given such prominence in the bank's dealings is not applicable in case of savings banks. This rule is somewhat startling, and certainly relieves the savings bank of the duty of making use of one safeguard, 69 L. R. A.

which, in the case of ordinary banks, is held to be of the highest importance. With the genuine signature on file, subject to the inspection of the bank officer at any time, it would seem to be gross negligence on his part, not at least to compare the signature of the proffered check with that on file, in case the signature was not familiar to the officer to whom the check was presented. The observance of such a rule in the case above reported would have prevented loss, and it is difficult to see how the bank could be relieved from liability when it utterly neglected to take so simple a precaution. [Ed.]

than is the case with ordinary banks. By agreement between the bank and its depositors, possession of the pass book is made prima facie evidence of the right to draw upon the fund which it represents. The check itself is unlike checks drawn upon ordinary banks, not being negotiable, and being in reality nothing but a receipt for the money drawn. Of course, a savings bank would be liable if its officers or employees should negligently or recklessly pay out money to one not entitled to receive it; and this seems to be the basis of the cases relied upon as authority by counsel for the plaintiff in error. But in this case there seems to have been no negligence chargeable to the bank. The money was paid in good faith to one in possession of the plaintiff's pass book, and apparently clothed with the right to that possession. Under the rules of the bank assented to by the plaintiff, possession of the pass book was prima facie evidence of the right to draw the money which it represented; and there seems to have been absolutely nothing to put the teller on inquiry as to the genuineness of the check. Under these circumstances we cannot hold that it was his duty to go further, and compare the signature with that of the plaintiff on file in the bank, and that, failing in this, the bank is liable for the money so paid out.

Much stress is laid in the brief of counsel for the plaintiff in error upon the rule that, unless the depositor is personally present with his pass book when drawing money, "an order properly signed and witnessed must accompany the presentation of the book in case of withdrawal," and it is urged that because the plaintiff did not appear in person, and the person who did present the pass book had no order as required by the rule, the bank is liable for the payment of the money. Thoughtful consideration must show that this argument is entirely specious. Plainly, this rule has no application to a case like this, where the check drawn was in fraud of both the plaintiff and the bank. Its purport is merely to show that a savings-bank account is not negotiable by delivery of

the pass book, and to prescribe that when a depositor wishes to assign his funds on deposit he must do it in a certain manner. It is also urged that the rule reciting that "every effort will be made to protect depositors against fraud" required that the cashier or teller to whom the check was presented should at least compare the signature to the check with that of the plaintiff on file with the bank; and that the ensuing clause, "but payment made to a person presenting pass book shall be good and valid on account of the owner," etc., when taken in connection with the first part of the rule, conveys the meaning that the bank will only be excused from liability when it pays the money after having exerted "every effort" and used extreme caution to prevent fraud. We cannot agree with this construction of the rule. Giving it what seems to us a reasonable intendment, the rule means this: "We will do what we can to keep you from being defrauded, but, as the pass book is prima facie evidence of the right to draw money, you must look well after your pass book, and see that it does not fall into the hands of a thief or forger. Our means of identification are imperfect, and if your pass book is presented by someone other than yourself, with apparent right to draw your money, we will, unless our suspicions are aroused, honor his check without further question. We will deal honestly and fairly with you, but you must take every precaution to protect yourself by the preservation of your pass book." Such a rule is reasonable, and, as the plaintiff in the present case assented to it in writing, he is bound by its terms.

The foregoing disposes of the case on its substantial merits, and it follows that, regardless of inaccuracies in the charge of the court as disclosed by the motion for a new trial, the verdict was demanded, and the judgment overruling the motion will not be disturbed.

Judgment affirmed.

All the Justices concur.

MICHIGAN SUPREME COURT.

PEOPLE of the State of Michigan
v.

John P. SCHNEIDER, *Plff. in Certiorari.*

(.... Mich.)

1. Power to require the registering and numbering of automobiles is conferred upon the city council by charter au-

thority to control, prescribe, and regulate the manner in which the streets shall be used and enjoyed.

2. The court will take judicial notice of the fact that many automobiles may be driven at a speed of at least 40 miles per hour.

3. Authority given to a municipal corporation to regulate includes authority

NOTE.—As to limitation of speed of automobiles in streets under control of park commission, see, in this series, *Com. v. Crowninshield*, 68 L. R. A. 245, with footnote as to 60 L. R. A.

missioners, see, in this series, *Com. v. Crowninshield*, 68 L. R. A. 245, with footnote as to

to license as a means of regulation when it cannot be otherwise accomplished.

4. **Requiring an automobile to carry a number** does not violate the constitutional provision against unreasonable searches, or compel the owner to testify against himself, or deprive him of property without due process of law.

(April 21, 1905.)

CERTIORARI to the Recorder's Court of Detroit to review a judgment convicting defendant of violating a municipal ordinance. *Affirmed.*

The facts are stated in the opinion.

Messrs. Henry F. Chipman and Henry Look, for plaintiff in certiorari:

Municipal corporations derive all their power from legislative acts, and can pass no ordinance which conflicts with the terms of the charter.

People v. Armstrong, 73 Mich. 288, 2 L. R. A. 721, 16 Am. St. Rep. 578, 41 N. W. 275; *Taylor v. Bay City Street R. Co.* 80 Mich. 77, 45 N. W. 335; *Grand Rapids v. Newton*, 111 Mich. 48, 35 L. R. A. 226, 66 Am. St. Rep. 387, 69 N. W. 84.

Whenever a by-law is clearly unconstitutional, or its provisions are inconsistent with any of the requisites to its validity, it becomes the duty of the courts, as a matter of law, to declare it void.

Cooley, Const. Lim. 6th ed. p. 240.

Police power may regulate and preserve, and extend to the protection of, the public health, good order, and decency, the lives, health, and property of citizens; may maintain good order and public morals, and prevent imposition and fraud.

People v. Wagner, 86 Mich. 594, 13 L. R. A. 286, 24 Am. St. Rep. 141, 49 N. W. 609; *Davock v. Moore*, 105 Mich. 120, 28 L. R. A. 783, 63 N. W. 424; *People v. Phippin*, 70 Mich. 6, 37 N. W. 888; *Sherlock v. Stuart*, 96 Mich. 197, 21 L. R. A. 580, 55 N. W. 845; *People v. Walling*, 53 Mich. 264, 18 N. W. 807; *Robison v. Haug*, 71 Mich. 38, 38 N. W. 668; *People v. Henwood*, 123 Mich. 317, 82 N. W. 70; *People v. Reetz*, 127 Mich. 87, 86 N. W. 396.

But property is sacred.

People v. Lake Shore & M. S. R. Co. 52 Mich. 277, 17 N. W. 841; *Re Frazee*, 63 Mich. 396, 6 Am. St. Rep. 310, 30 N. W. 72.

In Michigan police power is not omnipotent; it cannot, under the guise of regulation, destroy property rights arbitrarily and without reason.

Grand Rapids v. Powers, 89 Mich. 94, 14

limitation of speed of vehicles in streets generally.

As to validity of regulation of use of bicycles on streets, see *note* to *Taylor v. Union Traction Co.* 47 L. R. A. 289. 69 L. R. A.

L. R. A. 498, 28 Am. St. Rep. 276, 50 N. W. 661; *Chaddock v. Day*, 75 Mich. 527, 4 L. R. A. 809, 13 Am. St. Rep. 468, 42 N. W. 977.

Any person is at liberty to pursue any lawful calling, and to do so in his own way, not encroaching on the rights of others.

Sherlock v. Stuart, 96 Mich. 197, 21 L. R. A. 580, 55 N. W. 845; Cooley, Const. Lim. 6th ed. 742.

Property does not consist merely in the title and possession; it includes the right to make any use of it.

Kuhn v. Detroit, 70 Mich. 534, 38 N. W. 470.

The ordinance is inquisitorial, and compels the owner either to submit to a search or to give testimony against himself.

Robison v. Haug, 71 Mich. 38, 38 N. W. 668; *Chaddock v. Day*, 75 Mich. 527, 4 L. R. A. 809, 13 Am. St. Rep. 468, 42 N. W. 977; *Weimer v. Bunbury*, 30 Mich. 201; *Rosenthal v. Dickerman* (*Rosenthal v. Muskegon Circuit Judge*), 98 Mich. 208, 22 L. R. A. 693, 39 Am. St. Rep. 535, 57 N. W. 112; *Rouse, H. & Co. v. Donovan*, 104 Mich. 234, 27 L. R. A. 577, 53 Am. St. Rep. 457, 62 N. W. 359; *Parsons v. Russell*, 11 Mich. 113, 83 Am. Dec. 728.

The common council of the city of Detroit possesses no authority to make criminal by ordinance that which is not so in fact.

Grand Rapids v. Powers, 89 Mich. 94, 14 L. R. A. 498, 28 Am. St. Rep. 276, 50 N. W. 661; *Re Frazee*, 63 Mich. 407, 6 Am. St. Rep. 310, 30 N. W. 72.

The ordinance, in compelling owners of automobiles to take out a license, imposes a burden upon one class of citizens in the use of the streets not imposed upon others, and is a restriction which is not applied alike to all.

Chicago v. Collins, 175 Ill. 445, 49 L. R. A. 408, 67 Am. St. Rep. 224, 51 N. E. 907; *Wilkie v. Chicago*, 188 Ill. 444, 80 Am. St. Rep. 182, 58 N. E. 1004; *Cairo v. Bross*, 101 Ill. 475; *Kiel v. Chicago*, 176 Ill. 137, 52 N. E. 29; *Besette v. People*, 193 Ill. 334, 56 L. R. A. 558, 62 N. E. 215.

An automobile is a vehicle entitled to all and equal rights in the public streets with other vehicles.

A bicycle is a vehicle.

Myers v. Hinds, 110 Mich. 300, 33 L. R. A. 356, 64 Am. St. Rep. 345, 68 N. W. 156; *Murfin v. Detroit & E. Pl. Road Co.* 113 Mich. 675, 38 L. R. A. 198, 67 Am. St. Rep.

As to license fee for use of streets by vehicles, see *Tomlinson v. Indianapolis*, 36 L. R. A. 413, and *note*; also *Chicago v. Collins*, 49 L. R. A. 408.

489, 71 N. W. 1108, *Leslie v. Grand Rapids*, 120 Mich. 28, 78 N. W. 885.

Messrs. Timothy E. Tarsney and J. Walter Dohany, for defendant in certiorari:

The ordinance is not void for discrimination.

Des Moines v. Keller, 116 Iowa, 648, 57 L. R. A. 243, 93 Am. St. Rep. 268, 88 N. W. 827; *People v. Hanrahan*, 75 Mich. 611, 4 L. R. A. 751, 42 N. W. 1124.

The council has the power to provide for the preservation of the general health of the inhabitants, and to make regulations to secure the same.

Chicago Packing & Provision Co. v. Chicago, 88 Ill. 221, 30 Am. Rep. 545; *Kinsley v. Chicago*, 124 Ill. 359, 16 N. E. 260.

The legislature has power to delegate to municipalities the regulation of general street traffic.

Cicero Lumber Co. v. Cicero, 176 Ill. 9, 42 L. R. A. 696, 68 Am. St. Rep. 155, 51 N. E. 758; *Dane v. Mobile*, 36 Ala. 304; *People ex rel. Nechamov v. City Prison*, 144 N. Y. 529, 27 L. R. A. 718, 39 N. E. 686; Dill. Mun. Corp. p. 810, § 682.

The delegation of power by the legislature to the common council in §§ 169 and 170 of the charter is not such a delegation of power as will be held unconstitutional.

Brodhine v. Revere, 182 Mass. 598, 66 N. E. 607; *Nagle v. Augusta*, 5 Ga. 546.

No one can say that the license charge of \$1, which includes the price of the tag or number, is unreasonable or a tax, when the paying of the sum but once entitles the person to use said number and operate his automobile for all time to come.

Terre Haute v. Kersey, 159 Ind. 300, 95 Am. St. Rep. 296, 64 N. E. 469; *Brown v. Galveston*, 97 Tex. 1, 75 S. W. 488; *Norfolk v. Flynn*, 101 Va. 473, 62 L. R. A. 771, 99 Am. St. Rep. 918, 44 S. E. 717.

Police power in its broadest acceptance means the general power of a government to preserve and promote the public welfare by prohibiting all things hurtful to the comfort, safety, and welfare of society, and establishing such rules and regulations for the conduct of all persons and the use and management of all property as may be conducive to the public interests.

22 Am. & Eng. Enc. Law, p. 916; *Stone v. Mississippi*, 101 U. S. 814, 25 L. ed. 1079; *Wettengel v. Denver*, 20 Colo. 552, 39 Pac. 343; *Love v. Recorder's Ct. Judge (Love v. Phalan)* 128 Mich. 545, 55 L. R. A. 618, 87 N. W. 785; *Com. v. Bearse*, 132 Mass. 542, 42 Am. Rep. 450; *State, Cape May, D. B. & S. P. R. Co., Prosecutor, v. Cape May*, 59 N. J. L. 404, 36 L. R. A. 657, 36 Atl. 678; *American Rapid Teleg. Co. v. Hess*, 69 L. R. A.

125 N. Y. 641, 13 L. R. A. 454, 21 Am. St. Rep. 764, 26 N. E. 919; *Thorpe v. Rutland & B. R. Co.* 27 Vt. 140, 62 Am. Dec. 625; *Braun v. Chicago*, 110 Ill. 187; *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; *People ex rel. Mizer v. Manistee County*, 28 Mich. 422; *Com. v. Stodder*, 2 Cush. 562, 48 Am. Dec. 679; *Frankfort & P. Pass. R. Co. v. Philadelphia*, 58 Pa. 119, 98 Am. Dec. 242.

The common council has power to provide for the general health of the inhabitants of the city, and to abate and remove all nuisances in said city.

Rex v. Egerly, Cited in 3 Salk. 183; *Rex v. Cross*, 3 Campb. 226; *King v. Russell*, 6 East, 427; Dill. Mun. Corp. § 660, note. The ordinance is reasonable.

People v. Lewis, 86 Mich. 273, 49 N. W. 140; *People v. Hotchkiss*, 118 Mich. 59, 76 N. W. 142; *Jackson v. People*, 9 Mich. 111, 77 Am. Dec. 491; *Hyde v. Nelson*, 11 Mich. 353; *Linn v. Roberts*, 15 Mich. 443; *Lynch v. People*, 16 Mich. 472; *Brown v. Blanchard*, 39 Mich. 790; *Sheldon v. Stewart*, 43 Mich. 574, 5 N. W. 1067; *Fellows v. Canney*, 75 Mich. 445, 42 N. W. 958; *Crawford v. Byrnes*, 112 Mich. 599, 71 N. W. 152.

Carpenter, J., delivered the opinion of the court:

Certiorari to the recorder's court of the city of Detroit. Respondent was convicted in the lower court, and fined \$25, for operating an automobile in the streets of the city of Detroit without having first registered said automobile, and without placing thereon a number, as required by an ordinance of said city. We are asked to set aside said conviction upon the ground that said ordinance is invalid.

The provisions of said ordinance material to this decision are as follows:

"Sec. 1. No person or persons shall drive or propel any automobile or other motor vehicle within what is known as $\frac{3}{4}$ mile circle at a rate of speed to exceed eight (8) miles per hour; nor shall any person or persons drive or propel any automobile or other motor vehicle outside of said $\frac{3}{4}$ mile circle within the city limits at a rate of speed to exceed twelve (12) miles per hour; and at no time shall any person or persons drive or propel any automobile on any street, highway, or public place in a careless, reckless, or negligent manner. . . .

"Sec. 2. The owner or driver of any automobile or other motor vehicle shall, before operating the same, register with the license collector his name and residence, together with a description of the vehicle so owned or operated, and the license collector shall

enter such name and residence and description in a record kept for that purpose, and shall furnish the person so registered with one or more aluminum figures sufficient to compose a number corresponding with the number appearing upon the record so made. The figures shall be four (4) inches high, and three (3) inches in width, for which the person to whom delivered shall pay to said license collector the sum of one dollar (\$1). The owner of such vehicle shall place, or cause to be placed, such figures on the rear of his vehicle in the center of the bed thereof, arranging the same in a horizontal line with a space of one and one-half (1½) inches, between the nearest adjacent points thereof, and on a dark background; but said figures may be rigidly attached to the axle or hung under the body of the vehicle; said figures shall at no time be concealed or covered, but shall be kept in plain sight. . . .

"Sec. 5. No person shall operate, or cause to be operated, an automobile or other motor vehicle upon any of the streets, alleys, boulevards, park driveways, or public grounds, of the city of Detroit without complying with the provisions hereof.

"Provided that the provisions of the ordinance relating to the registration and numbering of such vehicles and notification as to transfers thereof shall not apply to automobiles or other motor vehicles owned by nonresident visitors when said vehicle is kept in the city for not more than two (2) days.

"Sec. 6. Any person violating any of the provisions of this ordinance shall be punished by a fine not exceeding one hundred dollars (\$100) for each offense; and, in the imposition of such fine, the court may make a further sentence that, in default of the payment of such fine, the offender may be imprisoned in the Detroit House of Correction for such offense for any period of time not exceeding three (3) months."

Respondent concedes that part of the ordinance regulating the speed of automobiles is valid. He contends, however, that the provisions respecting registration and numbering are invalid. His objections to the validity of those provisions may be classified thus: (1) The legislature has never granted to the common council of Detroit authority to enact them. (2) They interfere with respondent's constitutional rights. We will consider each of these objections separately.

1. Has the legislature authorized the common council to enact the provision in question? This depends upon the proper construction of § 170 of the city charter, which gives the common council authority "to control, prescribe, and regulate the

manner in which the highways, streets, avenues, lanes, alleys, and public grounds and spaces within said city shall be used and enjoyed." It is scarcely necessary to say that this gives the common council ample authority to enact ordinances which will tend to make streets safe for the traveling public. We may take judicial notice that many of these automobiles may be driven at a speed of at least 40 miles an hour. Driven by indifferent, careless, or incompetent operators, these vehicles may be a menace to the safety of the traveling public. Under its authority to regulate the use of the streets, the city may enact ordinances which will diminish this danger. It is clear, and it is conceded, that it may regulate the speed of automobiles and repress their careless management, but it is contended that it has no power to provide for their registration and numbering. It is not difficult to see that the registration and numbering of automobiles is intimately connected with their safe operation in the streets. In a city like Detroit many automobiles are precisely alike in external appearance. They are sometimes operated by persons whose faces are partially concealed and whose identity is uncertain. Those operators who are most reckless and indifferent—and those are the ones who endanger the safety of others—may violate this ordinance with impunity unless some method is adopted by which they or their automobiles may be identified. The provision in the ordinance for registration and numbering is such a method. It is reasonable to believe that, when he knows that the number displayed at the rear identifies his automobile, fear of discovery and punishment will lead the automobile's driver to observe the requirements of the ordinance. Indeed, we cannot say that the common council did not decide—and did not justly decide—that the provision for identification by registering and numbering was necessary to prevent injury to pedestrians and other travelers from the careless management of automobiles. If authority be needed for the proposition that the city may enact this provision for the purpose of identifying automobiles which endanger the safety of travelers, *Frankford & P. Pass. R. Co. v. Philadelphia*, 58 Pa. 119, 98 Am. Dec. 242, is such an authority. The ordinance there in question provided "that each car run shall be numbered and have its number painted in a conspicuous place." The court sustained this ordinance, saying: "It is obvious . . . that its effect is that of a police regulation. It clearly furnishes a means of identifying every car which may be run in violation of those rights and public interests which the city is authorized

by its charter to maintain and secure." See also *Laundry License Case*, 22 Fed. 703.

But it is said that the provision for registration and numbering is a license, and that the grant of authority to regulate gave the city no power to license. If the provision for registration and numbering—which involves no discrimination, and requires the payment of nothing more than is necessary to pay for the number which the municipality furnishes—can be regarded as a license (for conflicting definitions of "license," see Cooley on Taxation, 3d ed. p. 1137; *Adler v. Whitbeck* 44 Ohio St. 539, 9 N. E. 672), it is not a license for the purpose of raising revenue. If it were, it might well be contended that it did not pass as an incident to the power to regulate. See Cooley, Taxn. 3d ed. p. 1141; *Laundry License Case*, 22 Fed. 703. It is a license (if a license at all) as a mere means of regulation: indeed, we might say, as already shown, as a necessary means of regulation. This proposition is self-evident, *vis.*, that the grant of authority to accomplish a certain purpose carries with it authority to use any proper and lawful means without which that purpose cannot be accomplished. If, therefore, the speed of automobiles cannot be effectually regulated without licensing them, the grant of the power to regulate confers upon the city power to license, unless some other provision of law forbids the exercise of that power. I think this conclusion is supported by the following authorities: *Russellville v. White*, 41 Ark. 485; *Ft. Smith v. Ayers*, 43 Ark. 82; *St. Johnsbury v. Thompson*, 59 Vt. 300, 59 Am. Rep. 731, 9 Atl. 571; *Laundry License Case*, 22 Fed. 703. In the *Laundry License Case*, which involved the licensing of laundries in the city of Portland, Oregon, it was said: "The words 'to control' and 'to regulate,' *ex vi termini*, imply to restrain, to check, to rule and direct. And in my judgment, the power to do either of these implies the right to license, as a convenient and proper means to that end. . . . By this means the persons or occupations to be regulated are located and identified and brought within the observation of the municipal authorities, so that whatever regulations are made concerning them may be the more easily and certainly enforced." There are cases holding that the grant of power to regulate does not confer upon the city power to license. See *Burlington v. Baumgardner*, 42 Iowa, 673. In that case (that was a grant of authority to regulate taverns and houses for public entertainment) it might be said that the power of regulation might be effectually exercised without licensing. That is by no means an authority for the proposition that, when

regulation cannot otherwise be effectual, the grant of power to regulate does not carry with it power to license. We do not think that any of the cases cited by respondent are opposed to this conclusion. The cases most nearly in point are *Chicago v. Collins*, 175 Ill. 445, 49 L. R. A. 408, 67 Am. St. Rep. 224, 51 N. E. 907, and *Chicago v. Banker*, 112 Ill. App. 94. In *Chicago v. Collins* the supreme court of Illinois held invalid an ordinance of Chicago which imposed a license fee of \$10 on each vehicle using the streets of the city. The grounds of that decision were these: (a) The city had no authority to prohibit, and therefore no authority to license, "an ordinary method of locomotion, or even an extraordinary method, if it is not of itself calculated to prevent a reasonably safe use of the street by others." (b) The city had no authority to raise a revenue by taxing the use of vehicles which were already subject to taxation under the general laws of the state. That decision has no application to the case at bar. It does not hold nor indicate that municipal authorities may not (if in their judgment such a requirement is essential to safe travel) exclude from their streets automobiles not registered and numbered. *Chicago v. Banker*, 112 Ill. App. 94, is more nearly in point. In that case it was decided that an ordinance of the city of Chicago compelling one "who uses his automobile for his private business and pleasure only to submit to an examination and to take out a license (if the examining board see fit to grant it) . . . is beyond the power of the city council, and is therefore void." Without approving that decision, it is sufficient to point out that the ordinance in question in that case goes further than the ordinance in the case at bar.

We conclude, therefore, that the common council of the city of Detroit had authority to provide for the registration and numbering of automobiles under the grant of power to regulate the use of the streets, unless the exercise of that power is forbidden on some constitutional ground.

2. Is the ordinance constitutional? Respondent contends that the ordinance violates § 26, art. 6, of our Constitution, which forbids "unreasonable searches," and § 32 of article 6, which reads: "No person shall be compelled in any criminal case to be a witness against himself, nor to be deprived of life, liberty, or property without due process of law." We deem it sufficient to say that the provision requiring one operating an automobile on the street to display thereon a number furnished by the municipality is not an unreasonable search. The statement in the opinion of this court in *Robinson v. Haug*, 71 Mich. 38, 38 N. W. 668, re-

lied upon by respondent, which denies the right of the public to look into one's private place of business or residence, manifestly has no application. We think it equally clear that the ordinance does not compel an automobile owner or operator to testify against himself, or deprive him of any property rights. It is merely a justifiable exercise of the police power in the interest of the safety of the traveling public. We think it unnecessary to discuss any other objection.

The conviction is affirmed.

Wheeler MUMFORD

v.

Adolph M. STARMONT *et al.*, *Plffs. in Err.*

(.....Mich.....)

1. The arrest of a motorman to abate a nuisance caused by the running of cars when the trolley wire is in such poor condition that it is liable to come down to the injury of travelers upon the street is not justified when the result can be obtained by cutting the feed wires or removing the controllers from the cars.
2. The mayor and chief of police of a city are liable in damages in case they arrest motormen of street cars to abate a nuisance caused by the operation of cars when the trolley wire is in such poor condition as to be liable to fall, when the object can be effected by merely cutting the wires or removing the controllers from the cars.
3. Upon trial of an action for false imprisonment plaintiff may testify that he felt humiliated by the arrest.
4. It is not error to exclude evidence, in an action by a motorman for false imprisonment for attempting to run cars against the orders of the municipal authorities, to the effect that plaintiff was subsequently complimented by his employer for his effort to do so.
5. The exclusion of evidence as to a custom to search prisoners is not error in an action for wrongful arrest, where plaintiff was not searched.
6. An instruction in an action for false imprisonment permitting the damages to be fixed by what the average man would suffer under the circumstances is not reversible error, where there is nothing to show that plaintiff suffered less than would the average man, although the measure of damages should actually have been what plaintiff suffered.

(February 28, 1905.)

NOTE.—As to liability of officer for making arrest, see also, in this series, *Leger v. Warren*, 51 L. R. A. 198, and *note*, and *McCullough v. Greenfield*, 62 L. R. A. 906.

As to liability of municipal corporation for wrongful arrest generally, see *Bartlett v. Columbus*, 44 L. R. A. 795, and *note*, and *McGraw v. Marion*, 47 L. R. A. 593, and *note*.
69 L. R. A.

ERROR to the Circuit Court for Ingham County to review a judgment in favor of plaintiff in an action brought to recover damages for false imprisonment. *Affirmed.*

The facts are stated in the opinion.

Messrs. Black & Reasoner, with *Mr. O. J. Hood*, for plaintiffs in error:

The mayor was authorized to abate this public nuisance.

Hart v. Albany, 9 Wend. 571, 24 Am. Dec. 165; *Fields v. Stokley*, 99 Pa. 306, 44 Am. Rep. 109; *Gunter v. Geary*, 1 Cal. 462; *Harvey v. Dewoody*, 18 Ark. 252; *Wetmore v. Tracy*, 14 Wend. 250, 28 Am. Dec. 525; *Van Wormer v. Albany*, 18 Wend. 169; *Pedrick v. Bailey*, 12 Gray, 161; *Brown v. Perkins*, 12 Gray, 89; *Detroit v. Ft. Wayne & E. R. Co.* 90 Mich. 646, 51 N. W. 688.

The defendants were authorized to abate this nuisance by the express resolution of the common council. The common council had authority to pass the resolution under the general police power of the state. Under the police power, business injurious or hazardous may be prohibited.

People v. Hawley, 3 Mich. 330; *People v. Gallagher*, 4 Mich. 244.

It is as full and complete as any other governmental power.

Kidd v. Pearson, 128 U. S. 1, 32 L. ed. 346, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6; *Richmond, F. & P. R. Co. v. Richmond*, 96 U. S. 521, 24 L. ed. 734; *Stone v. Mississippi*, 101 U. S. 814, 25 L. ed. 1079.

The judicial power will not interfere with the legitimate discretion of any other department of government.

Detroit v. Hosmer, 79 Mich. 384, 44 N. W. 622; *Dixon v. Detroit*, 86 Mich. 516, 49 N. W. 628; *Rae v. Flint*, 51 Mich. 526, 16 N. W. 887.

Individual interests must yield to the public welfare.

Fields v. Stokley, 99 Pa. 306, 44 Am. Rep. 109; *Welch v. Stowell*, 2 Dougl. (Mich.) 332; *Meeker v. Van Rensselaer*, 15 Wend. 397; *Shafer v. Mumma*, 17 Md. 331, 79 Am. Dec. 656; *Manhattan Mfg. & Fertilizing Co. v. Van Keuren*, 23 N. J. Eq. 255; *Coe v. Schultz*, 47 Barb. 64.

Public officials are not liable for their acts done in good faith.

Gardner v. Couch (Mich.) 11 Det. L. N. 340, 100 N. W. 673; *Brooks v. Mangan*, 86 Mich. 576, 24 Am. St. Rep. 137, 49 N. W. 633; *Ournow v. Kessler*, 110 Mich. 10, 67 N. W. 982; *Tillman v. Beard*, 121 Mich. 475, 46 L. R. A. 215, 80 N. W. 248; *James v. Sweet*, 125 Mich. 132, 84 N. W. 61.

Defendants had the right summarily to do what they did.

Houghton v. Butler, 4 T. R. 364; *Wistar v. Addicks*, 9 Phila. 145; *American Print*

Works v. Lawrence, 1 N. J. L. 248, 3 N. J. L. 590, 57 Am. Dec. 420; *Meeker v. Van Rensselaer*, 15 Wend. 397; 2 Wood, Nuisances, p. 948; 16 Am. & Eng. Enc. Law, p. 991.

Mr. Russell C. Ostrander also for plaintiffs in error.

Messrs. Searl & Montfort for defendant in error.

Hooker, J., delivered the opinion of the court:

The defendants were respectively mayor and chief of police of the city of Lansing. The plaintiff recovered a verdict and judgment for \$150 against them, and they have brought the case to this court by writ of error.

The action was for false imprisonment, based upon an arrest and detention of the plaintiff by the police, under directions of the defendants. The record shows that the plaintiff was a motorman upon a street car operated upon the streets of Lansing. There was proof tending to show, and the court charged the jury, that the overhead system of the street railway was so out of repair as to be dangerous to persons and horses using the street, owing to the frequent falling of the wires, and that it was a public nuisance. The common council had, by resolution, so declared it, and directed that it be abated. There was evidence to the effect that the running of trolley cars increased the danger by causing the wires to break and fall. The mayor thereupon gave notice to the railway company that it must cease running cars while the wires remained in this dangerous condition. The cars were stopped, and did not run again that day. Some of the feed wires were cut. On the evening of that day the plaintiff learned of the difficulty between the city and the company, but having been ordered to report for duty on July 2d, the next day, he did so, and ran his car south on Washington avenue. On his return trip he met two cars at the intersection of the Michigan avenue branch with the Washington avenue line, being the principal business corner of the city. He stopped his car and started to take his controller cranks to the other end of the car, when defendant Starmont took them. The plaintiff took hold of the rope to reverse the trolley, when defendant Starmont took hold of him, and handed him over to a policeman, giving orders to hold him until Starmont should direct his discharge. He was taken to the police station, and, with other motormen who had been arrested, had an interview with the city attorney, who told them that they had resisted an officer and broken city ordinances, that unless they should

promise not to run the cars again they would have to be arraigned for trial, and asked them to decide. Plaintiff said that he would run a car every fifteen minutes if given the opportunity, for such were his instructions. Before dinner the men were discharged, after being taken before a magistrate. The defendants stated that it was their intention to stop the cars, and that to accomplish that it was necessary to restrain the motormen for a time. The judge directed the jury to find a verdict for the plaintiff, and assess his damages, which was done. Counsel have discussed several assignments of error, among them the following: (1) That the court should have directed a verdict for the defendants; (2) that, if not, the cause should have been left to the jury upon the question of plaintiff's right to recover.

The testimony conclusively shows that the defendants took the cranks or controllers used in starting plaintiff's car, and that without them he could not have afterwards started the car. Notwithstanding this, they took plaintiff into custody and detained him at the police station for several hours, in a vain attempt to secure a promise that he would not run the car if discharged. Then he was discharged. The car was stopped, and could not be run so long as the police retained custody of it, and there was no justification, so far as the facts disclosed by this record go, for the arrest and detention. The taking of the plaintiff before a magistrate was a further wrong, for there was no ground for the claim that he had been guilty of the offense of resisting an officer. The only thing that he is shown to have done after the controllers were taken from him prior to his arrest was to reverse the trolley of the car. That put the car in readiness to be run, but nothing more, and plaintiff made no effort to start the car. Indeed, he could not have started it, for the policemen had the necessary appliances. The only excuse for the detention of the plaintiff was that he would not promise not to run the car if liberated, and that it was more convenient to arrest and detain all of the motormen than to put a man in charge of each car, it appearing that seven or eight motormen were thus treated. The defendants seek to justify their action upon the ground that the condition of the overhead construction of the street railway line was a public nuisance, in that it was a menace to persons using the highway, and that it was the defendants' duty, both by virtue of their office, and by reason of the action of the common council which had declared it a nuisance, to abate the danger by preventing the operation of cars until the wire should be replaced by new. Defendants had forbidden and prevent-

ed the railroad company from making temporary repairs, being apparently of the opinion that they would be ineffective. The condition of the wire was not admitted to be so bad as to make the same a nuisance, and it is not clear that the judge was justified in instructing the jury that it was a nuisance; but these defendants cannot complain of such instruction, for the reason that it is what they claimed, and was distinctly favorable to them. Apparently the judge chose to eliminate that question, in view of his intention to direct a verdict for plaintiff. The undisputed facts in the case are that the defendants arrested and detained the plaintiff, as a means of preventing the running of cars, or, as they state, abating a nuisance. If the circumstances shown were such as to justify the abatement of a nuisance, it could have been done by removing the dangerous wires, or by cutting the same off from the power house from whence the current was furnished. The stopping of the cars was not essential to this. If the danger existed only by the reason of the running of the cars, cutting the wire would have been an effective method of stopping the cars, or they might have been stopped by taking possession of or disabling them without cutting the feed wire. Either of these methods would have been preferable to the wholesale arrest of the motormen. The evidence shows that the plaintiff's car was disabled through the seizure of the controllers. Counsel cite no case recognizing the method taken of abating a nuisance, or preventing injury to citizens, where the person arrested is not chargeable with a public offense or threatened breach of the peace. The conduct of the defendants was so clearly in excess of necessity that we find it unnecessary to discuss at length the authority of municipal officers as to summary abatement of nuisances. Under the admitted facts the court could have done no less than to direct a verdict for the plaintiff. This being so, it becomes unnecessary to refer to the other questions pertaining to that subject, and it is only necessary to inquire whether errors were committed in relation to the amount of damages suffered.

We think it was not error to allow the plaintiff to state that he felt humiliated by the arrest. It was not error to exclude evidence that subsequently he was compliment-

ed by his employer for his effort to run the car. Neither was it error to exclude evidence that it was the custom to search prisoners, which custom was not followed in this case. The court was justified in saying that there was no evidence tending to show that plaintiff resisted an officer.

In the course of his instructions, the court said to the jury that they should give the plaintiff actual damages, and that they were to say "what damage, if any, the average man would suffer, and to award plaintiff, if anything, such an amount as would compensate him for his actual damages sustained, and no more." In one instance he varied this by saying: "The sense of shame and mortification, of wrong and of outrage, for which the plaintiff may recover, is not limited to the actual time he was under restraint, but includes all such sense of shame, mortification, wrong, and outrage as it can be said the average man under like circumstances might have expected to experience for all time, arising from such arrest and detention as has been shown. No witness has placed a money standard on injured feelings, humiliation, sense of outrage, and mental suffering arising from an unlawful arrest and imprisonment, and no witness can do so. To do that is solely your province. The law has no other remedy for an action for wrong than to compensate, so far as it can be by way of money, for the injury done by one man to another. The facts and circumstances surrounding the doing of the unlawful act are to be considered by you, and you are to consider as best you can, from all the evidence, what sense of shame, mental suffering, humiliation, and sense of outrage the average man under similar circumstances might reasonably be expected to sustain, and award the plaintiff the amount thereof as his damages in this case." It is insisted that the measure of damages should not have been what the average man would suffer under the same circumstances, but what the plaintiff had suffered. Undoubtedly the latter is the rule, but in this case there is nothing to indicate that this plaintiff suffered less than the average man, and no injury is discernable from the instructions. We fail to discover any unfairness in the charge.

The judgment is affirmed.

TENNESSEE SUPREME COURT.

J. H. BARNUM

v.

E. B. LE MASTER *et al.*

(110 Tenn. 638.)

1. A conveyance of land from husband to wife in the usual form, for a valuable consideration, though without words disclosing an intent to do so, vests in her a separate estate which she may transfer without his joinder or consent.

2. Marriage is a valuable consideration sufficient to support a conveyance from husband to wife.

(June 16, 1903.)

NOTE.—Effect of conveyance by husband to wife.

- I. At common law.
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- X. Effect of divorce, 379.
- XI. Form and provisions of conveyance, 380.

I. At common law.

a. Transfers of real estate.

The changes to which well-established rules of law are subject have perhaps no better illustration than is afforded by a comparison of the ancient rule with respect to conveyances between husband and wife with the rule as it obtains at the present time in most jurisdictions whose law is derived from the common law of England.

Littleton says: A man may not grant or give his tenements to his wife during coverture, for his wife and he be but one person in the law. §168.

And while the common-law writers are not agreed as to the reason for the rule, both courts and text writers agree that such a conveyance had no effect. *Furrow v. Athey*, 21 Neb. 671, 39 Am. Rep. 867, 33 N. W. 208; *Smith v. Dean*, 60 L. R. A.

CROSS-APPEALS from a decree of the Chancery Court for Shelby County rendered in a suit to enjoin the sale and delivery of certain real estate; defendants appealing from so much of the decree as held that there was no right to make the sale; and complainant appealing from so much as held that certain agreements with respect to the property had not been proved. *Reversed on defendants' appeal.*

The facts are stated in the opinion.

Messrs. Smith & Tresevant, for complainant:

Land settled on the wife as separate estate will not carry rents, unless there

15 Neb. 433, 19 N. W. 642; *White v. Wager*, 25 N. Y. 323; *Kinney v. Dexter*, 81 Wis. 80, 51 N. W. 82; *Martin v. Martin*, 1 Me. 397; *Allen v. Hooper*, 50 Me. 371; *Jewell v. Porter*, 31 N. H. 38; *Ransom v. Ransom*, 30 Mich. 323; *Voorhees v. Presbyterian Church*, 17 Barb. 103; *Chouteau v. Magenis*, 28 Mo. 187; *Gluck v. Cox*, 75 Ala. 310.

A conveyance by husband to wife has no effect on the legal title. *Gaston v. Welr*, 84 Ala. 193, 4 So. 258.

A deed poll without consideration, by which a man grants all his estate to his wife, is void at law, and creates no trust which a court of equity will enforce. *Price v. Price*, 14 Beav. 598. The master of the rolls says, If I were to decide that this deed would be good as between strangers, I should really be deciding that, if a man execute a deed simply saying, "I hereby give all my estate at A to another," and nothing further takes place either to give possession, or to transfer the legal estate, this court would complete the delivery of the estate. This would, in my opinion, be contrary to the authority. With respect to the transfer of the estate he says nothing took place but the execution of the deed, the communication of it to the wife, and the delivery of it to the attesting witnesses. He further says that he is unable to discover on what principle the position that a voluntary gift by a man to his wife can properly rest.

That a deed from husband directly to his wife is a nullity at common law is a doctrine as old as the law itself. It results inevitably from the principle that the husband and wife are one, and of course are incapable of contracting with each other. *Coates v. Gerlach*, 44 Pa. 43.

In *Beard v. Beard*, 3 Atk. 72, the court, in speaking of a deed poll, says it cannot take effect as a grant or deed of gift to the wife because the law will not permit a man to make a grant or conveyance to the wife in his lifetime; neither will equity suffer the wife to have the whole of the husband's estate while he is living, for it is not in the nature of a provision, which is all the wife is entitled to.

In *Moyse v. Gyles*, 2 Vern. 385, an attempted grant by a man to his wife of his moiety in a church lease was held to be absolutely void at law.

In *Firebrass ex dem. Symes v. Pennant*, 2 Wills. 254, the question arose whether or not

is something in the settlement showing that they are included.

Ordway v. Bright, 7 Heisk. 681.

Intention to exclude the marital rights must be "expressed in the clearest and most unequivocal terms."

Wood v. Polk, 12 Heisk. 222; *Houston v. Embry*, 1 Sneed, 489; *Murdock v. Memphis & O. R. Co.* 7 Baxt. 558.

The rule in gifts of personalty by a husband to his wife does not apply to real estate.

Murdock v. Memphis & O. R. Co. 7 Baxt. 572; *Vick v. Gower*, 92 Tenn. 391, 21 S. W. 677.

The husband's right, as husband, in his wife's real estate, is an estate for the lives of the two, which may continue during the husband's life.

Guion v. Anderson, 8 Humph. 298; 2

Kent, Com. * * 130 *et seq.*; *Coleman v. Satterfield*, 2 Head, 261; *Bottoms v. Corley*, 5 Heisk. 4.

And during their joint lives the law gives him the right to the crops, profits, and products of her land.

Lucas v. Rickerich, 1 Lea, 728; *Ables v. Ables*, 86 Tenn. 333, 9 S. W. 692; *Jones v. Ducktown Sulphur, Copper & I. Co.* 109 Tenn. 375, 71 S. W. 823.

A wife who has abandoned her husband cannot sell the interest in her estate which he has acquired, either during their joint lives or during his life, if he is a tenant by curtesy.

The common law cannot be changed indirectly, or by implication, by a statute. To change it the language of the statute must be clear and direct.

Eaton v. Dickinson, 3 Sneed, 400; 1 Kent,

a man could grant land to his wife by copy of court roll, and it is stated that, the case being quite new, no authority could be cited to show whether the grant was good or bad, and the court said this was a provision by a man for his wife which should be gained, if possible, to get over the maxim at law, that a husband and wife are one person, and therefore cannot grant lands to one another. This was an original, voluntary grant from a husband to the wife, who cannot by law take immediately from him any more than a monk who is dead in law, and considered as no person; so here is no person to take, for the husband and wife are only one person. We might as well repeal the first section of Littleton as determine this grant from the husband immediately to his wife to be good.

Prior to New York Acts 1887, a deed of lands from a man to his wife was void unless founded upon a valuable or meritorious consideration, such as would enable a court of equity to sustain it. *Dean v. Metropolitan Elev. R. Co.* 119 N. Y. 540, 23 N. E. 1054. The court says in cases where equity interferes to sustain a deed between husband and wife an equitable consideration must be shown either upon the face of the conveyance itself or by extraneous proof.

In *Parker v. Stuckert*, 2 Miles (Pa.) 278, it is said that a direct transfer from husband to wife, purporting to be founded on a valuable consideration, cannot be effected at all. A transfer of this description implies a contract to which a *feme covert* can in no instance be a party.

All conveyances made by a man to his wife directly are at common law invalid for the reason that husband and wife are regarded as but one person, and the legal existence of the wife is merged into that of the husband. And the statutes creating and defining the separate estates of married women are not in abrogation of this doctrine of the common law; they are not intended to sever the unity of husband and wife so far as to confer upon them capacity to contract with, or to convey directly to, each other. But a court of equity will, when the contract is fair and just, give it full effect and validity. *Seals v. Robinson*, 75 Ala. 363.

In *Washburn v. Gardner*, 76 Ala. 599, the 69 L. R. A.

court says, with reference to the power of a married woman over land which her husband has conveyed directly to her, that, if the question was one of first impression before the court, much might be said against the theory that she had a right to treat it as though she was a *feme sole*. The court says the conveyance is inoperative at law. And does it not follow that in any relief which the law court can administer the property is that of the husband, unaffected by his abortive attempt to divest the title out of himself? And has the wife any interest in her right to the property other than the equitable right to invoke the powers of the chancery court to perfect that which the husband, by force of the relation which he sustains to the wife, was incompetent to do? And is this equitable right of the wife the equivalent of an estate secured to her sole and separate use?

At common law husband and wife could not separate their interests in common property by deeds of partition. *Frissell v. Bozler*, 19 Mo. 448.

A husband cannot convey land directly to his wife without the intervention of trustees. *Fletcher v. Mansur*, 5 Ind. 267.

In *Burdeno v. Amperse*, 14 Mich. 91, 90 Am. Dec. 225, the court held that the basis of the common-law disability of married women rested on the peculiar disqualification and burdens of the wife, and not upon anything growing out of the marital relation. It said that the wife, by her coverture, ceased to have control of her actions or her property, which became subject to the control of her husband, who alone was entitled, during the marriage, to enjoy the possession of her lands, and who became owner of her goods, and might sue for her demands. The husband alone remained *sui juris*, as fully as before marriage. It followed from this legal merger by coverture into a single personality, that the husband could make no grant to the wife, and the wife could make none to the husband. And furthermore, a grant to her by her husband, of a freehold, would be, in effect, a grant to take effect *in futuro* (the husband retaining possession for life), and such a grant was unlawful because a freehold could only pass by livery of seisin, which must operate either immediately or not

Com. 433; *Horne v. Memphis & O. R. Co.* 1 Coldw. 72; *Lucas v. Rickerich*, 1 Lea. 728; *Ables v. Ables*, 86 Tenn. 333, 9 S. W. 692; *Jones v. Ducktown Sulphur, Copper & I. Co.* 109 Tenn. 375, 71 S. W. 823; *Brasfield v. Brasfield*, 96 Tenn. 580, 36 S. W. 384.

The deed of a married woman alone is void for all purposes, if this be a general estate.

Cope v. Meeks, 3 Head, 387; *Ellis v. Pearson*, 104 Tenn. 591, 58 S. W. 318.

Messrs. Frank P. Poston and J. W. Canada for defendants.

Shields, J., delivered the opinion of the court:

The question for determination in this case is whether a conveyance of lands made by a husband to his wife, in the usual

at all. When equity recognizes a power in the wife, who is the disabled party, not only to deal with others, but even to contract with and make provision for her husband out of her separate funds, it can hardly be claimed that the husband, who was always *sui juris*, is restrained by any but technical rules from transferring to her directly. Equity will enforce even such conveyances. But there never was a time when he could not, by his deed, put property where she could control it. If it were not that by standing in her name he became legally the owner of the usufruct, there could be no valid reason why any indirection ever need be resorted to. It is not against the policy of the law that the wife should have the real benefit of his gift; and equity, looking through the form at the substance, calls it, as it is in fact, a gift from husband to wife.

In *Riehl v. Bingenheimer*, 28 Wis. 86, there is a *dictum* to the effect that a conveyance by a man directly to his wife is void at law.

And, by way of argument, the court, in *Welch v. Welch*, 63 Mo. 59, says at law gifts from husband to wife are held to be entirely void; but equity upholds some classes of gifts except where the claims of creditors might interpose.

So in *Doe ex dem. Abbott v. Hurd*, 7 Blackf. 510, the court, in considering the validity of a trust deed, stated that a man cannot convey land immediately to his wife on account of the legal unity of the parties, but he may convey it to trustees for her use.

B. Gifts of personalty.

Under the old theory that a husband and wife were in law one person, and that therefore there could be no contracts or conveyances between them, gifts of personalty were as ineffectual as transfers of real estate. There are some cases which have applied this theory with the result of nullifying attempted gifts.

In *Neufville v. Thomson*, 3 Edw. Ch. 93, it is said at common law there cannot be a gift of chattels *inter vivos*, from the husband to the wife during coverture; for, being but one person in law, she cannot take independently of him; and, though there might be a declared gift and delivery to the wife, yet the title would remain

form, without any words indicating an intention to do so, has the effect in law, *ex proprio vigore*, to create a technical separate estate in the wife. The facts necessary to be stated are these: Complainants J. H. Barnum, and defendant Clara S. Barnum, are husband and wife, without issue of their marriage. J. H. Barnum, on December 2, 1895, in consideration of an antenuptial contract, conveyed to his wife, Clara S. Barnum, certain valuable lands lying in Shelby county, near Memphis, the conveyance being in the usual form, without any words indicating an intention to create a separate estate, reciting a consideration of love and affection, and containing covenants of seisin and general warranty. Clara S. Barnum, without the consent or joinder of her husband, J. H. Barnum, November 7, 1902, conveyed by deed with

in the husband, and at his death pass to his representatives, except it should be paraphernalia and personal ornaments, suitable to the wife's condition, which the law, as against his representatives, would allow her to retain.

In *Mews v. Mews*, 15 Beav. 529, the master of the rolls, in deciding against the wife's claim to personal property on the evidence, said that he entertained no doubt that there might be a gift made by a man to his wife, which, though bad at law, would be supported in equity. But he states that there must be some clear and distinct act by which the husband has divested himself of the property, and engaged to hold it for the separate use of his wife.

A deed of gift of a slave by a man to his wife is absolutely void at law. *Tourney v. Sinclair*, 3 How. (Miss.) 324. The court says it did not profess to give her a separate property. It consequently vested an absolute right in the husband, and, unless he has divested himself of the right, he must be entitled to recover possession of the slave in the action of detinue which he had instituted.

In a case where the man bought a leasehold estate in the joint name of himself and wife, the court held that it was void under the custom of London, saying that in his lifetime he had equal power to dispose of it as any other part of his personal estate; and, further, that, if he had taken it entirely in the name of his wife, then it would have been the estate of his wife, and he might have disposed of it in his lifetime equally as now. *Coomes v. Effling*, 3 Atk. 676.

But the invalidity of gifts from husband to wife was difficult to maintain in practice. When she claimed small amounts of pin money, and personal ornaments and wearing apparel, it seemed absurd to insist that she was not entitled to them; and therefore the rule began to give way at this point very early. The first exceptions to the rule were by courts of equity under the principles noticed in the next subdivision of this note. But the distinction between law and equity has been abandoned, and such gifts have for a long period been upheld, even by courts of law.

In *Slanning v. Style*, 3 P. Wms. 334, the lord chancellor recognized the claim of a widow against her husband's estate for money which

proper privy examination, for a valuable consideration, a portion of these lands to the defendant E. B. Le Master. Complainant filed his bill November 14, 1902, charging that Mrs. Barnum had only a general estate in said lands, and could not sell and convey them without his joining in the conveyance, and that the deed made by her was void, and a cloud upon his marital rights in the premises. The prayer is that the conveyance be declared void, canceled, and surrendered, and E. B. Le Master be enjoined from taking possession of the property. This relief was granted by the chancellor, and a decree pronounced in accordance with the prayer of the bill, from which the defendants have appealed and assigned errors.

Complainant, as stated, contends that the defendant Clara S. Barnum had only a general estate in the lands; that by virtue of his marital rights he has the right to the possession of them during their joint lives, and that she cannot sell or convey them during that period without his joining in the conveyance; and therefore the sale and conveyance made by her to E. B. Le Master is a nullity, and a cloud upon his title. While the insistence of the defendant is that the conveyance to Mrs. Barnum, being one from husband to wife, by necessary implication and operation of law created and vested in her a separate estate in the lands conveyed, notwithstanding the entire absence of any words evidencing such intention, and which are necessary in transfers

he had allowed her to receive out of sales of small produce from the farm, citing the unreported case of *Calmady v. Calmady*, where an agreement by which the husband permitted the wife to retain a certain amount upon the renewals of their lease was upheld.

Jewels given by a man to his wife to wear upon her person constitute her paraphernalia, which, in case he dies before her without having disposed of them, will belong to her; but he may dispose of them during his lifetime. *Graham v. Londonderry*, 3 Atk. 393.

In *Grant v. Grant*, 34 Beav. 623, it is said that so far as gifts of chattels are concerned, it is merely a question of evidence; and it cannot now be disputed that a husband may be a trustee for his wife.

In *Graham v. Londonderry*, 3 Atk. 393, the court cites *Cowper's Case* to the effect that personal property given by a man to his wife may be her separate estate.

And when the statutes began to recognize a separate personality in the wife the way was already paved for the courts to hold that gifts of personality from her husband were effectual to vest the property in her.

So that now it has been repeatedly held that husband and wife may assign and transfer personal property directly to each other. *Dean v. Metropolitan Elev. R. Co.* 119 N. Y. 540, 23 N. E. 1054; *Whiton v. Snyder*, 88 N. Y. 304; *Armitage v. Mace*, 96 N. Y. 538.

At common law a man may make a gift of personal property to his wife. *Cottrell v. Spless*, 23 Mo. App. 35.

A gift of personal property by a man to his wife will be upheld without the aid of the married woman's acts. *Kelly v. Campbell*, 1 Keyes, 30.

A man may transfer a bank account to his wife by gift. *Re Holmes*, 79 App. Div. 264, 79 N. Y. Supp. 502, Affirmed in 176 N. Y. 603, 68 N. E. 1118.

A conveyance of personal property directly to the wife is binding upon the grantor. *De Garca v. Galvan*, 55 Tex. 53.

In *McWilliams v. Ramsay*, 23 Ala. 813, it is said that gifts of personality by a man to his wife are supported upon the presumption that he intended it to be for her separate use.

The wife may take title to a chattel by gift from her husband. *Armitage v. Mace*, 16 Jones & S. 108.

Although a deed of slaves by a man to his 69 L. R. A.

wife will not vest title in her, it amounts to a declaration of trust in her favor. *Huntly v. Huntly*, 43 N. C. (8 Ired. Eq.) 250.

A direct conveyance of slaves by a man to his wife in consideration of her relinquishment of dower will vest title property in her to her separate use without words to that effect. *Powell v. Powell*, 9 Humph. 480. The court says, when the husband himself sells and conveys property to his wife for a valuable consideration paid him out of her separate estate, there can be no intent in favor of his rights to the property thus conveyed, and it is absurd to talk about such conveyance being against his common right, for it is impossible to hold with regard to intention that a sale of property to a wife by the husband for a valuable consideration to him out of her own private estate can have any other design than the separate use and benefit of the wife. The husband parts from his interest by his conveyance, and, if the operation of the conveyance be to vest the property in the wife for his use and benefit, and he be immediately remitted to all his original rights, then is the whole transaction a farce, and the law, in permitting such contracts, has placed itself in a very ridiculous position.

And the rule recognizing the validity of the transfer has been extended to uphold gifts of notes and bonds, and to enforce notes executed by the husband in favor of the wife.

In *Re Murray*, 9 Ont. App. Rep. 374, Reversing 29 Grant, Ch. (U. C.) 443, a gift by a man to his wife of promissory notes was upheld.

A note representing a portion of the proceeds of homestead real estate may be made the separate property of the wife by the consent of the husband. *Ogden v. Giddings*, 15 Tex. 485.

A gift of a note by a man to his wife may be effected by directing the note to be made payable to her, and delivering it into her possession. *Reed v. Reed*, 52 N. Y. 651.

A note executed by a man to his wife in consideration of money belonging to her separate estate is enforceable against his estate. *Hall v. Hall*, 52 Tex. 204, 36 Am. Rep. 725.

Equity will enforce a note executed by a man to his wife during coverture on consideration of her moneys received or collected by him. *McC Campbell v. McC Campbell*, 2 Lea, 664, 31 Am. Rep. 623.

But in *Fourth Ecclesiastical Soc. v. Mather*,

of personal and conveyances of real property by strangers to married women in order to create such an estate; and that the conveyance made to E. B. Le Master vests in him a valid title, free from any and all claims of her husband. It has long been the established rule in this state that transfers of personal property, made by a husband to his wife without words to that effect, by implication and as a matter of law vests in the wife a technical separate estate in the thing transferred; but we have no reported case involving a conveyance of real estate in which the doctrine has been invoked. We, however, can see no reason why a distinction should be made in this respect between transfers of personal property and conveyances of real estate.

15 Conn. 587, it was held that during coverture no agreement could be made between husband and wife which in legal effect would transfer to the wife the title to a note representing the proceeds of her real estate.

And in *Glass v. Burt*, 8 Ont. Rep. 391, it was held that a bond given by a man to his wife for the payment of money to her by his executors cannot be upheld in law or in equity, since, being an imperfect gift, it cannot be beneficially enforced, and it cannot be regarded as a declaration of trust.

A woman claiming personal property as a gift from her husband must establish a clear and satisfactory case. *Walter v. Hodge*, 2 Swanst. 98, Wils. Ch. 445.

And in *Finch v. Finch*, L. R. 23 Ch. Div. 267, it was held that a claim to chattels cannot be maintained on the unsupported testimony of the claimant.

So in *Moore v. Moore*, L. R. 18 Eq. 474, an attempted gift of stock failed because of failure to have a transfer made on the books.

II. In equity.

a. Conveyances upheld.

As noticed in the preceding subdivision, courts of equity at an early date began to ignore the unity of husband and wife, and to support gifts of personal property from husband to wife if the circumstances were such as to call for equitable intervention. So that in *Walter v. Hodge*, 2 Swanst. 97, Wils. Ch. 445, it is stated that in equity exceptions are introduced to the rule that a man cannot give property to his wife, such as cases of paraphernalia, trinkets, or savings of pin money.

There are species of allowance to the wife by the husband which may be classed under the head of pin money. It is where he permits the wife to have and make of certain articles of his property, either for her own use, or in consideration of her supplying the family with particular kinds of necessaries, or when he makes to her a yearly allowance for keeping his house. The profits in the first case and the savings in the other will, in equity, be considered as the wife's separate estate. *Kee v. Vasser*, 37 N. C. (2 Ired. Eq.) 553.

But the exception to the rule was not long limited to the matters mentioned in that case, and equity extended its power over all kinds of

The reasons given in support of the rule as applied to personal property, the chief of which is that the transfer is without beneficial effect, and abortive, unless a separate estate is vested, apply with equal force to conveyances of lands. This fully appears from a review of our cases involving sales and gifts of personal property by husbands to their wives. The earliest of these cases is that of *Powell v. Powell*, 9 Humph. 486, where a sale of four slaves, made by Robt. Powell to his wife, Mary L. Powell, for a valuable consideration, was in issue. Judge Turley, for the court, in this case says: "We have seen that though, by the common law, a married woman could not have and hold property to her separate use, yet equity has so far qualified this as

conveyances, both of real and personal estate. *McKenzie v. Ohio River R. Co.* 27 W. Va. 306; *Ex parte Wells*, 3 Desauss. Eq. 158; *Williams v. Avery*, 38 Ala. 115; *Pennsylvania Salt Mfg. Co. v. Neel*, 54 Pa. 9; *Thompson v. Allen*, 103 Pa. 44, 49 Am. Rep. 110; *Reagle v. Reagle*, 179 Pa. 89, 36 Atl. 191; *Humphrey v. Spencer*, 36 W. Va. 11, 14 S. E. 410; *Cosner v. McCrum*, 40 W. Va. 339, 21 S. E. 739; *Putnam v. Bicknell*, 18 Wis. 334; *Hannan v. Oxley*, 23 Wis. 519; *Wheeler & W. Mfg. Co. v. Monahan*, 63 Wis. 198, 23 N. W. 127; *Albright v. Albright*, 70 Wis. 528, 36 N. W. 254; *Herr's Appeal*, 6 Law Rep. 408.

A gift of a note by a husband to his wife may be rendered effective in equity. *Wood v. Warden*, 20 Ohio, 518.

Equity will sustain gifts of slaves though no trustee is named. *Eddins v. Buck*, 23 Ark. 507.

And a deed from husband to wife is not void if good in equity. *Bedell's Appeal*, 87 Pa. 510.

In *Barron v. Barron*, 24 Vt. 375, it is said that courts of equity have for more than a century disregarded the rule that conveyances by a man to his wife were void, and for many purposes treat husband and wife as distinct parties capable of contracting with each other and of having separate estates. And as a general rule whenever the contract would be good at law when made with trustees for the wife that contract will be sustained in equity when made with each other without the aid of a trustee.

Equity, which looks more to the substance than to the form, holds that a conveyance directly from the husband to the wife, if fair and free from signs of fraud, is just as valid as if the conveyance had been made to a trustee for the benefit of the wife. *Sayers v. Wall*, 26 Gratt. 373, 21 Am. Rep. 303.

Equity will sustain a conveyance by a man to his wife of real estate for her suitable maintenance. *Shepard v. Shepard*, 7 Johns. Ch. 57, 11 Am. Dec. 396; *Strong v. Skinner*, 4 Barb. 552; *Simmons v. McElwain*, 26 Barb. 419.

Equity will sustain a conveyance from a man to his wife when a proper case is made out. *Fritz v. Fritz*, 23 Ind. 388.

Equity will uphold a deed if supported by adequate considerations. *Brown v. Brown*, 79 Hun, 44, 29 N. Y. Supp. 652.

In *Garlick v. Strong*, 3 Paige, 440, it is said that it is well settled that a postnuptial

to permit her to take and enjoy property to her separate use, when it is given to her to that intent. But equity has done this with timidity, for it holds that each claim on the part of a married woman, being against common right, and it being a presumption of law that all property of which she becomes the owner is her husband's, a trust by which it is to be secured to her separate use free from his marital rights should very distinctly express that intention. It, however, holds it to be immaterial in what form or phrase a trust of that nature is described, technical language not being deemed necessary, and it only being required that the intention of the gift shall appear manifestly to be for the wife's separate enjoyment, and in bar of the hus-

band's right. This is unquestionably the law in relation to gifts, devises, or settlements made in favor of married women by third persons, and perhaps to gifts and voluntary settlements made after marriage by the husband, though that is not so clear. But is this principle applicable to the cases of purchases made by the wife from the husband for a good and valuable consideration paid him by her out of her estate which has already been settled to her separate use and maintenance? I think not, because, in the first place, the reason why such direct expression of intention is regarded when gifts are made to the wife, as we have just seen, is because, in contemplation of law, all gifts of property to the wife are gifts to the husband, and that any other intendment is

agreement between the husband and wife, by which property is set apart to her separate use, will be sustained in equity.

And that case was followed in *Searing v. Searing*, 9 Paige, 284, and *Jaycox v. Caldwell*, 37 How. Pr. 240.

The voidness at law of a deed directly from a man to his wife does not interfere with equitable rights which may grow out of such instrument, they being capable, in equity, of being considered two persons. *Peck v. Brown*, 26 How. Pr. 350.

Equity should be very reluctant to disturb in favor of collateral heirs of the husband, a conveyance mutually satisfactory to both husband and wife. *Wells v. Wells*, 35 Miss. 638.

In *Rose v. Latschaw*, 90 Pa. 238, it is said that gifts and conveyances by a man to his wife have long been sustained in equity, and that in Pennsylvania a wife's equitable rights have been maintained in equity in actions at law, for rules in equity and of law are enforceable in the same form of procedure.

In equity gifts to the separate use of a married woman—as well those presented by her husband as those given by third persons, which are without the intervention of trustees expressly named—will be protected in cases where they have been made in good faith, and the rights of creditors are not infringed. *Neufville v. Thomson*, 3 Edw. Ch. 92.

A gift by a man to his wife will be upheld when the rights of creditors are not in question. *Borst v. Spelman*, 4 N. Y. 284.

In *Lane v. Union Nat. Bank*, 75 Ill. App. 299, it is stated that a deed from husband to wife is good as against all the world except creditors.

In *Ogden v. Walters*, 12 Kan. 282, the court says: We suppose a married man may convey real estate directly to his wife where it is right and equitable that he should do so, and where the conveyance does not interfere with the rights and equities of third persons. Such a deed, though void at law, is good in equity.

And the same statement is repeated in *Sproul v. Atchison Nat. Bank*, 22 Kan. 336.

The principle to be deduced from the English cases is that when a husband makes a deed of land to his wife which would have been operative to pass the title had it been made to a stranger the court will support it by declaring him to be a trustee of the land for his wife. *Kent v. Kent*, 20 Ont. Rep. 445.

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The equitable title of a promissory note given by a husband to his wife vests in her. *Tullis v. Fridley*, 9 Minn. 79, Gil. 68.

Under a deed of real estate from husband to wife, although the legal title remains in him the beneficial use will vest in her as her separate estate, which, upon her death, will descend to her heirs. *Cotton v. Brown*, 3 Ky. L. Rep. 679.

An attempted partition deed by which a man conveys his interest in the common property to his wife, though inoperative at law, in equity has the effect of constituting a trust of the legal estate remaining in him in favor of his wife. *Davissou v. Sage*, 20 Grant, Ch. (U. C.) 115.

The evident intention of a man who conveys real estate to his wife and her heirs, to their sole and only use forever, may be given effect by a court of equity, so far as the beneficial interest is concerned, so as to vest the equitable title to the property in her. *Whitehead v. Whitehead*, 14 Ont. Rep. 621.

If the conveyance is not a fraud on creditors, and is a reasonable provision for the wife, it will be upheld. *Babcock v. Eckler*, 24 N. Y. 623.

In *Kent v. Kent*, 20 Ont. Rep. 158, the court says there is reason for upholding cases of benefaction between husband and wife where the transfer, being complete and apt for the purpose, falls of full effect only because of the legal and technical unity of giver and taker, which does not exist between strangers or others not so related when the gift or transfer is found to be inherently imperfect, or incomplete. And the court concludes that, so far as form and substance go, that which would be good at law if made by a stranger is good in equity if made by husband to wife.

And that case was affirmed in 20 Ont. Rep. 445.

b. Conditions upon which conveyances are upheld.

Not every attempted conveyance by a man to his wife will be upheld in equity. That court has certain well-defined principles upon which it administers relief, and a wife coming before it to establish title to property which she claims to have received from her husband must bring her case within these principles.

Conveyances by a man to his wife are not

in violation of his rights. But such is not the case when he himself sells and conveys property to his wife for a valuable consideration paid him out of her separate estate. In such case there is and can be no intentment in favor of his rights to the property thus conveyed, and it is absurd to talk about such a conveyance being against his common right; for it is impossible to hold, with regard to intention, that a sale of property to the wife by the husband for a valuable consideration, paid him out of her own private estate, can have any other design than the separate use and benefit of the wife. The husband parts from his interest by his conveyance, and, if the operation of the conveyance be to vest the property in the wife for his benefit and use, and he be im-

mediately remitted to all of his original rights, then is the whole transaction a farce and the law, in permitting such contracts, has placed itself in a very ridiculous position."

In *McCampbell v. McCampbell*, 2 Lea, 664, 31 Am. Rep. 623, the court, citing with approval the *Powell Case*, says: "A consideration passing from the wife will sustain a direct conveyance of the property by the husband to her and the very nature of the transaction will fix the property, even if personalty, with a trust for the separate use of the wife, without any words to that effect."

In *Sherron v. Hall*, 4 Lea, 500, it is said: "But the gift was, in effect, as if the husband, for a valuable consideration, had

only sold at law, but equity will exercise a sound discretion as to whether or not they will be upheld in that form. *Bunch v. Bunch*, 26 Ind. 400.

As said in *Elliott v. Elliott*, 21 N. C. (1 Dev. & B. Eq.) 57, since the conveyance is void at law the case in equity must always be that of an application to aid a defective conveyance. The wife cannot have that assistance unless she shows herself to be meritorious, and shows, further, a clear intention that what was done should have the effect of divesting the interest of the husband and creating a separate estate in her which she should have the immediate power to dispose of as she chose, and that the estate was but a reasonable provision for her.

In *Loomis v. Brush*, 36 Mich. 40, it was stated that it is well settled that a quitclaim deed from husband to wife is of no more validity as an actual conveyance in equity than at law, and, in order to work out any equity, there must be a clear right working out of matters independent of the deed, as well as some further conveyance or release calculated to carry it into effect as an agreement or obligation. There can be no ground for claiming that a deed absolutely void at law when made is validated as a conveyance by the subsequent laws which enable married women to take and enjoy property as if sole. While courts will, under peculiar circumstances, carry out a purpose which has failed by reason of the incapacity of the wife to accept the deed from her husband, the case must be plain and the equity manifest.

Although this note is not intended to deal with the rights of creditors, it may be stated that no conveyance will be upheld which will operate as a fraud upon their rights. Moreover, the intent to make the gift must be clearly made out, for courts of equity require clear and incontrovertible evidence to establish gifts between husband and wife. *Keniston v. Keniston*, 56 Vt. 680.

The fact of the gift must be clearly proved. *Shuttleworth v. Winter*, 55 N. Y. 624.

In a case in which the attack on the conveyance was made by a creditor, the court said, equity examines transfers by husband to wife with great caution before it will confirm them. They must be fair and certain; it must be clearly and satisfactorily shown that the purpose is a provision for the wife; the property must be distinctly separated from the mass of

the husband's property; and the transfer must not interfere with the rights of creditors. *Hinman v. Parkie*, 33 Conn. 197.

So, in order to support a gift by a man to his wife, there must be an unequivocal act by which the husband divests himself of the property and places it at the disposal of the wife. *Hoyes v. Kindersley*, 2 Smale & G. 195.

Therefore in order to place the title to the proceeds of the farm in the wife there must be proof of an unequivocal, complete, and final intention on the part of the husband to constitute himself a trustee for his wife. *Whittaker v. Whittaker*, L. R. 21 Ch. Div. 657.

To uphold a gift by a man to his wife nothing else will do than a clear, irrevocable gift either to some person as a trustee, or by some clear and definite act of the husband by which he divested himself of his property, and engaged to hold it as a trustee for the separate use of his wife. And the court held that the evidence was not sufficient to raise an issue. *M'Lean v. Longlands*, 5 Ves. Jr. 71.

Another rule is that the man must not impoverish himself. It is against public policy to permit a man to divest himself of his property so as to create the possibility of his becoming a public charge.

A settlement by a man of his whole estate upon his wife will not be upheld. *O'Doherty v. Ontario Bank*, 32 U. C. C. P. 299.

A gift of real estate by a man to his wife will be upheld in equity if the transaction appears to have been fair, and to amount to no more than a reasonable provision for the wife's maintenance and support. *Wilder v. Brooks*, 10 Minn. 50, 88 Am. Dec. 50, Gil. 82.

An assignment by a man of a deed in which he is named as grantee to his wife and her heirs after his death has no legal operation in favor of the wife, and it will not be enforced in equity, where the subject-matter of the grant was the principal or chief part of his estate. *Benedict v. Montgomery*, 7 Watts & S. 238, 42 Am. Dec. 230.

But a conveyance of real estate by a man to his wife will be upheld in equity, although it is not stated to be for the purpose of her maintenance and support. *Hunt v. Johnson*, 44 N. Y. 27, 4 Am. Rep. 631. The court distinguishes *White v. Wager*, 25 N. Y. 328, and *Winans v. Peebles*, 32 N. Y. 423, on the ground that in those cases the conveyances were from the wife

made the conveyance to the wife, in which case the transaction, from its very nature, would confer a separate estate, without express words."

In *Templeton v. Brown*, 86 Tenn. 55, 5 S. W. 441, the court says: "The intention to create a separate estate must clearly appear either by express terms or by necessary implication; otherwise the marital rights of the husband will attach. When the gift is from a stranger, the intention must usually appear from the express language of the donor in terms creating such an estate; otherwise the rights of the husband will not be excluded. But where the gift is from the husband, the intention to exclude himself is inferred from the circumstances of the case and the situation of

the parties, without the use of the express words that would be required where a third person is the donor;" citing 1 Bishop, Married Women, § 119; Story, Eq. Jur. § 1373; Perry, Tr. 639.

In *Carpenter v. Franklin*, 89 Tenn. 142, 14 S. W. 484, it is said: "An agreement that the gift of the husband to the wife shall be to her separate use arises from the very necessity of the case, else the gift would be ineffectual. A gift to the wife of her own earnings, either from her labor as for sewing, or from the profits of her boarders, or of her savings from money furnished her for her own personal expenses or her household expenses, may be made out by circumstances, and, when so made out, is as effectual as if proved by express con-

to the husband, and therefore not supported by the same equitable considerations.

No intention on the part of the wife to circumvent or defraud her husband must appear.

If the wife secures the title to property by fraud, with the intention of procuring a separation, it will be restored to the husband. *Meldrum v. Meldrum*, 15 Colo. 478, 11 L. R. A. 65, 24 Pac. 1083.

A deed of property secured by the wife upon separating from her husband in contemplation of entering into an illicit relation with another will be set aside in equity. *Evans v. Carrington*, 2 De G. F. & J. 481.

A wife will be compelled to reconvey to her husband land transferred to her upon her representation that upon his death she will be left without support, where immediately after obtaining the title she abandons him. *Dickerson v. Dickerson*, 24 Neb. 530, 8 Am. St. Rep. 213, 39 N. W. 429. The court places this ruling upon the ground that a person who, by means of confidential relations between the parties, by deceit and imposition, obtains property of another, will be compelled in a proper case by a court of equity to restore the same to the person injured.

If a wife who has been guilty of adultery obtains a conveyance from the husband, who remains ignorant of that fact, the conveyance may be set aside at his request. *Evans v. Evans*, 118 Ga. 890, 98 Am. St. Rep. 180, 45 S. E. 612.

That the conveyance was procured by threats of abandonment does not constitute a ground for cancellation. *Grove v. Jaeger*, 60 Ill. 249.

The mere facts that a woman importuned her husband to convey real estate to her upon the suggestion that they would enjoy it as a home, and that subsequently, upon difficulty arising between them, she expelled him from the premises, do not show such fraud as will require the setting aside of the conveyance. *Finlayson v. Finlayson*, 17 Or. 347, 3 L. R. A. 801, 11 Am. St. Rep. 836, 21 Pac. 57.

A deed to the wife of merely her dower interest in the husband's lands will not be set aside on the ground that she had a husband living at the time of her marriage to the grantor, if at the time of the conveyance he knew of that fact so that no fraud was committed on him. *Chew v. Chew*, 38 Iowa, 405.

Equity will not aid a wife who has been unfaithful to her marriage vows to enforce a

deed to her from her husband where no consideration is shown other than a desire to furnish her with support. *Miller v. Miller*, 17 Or. 423, 21 Pac. 938.

Some cases have held that the conveyance must be supported by a consideration.

A deed without consideration, conveying real estate from a man directly to his wife, is void both at law and in equity. *Fowler v. Trebelin*, 16 Ohio St. 493, 91 Am. Dec. 95. The court says the conveyance which the grantor attempted to execute directly to his wife was in law an utter nullity. The legal title remained in him as fully after its execution as before. The relation of the parties *inter se* rendered him incompetent to convey the legal title to real estate from the one to the other. Such a conveyance from the husband to the wife, and founded upon a sufficient consideration, might be upheld in equity. But in this case the deed had been found to be without consideration. Even as between the parties, then, this instrument purporting to be a conveyance was simply void both at law and in equity.

Equity will not specifically enforce against himself an agreement by a man to make a settlement on his wife which is not founded on an adequate consideration. *Andrews v. Andrews*, 28 Ala. 432.

Where the deed is intended as a mere gift it is wholly invalid, even in equity, since equity will not complete an unexecuted gift which, being unsupported by a consideration, is devoid of equity. But it is a sufficient consideration that the gift was in the nature of a settlement, and was intended to be a reasonable provision for the support of the wife. *Crooks v. Crooks*, 34 Ohio St. 610.

It will be noticed that in the last-cited case it is intimated that a desire to provide for the maintenance of the wife is a sufficient consideration. That being so, the instances would be few when a consideration could not be shown, so that the rule requiring a consideration is more theoretical than practical. The considerations which will move the court to aid the wife have been summed up as follows:

Although void at law, a conveyance by a man to his wife will be upheld in equity, first, when the consideration of the transfer is a separate interest of the wife, yielded up by her for the husband's benefit, or that of the family, or which had been appropriated by him to his

tract. Especially does the implication of a gift to her sole and separate use arise where, as in this case, the wife, with the assent of the husband, loaned out such earnings and savings in her own name, . . . taking title to herself."

In *Snodgrass v. Hyder*, 95 Tenn. 575, 32 S. W. 764, the court again holds as follows: "A direct gift by the husband to the wife, during coverture, of money or other personalty, creates, by necessary implication, a separate estate in the wife, . . . and likewise a gift of earnings or savings may be shown by circumstances, and, when so shown, is as effectual as if proved by express contract;" citing *Pom. Eq. Jur.* § 1100. It seems to be taken for granted by the court in these and all other cases that

the rule is the same in relation to both personal and real estate.

Some stress in the earlier cases appears to be laid upon the fact that a valuable consideration was paid by the wife to the husband, but in the later ones the doctrine is applied without question to gifts from the husband. This conveyance, however, was made in consideration of marriage, which is a valuable consideration, and held to be sufficient to support a settlement by the husband upon his wife by all the authorities. *Nelson v. Trigg*, 2 Tenn. Cas. 645; *Spurlock v. Brown*, 91 Tenn. 241, 257, 18 S. W. 868.

While, as stated, this doctrine has not been heretofore applied in this state in any reported case to a conveyance of real estate

uses. Second, where he is in a situation to make a gift to his wife, and distinctly separates the property from the mass of his property, and sets it apart to the separate, sole, and exclusive use of the wife. *Sims v. Ricketts*, 35 Ind. 181, 9 Am. Rep. 679.

A man may make a gift to his wife without the intervention of a trustee, and equity will hold it good if it be no more than a reasonable provision for her; be proportioned to his circumstances, and not hurtful to his creditors. The deed will not be upheld if it is for all the husband's property. A conveyance which denudes a husband of all, or the greater part, of his property is much more than a reasonable provision for the wife; for, in considering what is and what is not a reasonable provision, the circumstances of the husband are to be regarded as probable necessities as well as debts. *Coates v. Gerlach*, 44 Pa. 48.

A conveyance of real estate by a man to his wife will be upheld in equity if made upon good or meritorious considerations, and it is free from imposition or fraud. *Waterman v. Higgins*, 28 Fla. 660, 10 So. 97.

It would seem that relief must be applied for in due season.

In *Stolt v. Ayliff*, Rep. in Ch. 60, a suit was brought to enforce a promise by a man to pay money to his wife, but the court, for the reason that the debt was sixteen years old, and the promise entirely void at law, refused to interfere.

The English court has had some difficulty in carrying the doctrine which upheld the gift to the extent that it has been carried in this country because of the theory upon which it has attempted to work it out. As has been seen, gifts of paraphernalia and pin money were held valid, but, when the question was reached as to the validity of larger gifts, the attempt was made to solve it upon the theory that the husband must have actually divested himself of the title, as stated in the cases cited in the early part of this subdivision, or upon the equitable doctrine that the gift must be regarded as creating a trust. The rules governing such trusts had been established in other classes of cases.

In *Kekewich v. Manning*, 1 De G. M. & G. 176, the question was merely what was sufficient to make a perfect gift, the court saying a distinction exists between the cases depending upon the answer to the question whether 69 L. R. A.

a gift, or a promised or intended gift, was in truth a perfected act or completed gift, resting neither in promise merely, nor merely in unfulfilled intention, or was incomplete, was imperfect, and rested merely in promise or unfulfilled intention.

In *Richards v. Delbridge*, L. R. 18 Eq. 11, a man made a deed conveying his stock in trade and other property to his grandson, and delivered it into the keeping of the latter's mother. The court held it to be without effect. The court applied the rule that the one thing necessary to give validity to a declaration of trust is that the donor shall have absolutely parted with that interest which had been his.—shall have effectually changed his right in that respect, and put the property out of his power, at least, in the way of interest. The court says a man may transfer his property without valuable consideration in one of two ways; he may either do such acts as amount in law to a conveyance or assignment of the property, and thus completely divest himself of the legal ownership and vest it in the donee; or he may, by one or other of the modes recognized as amounting to a valid declaration of trust, constitute himself a trustee. For a man to make himself a trustee there must be an expression of intention to become a trustee, whereas words of present gift show an intention to give over property to another, and not retain it in the donor's hands for any purpose.

In *Milroy v. Lord*, 4 De G. F. & J. 264, the beneficiary was a niece of the settlor, and the settlement was imperfect because of failure to transfer the shares of stock, which was the subject-matter of the settlement, upon the books of the corporation. The transaction was not founded upon a valuable consideration, but was merely gratuitous and voluntary, and the court held that equity would not enforce the attempted settlement specifically against the executor of the settlor.

When the question of the effect of an attempted gift from husband to wife came before the court the principles announced in these cases were applied.

By such application a letter purporting to give personal property forming part of the household furniture to the wife as her separate estate was held not sufficient to constitute the husband a trustee for her benefit. *Re Bregon*, L. R. 17 Ch. Div. 416. The vice chancellor says that he is unable to support the gift as a trust

made by a husband to his wife, it has been by the courts of last resort in a number of other states, and an examination of the opinions of those courts will show that the same reasons advanced in our cases for the creation of a separate estate in transfers of personalty are there given to support the application of the rule to conveyances of land. The case of *McMillan v. Peacock*, 57 Ala. 127, is very much in point. In the opinion, Chief Justice Brickell speaking for the court, it is said: "To the creation of the equitable separate estate no particular form of words, no technical expressions, are necessary. A clear, unequivocal, intention to exclude all marital rights of the husband to secure to the wife the separate, exclusive enjoyment of the estate, manifested by the

terms or legal operation of the instrument creating it, is sufficient. If the grant or conveyance is made by a stranger, the intent to exclude all right of the husband, and to vest in the wife the entire, exclusive interest, must be expressed in clear terms. It cannot rest on conjecture or implication. . . . A conveyance by the husband to a trustee for the use of the wife is, necessarily, for the separate, exclusive use of the wife; otherwise it would be vain and inoperative. . . . A gift or conveyance made by the husband directly to the wife, during coverture, at common law is void, as are all contracts made between husband and wife. Courts of equity have long been accustomed to support and maintain such gifts and conveyances, when they are not fraudulent.

declared by the husband in favor of the wife. "I am very sorry for it because it is a monstrous state of the law which prevents effect being given to such a gift." He treats an attempted gift to a wife or to a stranger as the same, and says it is manifest from the transaction, taken by itself, that the alleged donor was mistaken as regards the proper and legal method of effecting what he intended to do. And that, in order to cause equity to afford its aid, there must be either a transfer of the property or a declaration of trust; following *Milroy v. Lord*, 4 De G. F. & J. 264, and refusing to follow *Fox v. Hawks*, L. R. 13 Ch. Div. 822.

So, in *Hayes v. Alliance British & F. Life & Fire Assur. Co. Ir. L. R. 8 C. L. 149*, it was held that a deed poll was not sufficient to transfer a life insurance policy from a man to his wife. The court said it was admitted that the deed could not operate as an assignment, being made to the wife; but it was strongly urged that it amounted to a declaration of trust in favor of the wife. But the court held that the rule laid down in *Milroy v. Lord*, 4 De G. F. & J. 264, and *Richards v. Delbridge*, L. R. 18 Eq. 11, was fatal to the contention of the claimant. The intention was to assign and transfer. There was no mention of a trust, and the rule was that, if a settlement was intended by one of the two possible modes,—that is, by present gift,—the court would not give it effect by applying the other,—that is, hold the settler to be a trustee.

c. Necessity of trustee.

Before the possibility of making a conveyance directly to the wife had been recognized that result had been accomplished by conveying the property to a trustee for her benefit. After equity began to uphold conveyances directly from husband to wife, the intervention of a trustee was no longer necessary.

As a general rule whenever a contract would be good at law if made with trustees for the wife that contract will be sustained in equity, though made by the husband and wife, without the intervention of trustees. *Maraman v. Maraman*, 4 Met. (Ky.) 84.

A wife may acquire a separate property in equity by agreement with her husband without the intervention of trustees. *McKenna*, 69 L. R. A.

v. Phillips, 6 Whart. 571, 37 Am. Dec. 438; *Fisher v. Filbert*, 6 Pa. 61; *Furrow v. Athey*, 21 Neb. 671, 59 Am. Rep. 867, 33 N. W. 208; *Story v. Marshall*, 24 Tex. 305, 76 Am. Dec. 106; *Richardson v. Hutchins*, 68 Tex. 87, 3 S. W. 276; *Evans v. Opperman*, 76 Tex. 299, 13 S. W. 312.

The intervention of a trustee is not necessary to validate a voluntary settlement by a man upon his wife. *White v. Bettis*, 9 Heisk. 645; *Powell v. Powell*, 9 Humph. 480.

In *Jones v. Clifton*, 101 U. S. 225, 25 L. ed. 908, which was an action by an assignee in bankruptcy to set aside conveyances by the debtor to his wife, the court says the intervention of trustees in order that the property conveyed may be held to her separate estate beyond the control or interference of her husband is no longer required.

This is especially true under the statutes which have been passed for the benefit of married women.

Under the married woman's acts a man may grant to his wife the legal title to real estate without the necessity of a trustee. *Blake v. Blake*, 7 Iowa, 46.

Under the Iowa statutes the wife can take title to real estate by gift or grant from the husband without the necessity of a trustee. *Hoffman v. Stigers*, 28 Iowa, 308.

In *Barker v. Koneman*, 13 Cal. 9, it is stated that under the California statutes a man could convey his property as a gift directly to his wife without the intervention of a trustee.

d. Effect of conveyance.

Since it is only in equity that the conveyance is regarded as valid, the question arises as to the character of the estate which is conveyed. The logical answer is that, if there is no estate which will be recognized by a court of law, it must be an equitable, and not a legal, estate which she requires.

While in equity an absolute conveyance of property from a man directly to his wife is sufficient to divest him of such property and vest it in the wife (*Craig v. Chandler*, 6 Colo. 543), yet she secures an interest in the property only because equity intervenes to aid her by holding the husband to be a trustee for her benefit or otherwise. Therefore, it is generally considered that a conveyance of lands

lent, as to creditors." The necessity for creating in "the wife a separate estate, vesting in her the entire, exclusive interest [is apparent], since otherwise the transaction, which was intended to have some effect, can have none in law or equity. . . . [And, further,] all that is necessary to the creation of an equitable separate estate is, as we have seen, . . . a clear, unequivocal manifestation and declaration of the intention to relinquish his own rights, and to clothe the wife with them; and that intention a court of equity will carry into effect."

The case of *Helmetag v. Frank*, 61 Ala. 69, in which the opinion was also delivered by Brickell, Ch. J., is to the same effect. It is there said: "We regard it as the

settled law of this state that a gift by the husband to the wife of property, real or personal, creates in the wife an equitable estate. Property thus acquired by the wife is not within the influence and operation of the statutory or constitutional provisions which create separate estates."

In the case of *Kimbrough v. Kimbrough*, 99 Ga. 134, 25 S. E. 176, the supreme court of Georgia holds: "Where a husband, with his own money, purchased and paid for a home, and deliberately and intentionally had the same conveyed to his wife, with no understanding or agreement that he was, in any event, to have an interest in the title, the transaction amounted to a gift from the husband to the wife, and, as between them, the property became absolutely her

by a man directly to his wife passes to her only an equitable estate, leaving the legal title in him, which on his death will descend to his heirs. *Powe v. McLeod*, 76 Ala. 418; *Washburn v. Gardner*, 76 Ala. 599; *Bush v. Heney*, 85 Ala. 606, 5 So. 321; *Sibley v. Wass*, 49 N. J. Eq. 463, 24 Atl. 233; *Vought v. Vought*, 50 N. J. Eq. 177, 27 Atl. 489.

Although a man purchases real estate which is conveyed to him, with his wife's money, a conveyance by him directly to her will not vest the legal title in her. *Crawford v. Whitmore*, 120 Mo. 144, 25 S. W. 365, *Overruling Bangert v. Bangert*, 13 Mo. App. 144, and *Cooper v. Standley*, 40 Mo. App. 138.

A conveyance of real estate by a man to the sole and proper use and behoof of his wife vests in her merely an equitable estate, so that if he has curtesy in it, it is of an equitable nature, and one who levies upon and sells it cannot enforce his rights by an action at law. *Carlington v. Richardson*, 79 Ala. 106.

But a conveyance by husband to wife vests in her an equitable estate which she may charge. *Rabitt v. Orr Bros.* 83 Ala. 185, 3 So. 420; *McIlwain v. Vaughan*, 76 Ala. 489; *Snediker v. Boyleston*, 83 Ala. 408, 4 So. 33.

And a deed by a man to his wife may convey the equitable estate, and, when the legal estate is outstanding in a prior mortgagee, such deed may convey all the remaining interest of the grantor. *Jones v. McGrath*, 15 Ont. Rep. 189.

Upon a subsequent hearing of the case, however, judgment went against the grantor in favor of a purchaser from the wife, on the ground that the statute made a recital of consideration in the deed conclusive in favor of purchasers without notice. The court, however, intimated that the grant might be supported even by the general rule governing conveyances from husband to wife. 16 Ont. Rep. 617.

III. Effect of statutes.

a. In general.

After it had become established that an attempted conveyance of property was void at law, but might be upheld in equity, statutes were passed enlarging the powers of married women, and securing to them greater control over their separate property; and the contention was at once made that these statutes removed the barriers which had prevented the

husband from conveying property to his wife. The position which the courts took upon the question depended largely upon the form of the statute, but the tendency seems to have been towards conservatism and to hold that the right to contract between themselves did not exist unless expressly conferred. Thus it has been held that a conveyance by a man to his wife of property purchased with money in which she has an interest is absolutely void at law, notwithstanding the enactment of a statute providing that a married woman may sell and convey her real and personal estates to the same extent and with like effect as a married man may. *Aultman v. Obermeyer*, 6 Neb. 260; *Johnson v. Vandervort*, 16 Neb. 144, 19 N. W. 461, 20 N. W. 122.

So in *Kent v. Kent*, 20 Ont. Rep. 445, *Armour, Ch. J.*, said that in his opinion, since the act of 22 Vict. chap. 34, an effectual conveyance of the legal estate in land can be made by a husband to his wife, but that, from the construction which had been placed upon the act, his opinion could not prevail. And *Street, J.*, says that the statute which merely declared that the wife might hold her dower property did not have the effect of permitting the husband to convey directly to her.

But the form of many of the statutes has been such as to leave no question that the power to make such conveyances was conferred.

Thus the Maine act of 1847, chap. 27, § 2, expressly recognized the validity of conveyances directly from husband to wife. *Johnson v. Stillings*, 35 Me. 427.

So, under the Maine statutes, a note given by a man to his wife for borrowed money may be enforced against him. *Webster v. Webster*, 58 Me. 139, 4 Am. Rep. 253.

Under the Utah statutes authorizing married women to take property by gift, purchase, etc., and to hold, manage, and transfer the same, and to sue and be sued, a man may convey property directly to his wife without the intervention of a trustee. *Cereghino v. Wagener*, 4 Utah, 514, 11 Pac. 568.

By the Ontario statute (49 Vict. chap. 20 § 6), a man can convey real estate directly to his wife. *Whitehead v. Whitehead*, 14 Ont. Rep. 621.

Under the statutes preserving the estates of married women, the husband may transfer directly to his wife securities which form

separate estate. Where the husband and wife took joint possession of the property thus conveyed, and after they had lived together thereon for a time she was forced, by mistreatment and cruelty on his part, to leave the premises, and he remained in possession, he was, in law, her tenant at sufferance, and upon his refusing to surrender possession to her when so demanded it was her right to sue out a dispossessory warrant for the purpose of ejecting him."

In the case of *Whitten v. Whitten*, 3 Cush. 199, which was the case where land was purchased by the husband with his money, and the title taken in his wife, the court says: "Where the husband himself makes a gift or grant to the wife, the intention to relinquish his own rights in favor

of the wife, and thus to give her a separate property or interest, is necessarily and most clearly and unequivocally manifested and declared."

In the case of *Sayers v. Wall*, 26 Gratt. 373, 21 Am. Rep. 303, the court says: It seems to be well settled that express words are not necessary to create a separate estate in a deed from the husband to his wife. The law attaches to absolute deeds and transfers a full alienation of the entire interest of property, so far as the alienation is permitted by the principles of law and equity.

In *Garland v. Pamplin*, 32 Gratt. 314, it is held: "The general rule is that a conveyance by the husband directly to his wife, although void at law, or to a third person

part of her separate estate. *Beard v. Dedolph*, 29 Wis. 138.

The English statute 44 & 45 Vict. chap. 41, § 50, permitted a conveyance of real estate by husband to wife. *Whitehead v. Whitehead*, 14 Ont. Rep. 621.

Under the South Carolina Constitution, a woman may acquire separate estate by gift from her husband. *State v. Pitts*, 12 S. C. 180, 32 Am. Rep. 508.

Under a constitutional provision creating a separate estate in a married woman with respect to her property, free from the debts, engagements, or obligations of her husband, he may convey real estate directly to her. *Walker v. Long*, 109 N. C. 510, 14 S. E. 299.

Under the married woman's acts, the wife has a right to the rents, issues, and profits of land conveyed to her by the direction of her husband. *Woodward v. Woodward*, 145 Mo. 241, 49 S. W. 1001.

Under the Oregon statutes, a man may convey property to his wife as freely as to a stranger, and exclude himself from all interest therein. *Jenkins v. Hall*, 26 Or. 79, 37 Pac. 62.

Since 1840 a man may, under the Texas laws, make donations of property directly to his wife without the intervention of a trustee. *Fitts v. Fitts*, 14 Tex. 443; *Reynolds v. Lansford*, 16 Tex. 286.

Under a statute permitting a married woman to hold property and sue in the same manner as if unmarried, she may maintain suit upon a note given to her by her husband for a valuable consideration during coverture. *May v. May*, 9 Neb. 16, 31 Am. Rep. 399, 2 N. W. 221.

At least she may after the parties have been divorced. *Webster v. Webster*, 58 Me. 139, 4 Am. Rep. 253.

Or against his estate. *Logan v. Hall*, 19 Iowa, 491.

Under the statutes giving power to a married woman to enjoy, contract, sell, transfer, convey, devise, and bequeath her property in the same manner and with like effect as if she were unmarried, her husband may convey real estate to her by deed directly, without the necessity of a trustee. *Burdeno v. Amperse*, 14 Mich. 91, 90 Am. Dec. 225.

Under statutes permitting a married woman to hold property separate from her husband, 60 L. R. A.

the wife may take a conveyance of personal property directly from the husband. *Going v. Orns*, 8 Kan. 85; *Faddis v. Woollomes*, 10 Kan. 56.

A conveyance of real estate by a man to his wife becomes her separate estate, although in form a quitclaim, if it is upon consideration of love and affection so as to be in effect a gift, under a statute providing that property received by a married woman through gift shall be her separate estate. *Thrope v. Sampson*, 84 Fed. 63.

The rule that a woman cannot take a gift of personal property from her husband is repealed by the amendment of a statute which provided that she might sue in all matters relating to her property which might come to her by gift of any person except her husband, by omitting the words "except her husband." *Rawson v. Pennsylvania R. Co.* 2 Abb. Tr. N. S. 220. The court says: "As a married woman can maintain an action in relation to property obtained from her husband, as well as from all other persons, the denial of her sole and separate right to that property as donee would be inconsistent with her right to sue for it."

Under the New York act of 1860, gifts of paraphernalia from a man to his wife became her separate estate at law. *Rawson v. Pennsylvania R. Co.* 48 N. Y. 212, 8 Am. Rep. 543.

By N. Y. act 1887, chap. 537, a man is permitted to convey lands directly to his wife. *Diefendorf v. Diefendorf*, 29 N. Y. S. R. 122, 8 N. Y. Supp. 617.

A statute providing that property acquired by a married woman by descent, devise, bequest, gift, or grant shall be her sole and separate estate includes property acquired by gift from her husband. *Barnum v. Farthing*, 40 How. Pr. 25.

A conveyance which was valid by the existing statute is not rendered invalid by the repeal of the statute and restoration of the rules of the common law. *Baygents v. Beard*, 41 Miss. 531.

b. Exception of conveyances from husband.

Some of the statutes which created separate estates of married women contained a clause excepting property acquired from the husband, and the courts have not been able to agree as to the effect of this exception. Separate estate

for her benefit, is construed as operating to her separate use; and the reason assigned is that the conveyance otherwise would be wholly inoperative."

A case in point is *Leake v. Benson*, 29 Gratt. 156, in which it is held: "Where the conveyance is by the husband to the wife, . . . as a general rule it will be construed as operating to her separate use, although no such words are used as would be necessary to [create] a separate estate in a conveyance by a stranger. . . . The reason is said to be that otherwise the conveyance would be wholly inoperative."

In *Deming v. Williams*, 26 Conn. 231, 68 Am. Dec. 386, the court discusses this question, and, citing a large number of authorities, thus lays down the rule: "Undoubt-

edly the cases all of them import that the wife is to take to the exclusion of the husband. But this is to be inferred from the fact that it is a bona fide gift of the husband to his wife. If this is not irrevocably to her separate use the transaction has no meaning, for no one pretends that a legal title passes to her. We cannot believe that the husband, in order to be irrevocably bound, must use language to that effect, or covenant that he will not resume or sell the thing he has given to his wife. When a stranger gives to the wife, it is true that words of exclusiveness are necessary, for otherwise the unity of husband and wife would carry to the husband alone a gift of personal property made to the wife; but when the husband himself gives to his

is usually regarded as being held by a married woman free from the control of her husband. A clause in a statute creating separate estate in her, which excepts property acquired from him, can have full effect by being limited to the question of her separate estate without having any bearing upon the question of his right to convey property to her either at law or in equity. Some of the courts have held that this is the full effect of the statute, so that the question of the validity of the statute was left as before the statute was passed.

A provision excepting property acquired from the husband, in a statute creating a wife's separate estate, does not destroy her right to acquire property from him which will be free from his debts. Property acquired under such statutes is statutory separate estate, and the incidents of it are entirely different from those which attach to property so settled as to be her separate estate in equity. *O'Doherty v. Ontario Bank*, 32 U. C. C. P. 299.

In *Moore v. Somerindyke*, 1 Hilt. 199, it is said that the New York acts creating the separate estate of married women expressly except property coming to her from the husband, and that therefore gifts from him to her were not her separate property.

Under the Massachusetts statutes, a woman cannot acquire property to be held as her sole and separate property by gift from her husband. Though such a gift may be so far valid as to give the wife a right to the property at the death of the husband, as against his heirs or executors, it is invalid as to his creditors. Property thus given remains the property of the husband during his life, and may be demanded by him. *Spelman v. Aldrich*, 126 Mass. 113.

In case a man makes a gift of personal property to his wife the title and possession remain in him during his life, the possession of the wife being, in legal contemplation, his possession, and he may revoke the gift at any time; but, in case he does not revoke it prior to his death, she may enforce her rights against his representatives. *Marshall v. Jaquith*, 134 Mass. 138.

The mere fact that the statutes permit the woman to acquire property from anyone except her husband does not invalidate gifts *causa mortis* which he makes to her. *Whitney v. Wheeler*, 116 Mass. 490.

Under the Massachusetts statute permitting

a married woman to hold as her separate estate property which comes to her from any person except her husband, personal property transferred to her by a third person at the instance of her husband does not become hers free from his control. *Towle v. Towle*, 114 Mass. 167. The court says, however, it is true that, if she had survived him, and he had done nothing to reduce it to possession, and it was not needed for his creditors, she could hold it against his legal representatives. But during his life the rules of the common law apply to it, and he has the right to reduce it to possession.

In *Stockwell v. Baird*, 1 Marv. (Del.) 420, 31 Atl. 811, where the question was as to the rights of creditors of the husband, the court held that, under a statute providing that the real and personal property acquired by a married woman from any person other than her husband should be her sole and separate property, she could not acquire from him property to her sole and separate use.

In Mississippi it is held that, under a statute providing that any married woman may become seised or possessed of any property in her own name and her own property, provided the same does not come from her husband after coverture, a gift of chattels by a man to his wife is void at law. *Ratliff v. Dougherty*, 24 Miss. 181.

But the mere fact that the statute providing for the separate property of married women contains a clause to the effect that she may acquire property except from her husband does not change the equity rule that real estate conveyed to her may be preserved for her benefit by that court. *Warren v. Brown*, 25 Miss. 66, 57 Am. Dec. 191.

So, a lower New York court has held that a statute giving a married woman the power of a *feme sole* with reference to all property derived from anyone but her husband does not destroy her equitable right to receive gifts directly from him for her support. *Peck v. Brown*, 26 How. Pr. 350.

But there is an intimation to the contrary in *Little v. Willets*, 37 How. Pr. 493.

The Supreme Court of the United States has held that an exception in the statute of the District of Columbia, providing that property coming to her, except by gift or conveyance from her husband, shall be her separate estate, refers to voluntary gifts and conveyances, and does not operate upon property conveyed for a

wife this cannot be necessary, and we are confident no case can be found which upholds such a doctrine."

The cases of *Steel v. Steel*, 36 N. C. (1 Ired. Eq.) 452; *Sims v. Rickets*, 35 Ind. 181, 9 Am. Rep. 679; *Haines v. Haines*, 54 Ill. 77; *Smith v. Seiberling*, 35 Fed. 677; *Maraman v. Maraman*, 4 Met. (Ky.) 84; *Callahan v. Houston*, 78 Tex. 494, 14 S. W. 1027; *Story v. Marshall*, 24 Tex. 305. 76 Am. Dec. 106; *Putnam v. Bicknell*, 18 Wis. 333,—are in line with those from which we have quoted, and fully sustain the view we have taken of the question.

These are all cases decided by courts of the highest authority, and would seem to be conclusive of the matter. Counsel for the complainant rely upon the fact that we

have no case in which this doctrine has been applied to conveyances of lands in Tennessee. But they have been unable to produce a case either in this or any other jurisdiction where a court has refused to apply it to such conveyances. In every case called to our attention, where it has been invoked, the rule has been applied and enforced. The question was not made or considered in the cases of *Murdock v. Memphis & O. R. Co.* 7 Baxt. 572, and *Vick v. Gover*, 92 Tenn. 391, 21 S. W. 677, and they do not support the contention of the complainant.

The reasons, we have said, given in the opinions of this court for holding that transfers of personal property by husbands to their wives create separate estate in the

valuable consideration. *Sykes v. Chadwick*, 18 Wall. 141, 21 L. ed. 824.

In *Williams v. Reid*, 8 Mackey, 46, it was held that, under the District of Columbia statutes, property conveyed by a man to his wife directly or indirectly is not her separate property.

In accordance with that ruling, it was held that a grant by husband to wife through the medium of a third person, of real estate, without words making it her sole and exclusive property, does not make it her sole statutory estate, under a statute providing that property acquired by her in any other way than by gift or conveyance from her husband shall be hers as absolutely as if she was unmarried, and she cannot, therefore, devise it free from his claims. And the power of disposition is not conferred upon her by a clause of the statute that any married woman may convey, devise, and bequeath her property, or any interest therein, in the same manner and with like effect as if she were unmarried, since such provision refers to her statutory or equitable separate estate. *Rathbone v. Hamilton*, 4 App. D. C. 475.

Following the same line, the court, in *Zeust v. Staffan*, 14 App. D. C. 200, held that, under a statute providing that property acquired by a married woman other than by gift or conveyance from her husband shall be her separate estate, property paid for by him, and conveyed to her, does not become her separate estate, which she can devise to the exclusion of his marital rights.

But that a conveyance to a married woman at the instance of her husband and upon consideration furnished by him, which is expressly stated to be for her sole use and benefit, free from the control and ownership of the husband, confers upon her an equitable separate estate, which she may devise free from his control, notwithstanding the provision for statutory separate estate is that all property acquired by the wife other than that by gift or conveyance from her husband shall be her separate estate.

But in the meantime the Hamilton Case had gone to the Supreme Court of the United States, and that court held that the fact that property was acquired from her husband does not prevent a woman from devising it under statutes which provide that all property acquired by her, except by gift or conveyance from her husband, shall be hers as absolutely as if unmarried, and that any married woman may con

vey, devise, and bequeath her property, or any interest therein, in the same manner and with like effect as if she were unmarried. 175 U. S. 414, 44 L. ed. 219, 20 Sup. Ct. Rep. 155.

The court then granted a rehearing in *Zeust v. Staffan*, 16 App. D. C. 141, and, upon the authority of *Hamilton v. Rathbone*, held that, under the statute, a married woman had power to devise all her property, however acquired; and this included power to devise real estate acquired by gift or conveyance from her husband, as fully as if unmarried.

In *Shea v. McMahon*, 16 App. D. C. 65, the court, without considering the effect of the statute, held that a conveyance of real estate by a man to his wife through a third person is good as against those claiming under him. The court says that it is not pretended that the rights of creditors were involved, and that, therefore, whatever was the consideration for the conveyance, even if it was a voluntary settlement, the conveyance to the wife was perfectly good and valid as against the husband, his heirs at law, and against his devisees and trustees claiming under his will.

But under the statutes of the District of Columbia, property conveyed by a man to his wife through a third person does not become her sole and separate property, which she can convey in the same manner as if she was unmarried. *Kaiser v. Stickney*, 131 U. S. CLXXXVII. Appx. and 26 L. ed. 176.

So, a conveyance of property by a husband to wife through the medium of a third person does not vest in her a statutory separate estate under the statutes governing the District of Columbia, so as to enable her to transfer it without joining her husband in the deed. *Cammack v. Carpenter*, 3 App. D. C. 219.

c. Exemption from husband's debts.

Where, by statute, real estate coming to a wife by gift or grant during coverture is exempt from the debts of her husband, a grant to her by the husband will, in equity, be regarded as for her sole and separate use, although not so expressed in the deed. *Smith v. Seiberling*, 35 Fed. 677. The court says an ordinary deed of conveyance to a married woman without appropriate words creating what is known as a separate estate invests her with the legal title to the land, which is as

property without language expressing that intention, apply with the same force to the conveyances of real property, and there is no sound basis upon which a distinction can be made. It is a question of intention and effect. The law conclusively presumes that the husband intends that this act shall have the effect that it purports to have upon its face, that he part with all his interest in the property conveyed. If a transfer of personal property to the wife by her husband did not, of its own force, vest in her a separate estate, the transfer would be a farce, and perhaps a fraud upon her, because the husband would immediately become again the owner of it by virtue of his marital rights, and the wife would take nothing. If the same result did not follow

a conveyance of land by a husband to his wife, he would, by the same marital rights, become seised of an estate therein during their joint lives, and, if they have a child born alive, for his life if he survives her, as tenant by the curtesy, and entitled to receive and enjoy the rents and profits. The wife would not only be deprived of all the fruits of ownership during all this time, but she could not sell or convey it without his consent and joinder in the conveyance,—a power in the husband over the disposition of the property that often enables him to control and reacquire title by reducing to possession the proceeds of the sale of it. The wife would acquire a bare right to sell with the concurrence of her husband while he lived, and only come into full own-

effectually protected against the husband's sole creditors as if made to a trustee to her separate use. While such a deed as this is void at law it is good in equity, and a court of equity will effectuate the manifest purpose of the parties, since the law presumes it was the intention to convey an estate to the separate use of the wife.

d. Permitting revocation.

By the express terms of the Louisiana Code a gift of real estate by a man to his wife is subject to revocation. *Lavedan v. Jenkins*, 47 La. Ann. 725, 17 So. 256.

IV. Conveyance by third person at instance of husband.

To avoid the rule that a man could not convey property directly to his wife, the device was adopted at an early date of conveying through the medium of a stranger. Such conveyances were uniformly upheld, and are not within the scope of the present investigation. But a modification of that principle has arisen which deserves some notice. That is where the husband purchases property and directs the title to be conveyed to his wife. Such a devise can be regarded in no other way than as a gift or conveyance of the property from him to her; and yet such conveyances are uniformly held to vest the legal title in her.

If the transfer is through the medium of a third person the title vests in the wife. *Barnum v. Farthing*, 40 How. Pr. 25.

A conveyance to wife at the instance of the husband vests title in her. *Frank v. Frank* (Tex. Civ. App.) 25 S. W. 819.

If property purchased by a man is, by his direction, conveyed to his wife, it becomes her separate estate. *Haines v. Haines*, 54 Ill. 74; *Wing v. Goodman*, 75 Ill. 159; *Indianapolis, B. & W. R. Co. v. McLaughlin*, 77 Ill. 275; *Elder v. Jones*, 85 Ill. 384; *Price v. Osborn*, 34 Wis. 34.

Payment for property by husband, and conveyance of the title to his wife by his direction, vest the absolute title in her. To entitle him to a conveyance of the property to himself he must show that it was mutually understood between himself and wife at the time the property was purchased that she should hold it for him. *Bent v. Bent*, 44 Vt. 555.

Under the act of 1800, land conveyed to the

wife through the medium of a third person vests in her to her sole and separate use. *Barnum v. Farthing, Sheldon*, 217.

A conveyance of land to the wife at the instance of the husband, upon consideration furnished by him which is expressed to be "to her use," is sufficient to create in her a separate estate which is free from any claim on the part of his heirs, and there is no resulting trust in his favor. *Whitten v. Whitten*, 3 Cush. 199. The courts say, where the husband himself makes a gift to the wife, the intention to relinquish his own rights in favor of the wife, and thus to give her a separate property or interest, is necessarily and most clearly and unequivocally manifested and declared. The cases therefore which hold that general expressions do not create a separate property in the wife cannot apply to a case where the grant is by the husband.

When a man effects a purchase of stock in the joint names of himself and his wife the transaction cannot of itself be considered as converting the wife into a trustee *quoad* her interest for the purchaser whose money paid the price of the stock. *Drummer v. Pitcher*, 2 Myl. & K. 262; citing the ruling of Lord Eldon in the unreported case of *Wilde v. Wilde*, where his lordship said that, if a husband purchases stock in the names of himself and wife, it is *prima facie* a gift to her in the event of her survivorship.

A conveyance to a wife at the instance of her husband need not expressly state that it is for her sole and separate use to have that effect. *O'Doherty v. Ontario Bank*, 32 U. C. C. P. 299.

A man who pays the purchase money for property conveyed to his wife has neither a resulting trust in the property nor a claim for the purchase money as against her heirs. *Swafford v. Ferguson*, 3 Lea, 292, 31 Am. Rep. 639.

But the New Hampshire court has taken a somewhat different view of the question. The New Hampshire statutes of 1800 provided that every married woman should hold to her separate use all property conveyed to her, provided such conveyance is not occasioned by payment or pledge of the property of her husband. Under this statute, the court held that the object of the legislature was to prevent the husband from conveying his own property to the separate use of his wife, and that there-

ership and enjoyment in the event she should survive him,—an estate more in the nature of a remainder than the absolute one taking effect immediately which the deed purports to pass, and wholly inconsistent with the terms of the instrument. Beneficial results would be practically wanting in transfers of both species of property, and there would be a like conflict in both cases in the effect and the apparent object of the transaction and expressed purpose of the parties. It cannot be supposed that parties intend that contracts deliberately entered into, often supported by valuable consideration, should be so abortive and barren of results. It is more reasonable to treat the contract as having its

plain and natural meaning, and effective to vest in the wife the absolute estate (a separate estate) which the language of the instrument indicates it was the intention of the conveyor to convey. This view is in harmony with our statute providing that a grant or conveyance of land is effective to pass all the title and interest of the grantee therein, unless the intent to convey a less estate appears by express words or necessary implication from the terms of the instrument. It is immaterial that the marital right of the husband attached to property conveyed to the wife by operation of the law, and without any affirmative action on his part. This is presumed to be known to and in contemplation of the par-

fore a conveyance by a third person to her at his instance upon consideration furnished by him vested no separate estate in her. *Vogt v. Ticknor*, 48 N. H. 242.

In *Newbert v. Zeddles* (Ky.) 11 S. W. 777, the title of the heirs of the wife was upheld against the claims of the husband, where he had procured the title to the land to be placed in her name.

An assignment of a bill of sale of personal property belonging to a married man, by a third person to the wife of such man by his direction, will, as against his subsequent assignees with notice, vest the title in her. *Paul v. Jennings* (N. J. Eq.) 23 Atl. 483.

When a husband has the title to real estate placed in the name of his wife the presumption is that a gift was intended, which he must rebut by clear, unequivocal, and explicit evidence in order to establish a resulting trust in his favor. *Rafferty v. Rafferty*, 5 Pa. Dist. R. 453; *Bradshaw v. Bradshaw*, 9 Pa. Dist. R. 1; *Earnest's Appeal*, 106 Pa. 310; *Kobarg v. Greeder*, 51 Neb. 365, 70 N. W. 921; *Klump v. Klump*, 51 Neb. 22, 70 N. W. 525; *Propst v. Cass County*, 51 Neb. 736, 71 N. W. 748; *Tucker v. Carr*, 39 Tex. 98; *O'Hair v. O'Hair* (Ark.) 88 S. W. 945.

Real estate purchased by a man and conveyed at his instance to his wife will be presumed to have been intended to be an advancement. *Gray v. Gray*, 13 Neb. 453, 14 N. W. 390; *Bartlett v. Bartlett*, 13 Neb. 456, 14 N. W. 385.

But this presumption may be rebutted by evidence showing that the purchase was intended for the benefit of the husband. *Smith v. Strahan*, 16 Tex. 314, 67 Am. Dec. 622.

Where land is purchased by a man, and the conveyance is, by his direction, made to his wife, the presumption is that it is intended as a settlement upon her for her benefit. *Ilgenfritz v. Ilgenfritz*, 116 Mo. 429, 22 S. W. 786; *Selbold v. Christman*, 75 Mo. 308, *Affirming* 7 Mo. App. 254; *Price v. Kane*, 112 Mo. 412, 20 S. W. 609; *Woodward v. Woodward*, 148 Mo. 241, 49 S. W. 1001; *Pitkin v. Mott*, 56 Mo. App. 401.

A man who procures property to be conveyed to his wife will be presumed to have intended to make it her separate estate. *Childress v. Grim*, 57 Tex. 58.

When property is purchased by a man in the name of his wife the relation of the parties
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rebutts the presumption of a resulting trust. *Underwood v. Warner*, 4 Phila. 6.

The mere fact that the consideration is paid by the husband for land conveyed to his wife will not control the presumption that the deed was intended as a provision for her, nor establish a resulting trust in his favor, without further proof that such was the intention at the time of the conveyance. *Edgerly v. Edgerly*, 112 Mass. 175.

The presumption that a conveyance by a third person to the wife at the instance of the husband is an advancement may be rebutted. *Wormley v. Wormley*, 98 Ill. 553.

But although the presumption that a man, in purchasing property and having it conveyed to his wife, intended to make a settlement upon her, may be rebutted, the burden is upon him to do so. *Lister v. Lister*, 35 N. J. Eq. 49.

The presumption that conveyance to a wife by a third person was for her separate use may be rebutted by parol evidence. *Wallace v. Bowen*, 28 Vt. 638.

V. Consideration.

As has been noticed *supra* II., b, some cases have held a consideration to be necessary to uphold a conveyance from husband to wife. While the necessity of a consideration may be questioned, there is no doubt that, if a consideration exists, there is ample ground for the interposition of the court to uphold the conveyance.

In *Hervey v. Hervey*, 1 Atk. 561, the court says, by way of argument, that, if the wife had claimed the fund which she sought in the case without setting forth any consideration, but merely as a voluntary gift from her husband, there is no doubt that the court would have given it to her, and it would be very absurd to say that because she sets forth in her bill a valuable consideration for a part thereof she shall lose the whole.

In *Arundell v. Phipps*, 10 Ves. Jr. 139, where plaintiff laid claim to certain property which she was alleged to have purchased from her husband, the chancellor says it appears to have been asserted in the court of King's bench that a husband and wife could not after marriage contract, for a bona fide and valuable consideration, for a transfer of property from him to her. The doctrine is not so either here or at law.

A postnuptial agreement on sufficient con-

ties when a contract of the character under consideration is made, and to be provided against so far as the creation of a separate estate can have that effect. When there is no reservation in a deed, it will be taken as passing to the vendee the highest estate that the vendor can convey, which in the case at bar is a separate estate in the land conveyed. It is clear upon principle and authority that a conveyance of lands by husband to the wife in the usual form must be held by necessary implication and as a matter of law to vest in the wife a technical separate estate in the premises conveyed. No words expressive of such intention are necessary. It will be conclusively presumed from the relation of the

parties and the nature of the transaction.

We are therefore of the opinion and hold that the chancellor was in error in decreeing that the conveyance made by Mr. Barnum to Mrs. Barnum did not pass to and vest in the latter a separate estate in the lands conveyed, and that she did not have the right to sell and convey the same, upon proper privy examination, without his consent and joinder in the deed. The deed made by Mrs. Barnum is valid and effective to vest in the purchaser a good title to the property free from all marital or other rights of her husband, and *the decree adjudging to the contrary will be reversed*, and one here entered in accordance with this opinion.

sideration will be enforced in equity. *Liles v. Fleming*, 16 N. C. (1 Dev. Eq.) 185.

A deed directly from husband to wife, founded on good consideration, will be upheld. *Brooklyn Bank v. Lamon*, 31 N. Y. S. R. 191, 9 N. Y. Supp. 849.

In *McCampbell v. McCampbell*, 2 Lea, 664, 31 Am. Rep. 623, the court states, by way of argument, that a consideration passing from the wife will sustain a direct conveyance of property by her husband to her, and the very nature of the transaction will fix the property, even if personalty, with a trust for the separate use of the wife, without any words to that effect.

A sufficient consideration may be found in a conveyance by the wife to her husband of her separate estate.

A married woman may purchase property from her husband with her separate estate. *Steadman v. Wilbur*, 7 R. I. 481.

A deed executed by a man to his wife in good faith and in consideration of the separate estate of the wife is valid. *Thompson v. Mills*, 39 Ind. 528. The court says: "In this state the distinction between actions at law and suits in equity, and the forms of all such actions which existed in this state prior to 1852, are abolished: there is but one form of action for the enforcement or protection of private rights and the redress of private wrongs, and every right, and every transaction, must be at once regarded by the court in its equitable, as well as in its legal, character and operation. Why, then, shall we longer speak of the same instrument as being void at law, but valid in equity? As the fact is recognized that the husband may, by deed made directly to his wife, convey real estate to her, and the conveyance will be upheld, why not apply to such conveyances the same rules which are applied to conveyances between other parties; that is, hold them valid until some legal reason has been shown for setting them aside?"

And that rule was followed in *Brookbank v. Kennard*, 41 Ind. 339.

A conveyance of land by a man to his wife in consideration of moneys which he had used and appropriated creates in her an equitable, separate estate, which she may sell or charge as if she were a *feme sole*. *Goodlett v. Hansell*, 66 Ala. 151.

Jewelry given to the wife in consideration of money from her separate estate, used by

the husband, will vest in her,—at least as to the equitable title,—so as not to pass to his assignees for creditors. *Barrows v. Keene*, 16 R. I. 484, 8 Atl. 713.

A man may convey land to his wife in satisfaction of indebtedness due from him to her at the time of the marriage. *Barclay v. Plant*, 50 Ala. 509.

Use of separate property of the wife will sustain a subsequent conveyance to her. *Perkins v. Perkins*, 1 Tenn. Ch. 541.

But the property must have been taken by the husband under the express agreement to make a settlement upon the wife in lieu of it. *Cheatham v. Hess*, 2 Tenn. Ch. 766.

If separate property may form a consideration, a conveyance by the man to the wife of her own property, which he acquired by the marriage, must of necessity be upheld.

So, a man may during marriage make a parol gift to his wife of money which came to him from her, and such money will become her separate estate. *Engleman v. Deal*, 14 Tex. Civ. App. 4, 37 S. W. 652.

And if a man transfers to his wife her personal property, or relinquishes his rights in regard to it, it becomes her separate property and subject to her contracts, even if no words of exclusiveness are used. *Williams v. King*, 43 Conn. 574.

In *Harvey v. Harvey*, 1 P. Wms. 125, the court enforced an agreement by the husband not to intermeddle with estate which had been devised to the separate use of his wife.

A deed by a man to his wife of her share in her father's estate will be supported in equity. *Bradford v. Goldsborough*, 15 Ala. 311.

So, an agreement to transfer property to the wife in consideration of her release of dower rights is binding and enforceable in equity. *Ward v. Crotty*, 4 Met. (Ky.) 59.

Therefore where a man, in consideration of his wife's signing deeds of his property to bar her dower right, procures real estate to be conveyed to her, it becomes her separate property regardless of the proportion which the value of her dower interest bore to its value. *McKinney v. McKinney* (Tex. Civ. App.) 87 S. W. 217.

So, a conveyance of chattels to a married woman in consideration of her releasing her rights in the homestead makes them her separate estate. *Blum v. Light*, 81 Tex. 414, 18 S. W. 1090; *Burnham v. McMichael*, 6 Tex.

Sarah W. BINGHAM *et al.*, Appts.,
v.

Jacob WELLER *et al.*

(113 Tenn. 70.)

1. A fee-simple estate is vested in a woman by a deed to her and her body heirs, in which her husband is entitled to curtesy, although the grant is expressly made free from his debts and liabilities.
2. A man is deprived of his curtesy interest in land by conveying it to his wife to her sole, separate, and exclusive use, free and discharged from all his control and liabilities.

(June 25, 1904.)

Civ. App. 496, 26 S. W. 887; Drake v. Davidson, 28 Tex. Civ. App. 184, 66 S. W. 889.

So the right to alimony may form a consideration.

Thus, the compromise of an alimony suit is a sufficient consideration to support a deed from husband to wife. *Adams v. Loomis*, 22 Grant, Ch. (U. C.) 99, Affirmed in 24 Grant, Ch. (U. C.) 242.

A transfer by a husband to his wife of a slave, together with other property in discharge of alimony which has been decreed against him, will empower her to manumit the slave, and he cannot, after the death of his former wife, assert any claim to the slave or her offspring. *Wallingsford v. Allen*, 10 Pet. 583, 9 L. ed. 542. The court says that equity sustains transfers of property from husband to wife during coverture when a clear and satisfactory case is made out that the property is to be applied to the separate use of the wife; where the consideration of the transfer is a separate interest of the wife, yielded up by her for the husband's benefit, or of their family, or which has been appropriated by him to his uses; or where the husband is in a situation to make a gift of property to his wife, and distinctly separates it from the mass of his property for her use. The court further says, with reference to the property in controversy before it, that the wife was to be considered as a *feme sole*, and her right to dispose of it followed as a matter of course.

The duty of the husband to provide for the support of his wife will furnish a sufficient consideration to support the conveyance. Under this rule he may make a settlement of property upon, or an advancement of property to, her to provide for her wants in case of his death.

As between the parties themselves a voluntary settlement upon the wife may be upheld in equity. *Pawley v. Vogel*, 42 Mo. 291.

A settlement not fraudulent, by a person not indebted, is valid though voluntary. *Battersbee v. Farrington*, 1 Swanst. 106.

In *Curtis v. Price*, 12 Ves. Jr. 89, the court says with respect to a settlement made after the settler's marriage that a settlement of this kind is void only as against creditors. To every other person it is good.

In *Moore v. Page*, 111 U. S. 117, 28 L. ed. 373, 4 Sup. Ct. Rep. 388, which was a case involving the rights of creditors of the husband, 69 L. R. A.

A PPEAL by complainants from a decree of the Chancery Court for Shelby County in a proceeding to settle the rights and interests in certain real estate. *Reversed*.

The facts are stated in the opinion.

Mr. Henry Craft for appellants.

Messrs. Turley & Turley, for appellees:

By the act of 1784 all estates tail were converted into fee-simple estates; so that in 1851, when this deed was drawn, it conveyed a fee-simple title to Mrs. Caroline I. Weller.

Middleton v. Smith, 1 Coldw. 144; *Kirk v. Furgerson*, 6 Coldw. 483; *Wynne v. Wynne*, 9 Heisk. 309; *Beecher v. Hicks*, 7 Lea, 207.

Mr. Weller is tenant by the curtesy of the Beale-street lot.

the court assumes that property conveyed by husband to wife as a settlement may be held as her separate estate beyond the control of her husband.

A conveyance of property from a man to his wife, when made as a provision for her, will be sustained and upheld in equity when the rights of creditors are not affected. *Kellogg v. Hale*, 108 Ill. 164.

And where the conveyance is made to the wife by the husband directly the presumption is that an advancement was intended. *Andrews v. Oxley*, 38 Iowa, 580; *Arp v. Jacobs*, 8 Wyo. 489, 27 Pac. 800; *Spring v. Hight*, 22 Me. 408, 39 Am. Dec. 587.

But the presumption that the conveyance to the wife was intended as an advancement for her benefit may be rebutted. *Livingston v. Livingston*, 2 Johns. Ch. 539.

Under this rule, there is no reason why a conveyance should ever fail for lack of consideration.

A gift *causa mortis* may therefore be valid. *Miller v. Miller*, 3 P. Wms. 356; *Lawson v. Lawson*, 1 P. Wms. 441.

But in *Weathersby v. Weathersby*, 39 Miss. 652, where the question was as to the right of the wife to slaves which had been hers before marriage, the court says it is well settled that where a settlement is made by the husband upon the wife for a permanent separation, if she return to her husband's house and protection such conduct on her part amounts to a total extinguishment of any future claim under the settlement.

A transfer by a man to his wife of all his property upon condition that she will assume his debts and pay the same out of property received from him and property held in her own right is valid as against him. *Brown v. Brown*, 22 Neb. 703, 36 N. W. 275.

VI. Does conveyance create separate estate.

The only way in which the conveyance would be of any value to the wife would be to hold that it was her separate estate free from the control of the husband, for it would be of little avail to recognize the validity of the gift or conveyance and at the same time hold that the property immediately reverted in the husband by reason of his marital rights. To create separate estate in equity in cases of gifts from strangers, the court required the

Baker v. Heiskell, 1 Coldw. 641; *Bottoms v. Corley*, 5 Heisk. 6; *Frazer v. Hightower*, 12 Heisk. 94; *Carter v. Dale*, 3 Lea, 710, 31 Am. Rep. 660.

The husband has curtesy interest in his wife's separate estate, unless the intent to exclude him is clear and explicit, and generally by express words.

8 Am. & Eng. Enc. Law, 2d ed. pp. 521, 522.

A tenant by the curtesy consummate is a husband whose wife is dead, and to whom a child or children have been born alive by his said wife.

8 Am. & Eng. Enc. Law, 2d ed. p. 509.

The husband may be tenant by the curtesy in lands devised to his wife "during the joint and several lives" of herself and husband.

statement explicitly to appear that the gift was for the sole and separate use of the wife. The question then arises, Is such a declaration necessary in a conveyance to a married woman by her husband? There seems to have been no question that he could create in her a separate estate.

In *Huber v. Huber*, 10 Ohio, 371, it is said it is admitted by counsel that a husband may settle a separate estate upon his wife; that is, he may transfer property to her which will inure to her as her separate estate. This may be done even without the appointment of a trustee.

And, if it is stated in the deed that the conveyance is for the separate use of the wife, the same rule would apply as though the conveyance was by a stranger.

So, a conveyance of real estate by a man to his wife for her separate use will be upheld in equity against subsequent grantees from his heirs. *Dale v. Lincoln*, 62 Ill. 22.

A conveyance by a man to his wife of real estate by a deed in which the habendum clause recites that it is to her sole and separate use will create in her a separate estate which will be upheld in equity. *Turner v. Shaw*, 96 Mo. 22, 9 Am. St. Rep. 319, 8 S. W. 897.

A separate estate is vested in the wife by a conveyance by the husband of a life estate in lands by deed containing a clause that she is authorized and empowered to collect the rents and use the same in any manner she may elect, to her separate use, and free from his debts, contracts, and control. *Vick v. Gower*, 92 Tenn. 391, 21 S. W. 677.

A deed by a man of leasehold property to his wife "to her own proper use and benefit" makes the property her separate estate. *Surman v. Wharton* [1891] 1 Q. B. 491.

An assignment by a man to his wife, by deed, of a leasehold to hold the same "as her separate estate" operates as a valid declaration of trust in favor of the wife. The court says the husband may become a trustee for his wife, but cannot retain any beneficial interest in the thing which is the subject of the deed. *Fox v. Hawks*, L. R. 13 Ch. Div. 822.

A clause in a conveyance by a man to his wife that she is to have and to hold the property to her, and her heirs forever, and so that the grantor, his heirs, or any other person, shall have no interest in it, creates in her 60 L. R. A.

Alexander v. Miller, 7 Heisk. 81; *Beecher v. Hicks*, 7 Lea, 213.

A husband may be tenant by the curtesy where the estate of the wife was a conditional or determinable fee, although the condition has happened upon which the limitation over in favor of other parties takes effect.

Crumley v. Deake, 8 Baxt. 362.

Wilkes, J., delivered the opinion of the court:

Mrs. S. W. Bingham filed the bill in this cause against her father, Jacob Weller, to have her rights and interests in two pieces of property in the city of Memphis declared, to recover this interest, and also her share of the rents and income which have been

a separate estate. *Davissan v. Sage*, 20 Grant, Ch. (U. C.) 115.

So, by antenuptial agreement the wife may be given power of disposition over her separate estate the same as though she remained sole, and such power will extend to property obtained from her husband. *Strong v. Skinner*, 4 Barb. 552.

Since the estate is an equitable one, so that it is necessary to resort to a court of equity to establish and protect it, that court has adopted the rule of giving effect to the evident intention of the parties and holding that the estate is separate,—at least so far as to protect it from the control of the husband during the lifetime of the wife.

In all instances of direct gifts to the use of the wife, if allowed at all, they must be supported as gifts to the sole use of the wife, and the husband is her trustee. This is necessarily so, for in that way only can the gift be effectual. It must be inferred, therefore, that the parties intended to create a separate property for the wife. *Steel v. Steel*, 36 N. C. (1 Ired. Eq.) 452.

A conveyance by a man to the separate use of his wife will constitute him a trustee of the legal title of the property for her use, where the effect of the legal unity is such that the legal title is retained by him. And a conveyance in the statutory form to convey real estate will be held to be to her separate use, although that fact is not expressly stated in the conveyance. This trust will be enforced in equity, and, if she devises the property to her children, and he retains possession after her death, he will be regarded as trustee for them so as to prevent his acquiring a title by adverse possession until he expressly repudiates the trust. *Kent v. Kent*, 19 Ont. App. Rep. 352.

MacLennan, J., says separate estate is an interest in property which is *sui generis*, and its distinguishing quality is that in relation to it the marriage bond is to be disregarded. The husband cannot vest the legal title in the wife, but he can give her what is known as a separate estate. And if that is the effect of his conveyance he has made himself a trustee, and his act may with perfect propriety be called a declaration of trust.

A conveyance by the husband need not state that it is for the sole and separate use of the

collected from said property by her said father. Her father, Jacob Weller, claims that he is entitled to the possession of the property as tenant by the curtesy of his wife, Caroline Weller, who died in July, 1809.

There are two pieces of this property, one known as the "Main-street" and the other as the "Beale-street" property.

On the 20th of February, 1851, H. B. Joiner conveyed to Mrs. Caroline Isabella Weller and her bodily heirs, forever, a certain piece or parcel of land on Market street, in Memphis, Tennessee, to be held by her to to her own bodily heirs, free from the debts and liabilities of her husband, Jacob Weller.

At that date Mr. and Mrs. Weller had two children living, to wit, Sarah W. and ———.

On the 10th of October, 1857, they had four children living, to wit, Sarah W., John J., Henry Clay, and Robert F., and all of them at that time were minors. At that date Jacob Weller and his wife, Caroline I., and the four minor children above named, by their next friend, John S. Erwin, filed their *ex parte* petition or bill in the chancery court at Memphis, setting up the purchase by Jacob Weller of this lot, and stating that it was conveyed to Caroline Weller, and her bodily heirs. The deed from Joiner is made an exhibit to the petition, and shows that the land was conveyed to Caroline I., and her bodily heirs, as before stated. The petition prayed that the Market-street property might be sold, and the proceeds reinvested in other property, or loaned out under the

wife to make it her separate property. *Maraman v. Maraman*, 4 Met. (Ky.) 84.

A conveyance of land by husband to wife for natural love and affection will permit her to hold the property against him and his heirs. *Stafford v. Stafford*, 41 Tex. 112.

A conveyance by a man directly to his wife in consideration of natural love and affection creates in her an equitable estate which she may encumber and alien as though a *feme sole*. *McMillan v. Peacock*, 57 Ala. 127; *Helmetag v. Frank*, 61 Ala. 67.

If the deed contains words of warranty, and recites a consideration, the land will vest in the wife as separate property, it being unnecessary that the deed should contain a recital to that effect. *Swearingen v. Reed*, 2 Tex. Civ. App. 386, 21 S. W. 383; *Watts v. Bruce*, 31 Tex. Civ. App. 347, 72 S. W. 258.

In *Leake v. Benson*, 29 Gratt. 156, it is stated by way of argument that a conveyance by a husband to his wife will as a general rule be construed as operating to her separate use, although no such words are used as would be necessary to a separate estate in a conveyance by a stranger. The court says the reason is said to be that otherwise the conveyance would be wholly inoperative.

And the same is true in *Garland v. Pampalin*, 32 Gratt. 314, and *Irvine v. Greever*, 32 Gratt. 419.

Words indicating that a conveyance of land is for the sole and separate use of the wife are not necessary in a conveyance by the husband, since the law will presume that such is the fact. *Sims v. Rickets*, 35 Ind. 181, 9 Am. Rep. 679.

In *Kelly v. Grundy*, 20 Ky. L. Rep. 1081, 45 S. W. 100, the rule is recognized that, if a gift of personal property be made by a man to his wife, although not expressed to be for her separate use, it will be so treated.

In a case involving the rights of the husband's creditors the court said, since gift or conveyance by the husband to the wife is invalid at law, and is valid only in a court of equity, it is regarded as creating in the wife a separate estate, although it may not contain words denoting that it is for her sole and separate use, or words in exclusion of the marital rights of the husband, and is therefore not within the statutes creating her separate estate. In that case, however, the deed recited that the property was conveyed "as her separate prop-

erty under the statutes of the state governing the estates of married women." Of the latter clause, the court said the effect which will be given to it, or whether it is capable of being construed as limiting or qualifying the estate, narrowing its incidents, lessening the dominion of the donee, as the estate is created by the general words which precede it, is not now of importance. Whether it is or is not valid and qualifying as a limitation, subjecting the estate and wife's dominion to the properties of a statutory estate, which is in but a limited sense a separate estate, it is indicative of the intention of the donor. Subjecting the estate to the statute would vest it in the donor as husband and trustee for the donee, entitling him to its rents and profits exempt from liability for his debts. This was held to be a badge of fraud. *Seals v. Robinson*, 75 Ala. 363.

A deed by a man directly to his wife creates in her a separate estate in equity; and in such case the technical words necessary to create a separate estate from persons other than the husband are not necessary. *Pitts v. Sheriff*, 108 Mo. 110, 18 S. W. 1071.

A gift of personal property by a man to his wife will in equity divest him of title, and vest it in her as her sole and separate estate, although words indicating that intention are not used, as would be necessary in case of a conveyance by a third person. *Deming v. Williams*, 26 Conn. 231, 68 Am. Dec. 386; *Jennings v. Davis*, 31 Conn. 138.

A gift of land by a man to his wife constitutes it her separate estate. *Kimbrough v. Kimbrough*, 99 Ga. 134, 25 S. E. 176.

A conveyance by husband to wife creates an equitable separate estate. *Loeb v. Manasses*, 78 Ala. 557.

Such conveyance creates an equitable estate unless it is in exchange for statutory separate estate. *Hamaker v. Hamaker*, 85 Ala. 232, 3 So. 611.

In case a man, for a valuable consideration, makes a gift to his wife, the transaction from its very nature confers a separate estate without express words. *Sherron v. Hall*, 4 Lea, 500.

A gift of personal property by husband to wife creates a separate estate by necessary implication. *Templeton v. Brown*, 86 Tenn. 53, 5 S. W. 441; *Carpenter v. Franklin*, 89 Tenn.

direction of the court. It also asked the court to construe said Joiner deed, and determine the amount of interest or title in said Market-street lot acquired by the said Caroline I. and her four children, who were parties thereto.

In these *ex parte* proceedings, on the 12th of January, 1858, a decree was entered adjudging that under the Joiner deed the children of Caroline I. Weller took an estate and interest in common with her in the Market-street property, and the cause was referred to the clerk to report whether it was manifestly to the interest of the said Caroline I. and her minor children that the Market street lot should be sold, and proceeds invested in other property, or loaned out under the direction of the court. The clerk and

master reported that it would be manifestly to the interests of the parties, and especially of the children, to sell the property, and invest the proceeds in other property, or loan it out at interest, as the court might order. This was confirmed by the chancellor, and it was again adjudged that Caroline I. and her children, named in the petition, held the Market-street property in common, and directing it to be sold. This decree was renewed on June 18, 1858, and again on January 22, 1859.

On November 28, 1859, an order was entered showing that petitioners had dismissed their petition.

Nothing further appears to have been done until the November term, 1865, when a decree of sale was renewed.

142. 14 S. W. 484; Snodgrass v. Hyder, 95 Tenn. 575, 32 S. W. 764.

The mere fact of the gift is as strong evidence that it is to be the sole and separate property of the wife as any declaration in writing would be. Lockwood v. Cullin, 4 Robt. 129.

A deed of gift by a man to his wife is valid as between the parties, and vests the title in her as completely as though she had acquired it by inheritance. Scrutchfield v. Sauter, 119 Mo. 615, 24 S. W. 137.

A conveyance of lands by a man directly to his wife is equivalent to a conveyance to her sole and separate use, and creates an equitable separate estate. But the effect of the insertion of a provision that the land was to be held in all respects as separate estate under the law was left undetermined. Loeb v. McCullough, 78 Ala. 533.

In Wedel v. Herman, 59 Cal. 516, the court held that a conveyance by husband to wife, intended as a gift, vested the property in her as her separate property.

In opposition to that mass of authority, in Plumb v. Ives, 39 Conn. 120, it was held that, in the absence of language in a deed from husband to wife of a life estate through a third person that the conveyance is to her sole and separate use, the law will not supply such intention, and he will have a right to the income as before. The court, after finding a reason for the conveyance which might support it without holding that there was an intention to deprive him of the rents and profits, held that the court ought not to impute an intention to the parties which may not have been in their minds. And the condition of the parties gave aid to the holding that there was no such intention.

So a Federal court has held that property conveyed by a man to his wife and her heirs by a deed which contains no terms from which it appears that it was the intention of the grantor to exclude himself from the benefit and control of it is not, by the operation of such deed, her separate estate. He will retain a freehold estate in such property, which is subject to execution in favor of his creditors. But, so far as conveyances after its adoption are concerned, such property is converted into separate estate by a constitutional provision that the property of every married woman shall not be subject to the debts and contracts

of her husband. Starr v. Hamilton, Deady, 268, Fed. Cas. No. 13,314.

And in Craine v. Edwards, 92 Ky. 109, 17 S. W. 211, the court held that a statute empowering a married woman to devise her separate estate does not apply to land obtained by gift from her husband, where the deed did not expressly state that it was for her sole and separate use. The court said, it is contended that, if the conveyance is from a stranger, it must contain words expressly stating that it is for her sole and separate use to have that effect, but not if it is from her husband. But the court says that this has been held with respect to personal estate, but that it is not true with respect to conveyances of real estate. "There is a manifest difference between the two cases. In the one he certainly has no longer any interest whatever in the property,—the transfer vests it absolutely in her; while in the other, by so making the deed, he may intend that his marital rights shall attach to the property just the same as if the conveyance were from some other party to her. In this instance, why was not the husband entitled to the use of the land during the life of the wife, and to be tenant by the curtesy after her death? . . . Where he merely conveys land to her by a deed general in its terms, an intention upon his part to create a separate estate in her cannot be presumed from the mere fact that the conveyance is from the husband. It, like a deed from any other person, must show in some way an intention to create a separate estate, or else, in the absence of a power to do so, she cannot, under the statute, devise it."

A distinction, however, is to be kept in mind between these equitable separate estates and statutory separate estates. The estates which are created and protected by courts of equity have only the incidents which belonged to such estates before the enactment of the statutes, and the rights pertaining to statutory estates do not belong to them.

Thus, a statute providing that all property which shall accrue to any married woman shall be owned and enjoyed by her as her own separate estate does not affect equitable separate estate; but the further provision that any deed from husband to wife shall be void against his existing creditors will abrogate the rule that the ordinary conveyance by husband to wife is void, and cause such convey-

On February 2, 1866, the clerk and master reported that Gen. W. Y. C. Humes had offered to give \$11,000 for the Market-street property, and on the 3d of February, 1866, the clerk reported that the offer was a good one and ought to be accepted.

No further step appears to have been taken in the case.

On the 20th of February, 1868, Jacob Weller, the husband, filed his original bill against his wife, Caroline I. Weller, and their minor children, J. J. Weller, Sarah W., Henry Clay, Robert F., Caroline I., and Forrest L. Weller. The bill alleged that this Market-street property was conveyed by Joiner to Caroline I. Weller to her sole and separate use and to the heirs of her body. It made the *ex parte* proceedings a part of the bill,

ance to vest in her a legal estate. *Gluck v. Cox*, 90 Ala. 331, 8 So. 161.

A married woman has complete control over her equitable separate estate, and may charge it as though she were sole; but her separate statutory estate can be charged only in the manner designated by the statute. And a statutory estate cannot be transformed into an equitable estate by transfer between the parties, as by a conveyance of the statutory estate, and the husband's conveyance of property to the wife in lieu of it. *Loeb v. McCullough*, 78 Ala. 533, Overruling expressions to the contrary in *Turner v. Kelly*, 70 Ala. 85.

Statutory separate estate cannot be converted into equitable estate. *Farrior v. New England Mortg. Secur. Co.* 92 Ala. 179, 12 L. E. A. 856, 9 So. 532; *Jordan v. Smith*, 83 Ala. 299, 3 So. 703.

The mere fact that the husband joins with a cotenant of his wife in the deed by which the property is partitioned does not alter the character of the title by which her share of the estate is held, and convert it from a fee simple into a separate estate, which, under the statutes, cannot be alienated, where there is nothing in the language of the deed to indicate that such is the intention. And the marital rights of the husband in the estate cannot be changed. *Murdock v. Memphis & O. R. Co.* 7 Baxt. 558.

To create statutory separate estate in the wife by a conveyance from her husband the consideration must have been statutory estate. *Hamaker v. Hamaker*, 88 Ala. 431, 6 So. 754.

But the Alabama act of 1887 converted the wife's equitable title into a legal one. *Maxwell v. Grace*, 85 Ala. 579, 5 So. 319; *Manning v. Pippen*, 86 Ala. 357, 11 Am. St. Rep. 46, 5 So. 572; *Allen v. Hamilton*, 109 Ala. 634, 19 So. 903.

In the absence of creditors whose rights are put in jeopardy, a man may create a separate estate for his wife out of his own property. *Yazel v. Palmer*, 81 Ill. 82; *Hockett v. Bailey*, 86 Ill. 76.

But such estate is a legal one, and must be conveyed or charged in the manner provided by statute. *Elder v. Jones*, 85 Ill. 384.

VII. Remaining interest of husband.

a. In general.

From the fact that the equitable title only 69 L. R. A.

and referred to the deed as being on file in that case. It set out that the Market-street property could be sold for \$11,000; and prayed that it might be sold, and the proceeds reinvested by Jacob Weller in other city property, upon the same trust as was set out in the deed from Joiner, heretofore referred to. A decree was entered directing a sale of the property for \$11,000, upon proof and report of the clerk and master that it was to the interest of the parties that the sale should be made. The sale was ordered to be made by Jacob Weller as special commissioner, the minimum price to be \$11,000.

On the 21st of July, 1868, Jacob Weller reported to the court that he had sold the Market-street lot to Alston, and this sale was confirmed, and title to the Market-street

is vested in the wife, there must of necessity be some custodian of the legal title, and this is held to remain in the husband.

In case of a gift of personal property by a man to his wife the legal title will remain in him, and the beneficial use will vest in her as her separate estate. *Campbell v. Galbreath*, 12 Bush, 464.

And the fact that she has the beneficial interest will preclude him from asserting it.

Therefore, after conveying property to the wife the husband is precluded from claiming without alleging fraud or mistake that there was no consideration for the conveyance. *Miller v. Miller*, 17 Or. 423, 21 Pac. 938. The court says to allow the grantor in such a case, in order to render the deed ineffectual, to come in and swear that he did not mean what he had said under his hand and seal, or to claim that the deed intended something different from what its terms implied, is a violation of the established rules of evidence.

If a man settles a house and business to the separate use of his wife he may be restrained from in any manner interfering with the business, and even from entering the house. *Wood v. Wood*, 19 Week. Rep. 1049. The court says the husband entered into a contract with his wife by which she was to conduct a hotel for the benefit of herself and the children, and to occupy it as a *feme sole*. How can she do so if he is allowed to walk in when he likes, occupy any room he pleases, and conduct himself as proprietor.

So, if an absolute gift is made by a man to his wife of his personal property it is to her exclusive use, and he cannot resume the use and control of it under the statute giving him certain rights in his wife's property, even although no words of exclusiveness are used. *Williams v. King*, 43 Conn. 574.

So, no trust results in favor of the grantor in case of a conveyance by a man to his wife unless he shows that such was the intention by a preponderance of the evidence. *McCaw v. Burk*, 31 Ind. 56.

And parol evidence is not admissible to contradict the recitals of a deed from husband to wife for the purpose of raising an implied trust in him. *Kahn v. Kahn*, 94 Tex. 114, 58 S. W. 825.

No conditional trust will be presumed in favor of the husband when he conveys real

lot was vested in him, and the commissioner was ordered to report to the next term of the court what disposition he had made of the money.

On the 19th of January, 1869, he reported that he had used \$8,109 in the purchase of a lot on the north side of Beale street, and that by mistake he had taken the title to himself, instead of to his wife and children, and he preferred to convey the Beale-street lot to his wife and children, to hold just as they held the Market-street lot, or, in lieu thereof, to convey to them the Main-street lot, which at that time belonged to him, to be held in the same way by his wife and children. This report sets out that the Main-street lot was more valuable than either the Market-street lot or the Beale-

street lot. This report was confirmed on January 16, 1869, and the cause was referred to the clerk to report whether it would be best to invest the proceeds in the Main-street lot or in the Beale-street lot. The clerk and master reported that the Main-street lot was the better investment, and should be made. This report was confirmed on the 10th of February, 1869, and it was ordered that the Main-street lot should be taken and accepted as an investment of the Market-street property. And it was further ordered that all right, title, and interest of the said Jacob Weller in said Main-street lot should be divested out of him, and vested in said Caroline I. Weller and her children by the said Jacob

estate to his wife without qualification or reservation. *Groff v. Rohrer*, 35 Md. 327.

But he may still retain the power of preventing a disposition of the property.

A conveyance of the homestead by the husband to the wife will not empower her to convey it by an instrument in which the husband does not join, where the statute provides that a conveyance or encumbrance by the owner is of no validity unless the husband, or wife, if the owner is married, concurs in and signs the same joint instrument. *Spoon v. Van Fossen*, 53 Iowa, 494, 5 N. W. 624.

Under the Indiana statutes, the husband was required to join in the conveyance to alienate the separate estate of a married woman. *Sims v. Ricketts*, 35 Ind. 181, 9 Am. Rep. 679.

And under a statute which permits a married woman to become seised of land by direct gift or purchase in her own name, and as of her own property, she becomes vested by a gift to her from her husband of the fee in which he retains his marital rights. *Mutual F. Ins. Co. v. Deale*, 18 Md. 26, 79 Am. Dec. 673.

b. *Curtsey*.

BINGHAM V. WELLER raises a very interesting question. Does a man, by conveying property to his wife, deprive himself of all rights of curtesy therein? In that case the conveyance was to the sole and separate use of the wife, and the court followed the line of decisions which hold that there are no rights of curtesy in separate estate. But would the same rule apply where the conveyance is not expressly made to the separate use of the wife, but is held to be so by construction? After distinguishing the cases as much as possible, there seems to be some conflict on this question. The terms of the conveyance in some instances have determined the question in favor of or against the right.

Thus, a grant by a man to his wife, which expressly states that it is for the purpose of providing sustenance for him, his wife, and two children now living, and any children which may hereafter be born, does not exclude the grantor from the right to take the personal property at the death of his wife by his right of marriage, or to inherit the real estate under the statutes of descent. *Allen v. Westbrook*, 16 Lea, 251.

So, property acquired by a married woman 49 L. R. A.

from her husband, which does not become statutory separate estate or equitable separate estate by reason of being conveyed to her sole and separate use, is held subject to her common-law disabilities, so that her husband is entitled to curtesy in it. *Zeust v. Staffan*, 16 App. D. C. 141.

On the other hand, a man will deprive himself of his rights of curtesy by conveying land to his wife for life with remainder to her heirs, since there can be no curtesy in a life estate. *Phillips v. LaForge*, 89 Mo. 72, 1 S. W. 220.

So, if property is conveyed to a married woman in such a manner as to give her a power of alienation over it free from the control of her husband, his rights of curtesy do not attach to it if she effects an alienation before her death. *Chapman v. Price*, 83 Va. 392, 11 S. E. 879.

In *Rautenbusch v. Donaldson*, 13 Ky. L. Rep. 752, 18 S. W. 536, where the rights of a second husband to land conveyed to the wife by the first one were involved, the court says that where the language used in the conveyance expresses a plain intent to deprive the husband of the right of curtesy his claim to a life estate is barred.

And the question may be solved by the provisions of the statute.

Thus, real estate conveyed to a woman by her husband cannot be held to her sole and separate use under the New Hampshire statutes, and therefore his right of curtesy in it remains unimpaired. *Robie v. Chapman*, 59 N. H. 41.

But by the Ohio statutes a surviving husband without issue born during coverture is not entitled to curtesy in the lands of his deceased wife as against her issue by a former husband, unless the lands were obtained by gift from himself. *Denny v. McCabe*, 35 Ohio St. 576.

In New York the woman has the right to dispose of her separate estate during life, but in case she does not do so her husband may have his curtesy.

Therefore, a man is entitled to curtesy in a lot conveyed to his wife through the medium of a third person by deed which makes no mention of his marital rights, where she dies seised of it and leaves no will. *Vanderveer v. Vanderveer*, 17 N. Y. S. R. 648, 1 N. Y. Supp. 897.

Weller in like manner as they owned the Market-street property under the deed from Henry B. Joiner, and that the title be vested in them and their assigns, forever.

During the pendency of this case Henry Clay and Robert F. died intestate, and without children. Caroline I. Weller has died, leaving her husband, Jacob Weller, and the four children, Mrs. Bingham, John J., Caroline I., and Forrest L.

It is insisted on behalf of Mrs. Bingham that the last proceeding in the court to which we have referred vested the title to the property in Caroline I. Weller and her two children, Mrs. Bingham and John J. Weller, who were alive at the time the deed was made by Joiner in 1851; and hence Mrs. Weller, the mother, and Mrs. Bingham and

John J. Weller, were entitled to a one-third interest in common in the Market-street property, and upon the death of her mother she inherited one fourth of her one-third interest; so that her interest in the property is five twelfths of the same.

The argument is that the decree of the court construing the deed of Joiner to Mrs. Weller adjudged that the title to the lot was vested in Mrs. Weller and her children, and all the parties in interest being before the court in that case are bound by its decrees construing the deed and fixing the right of the parties.

The chancellor, in his decree in the present case, however, adjudged that the title to Market-street property was vested in Caroline I. Weller in fee simple.

So, in *Clark v. Clark*, 24 Barb. 582, it is said with respect to estates acquired during coverture, the rights of curtesy of the husband were not defeated by the statutes establishing separate estates of married women, unless the property was conveyed or devised before the owner's death.

And in *Fettiplace v. Gorges*, 1 Ves. Jr. 46, it was held that a married woman may dispose of her personal separate estate by law free from any claim of her husband. If no disposition is made the husband succeeds as next of kin, not in consequence of marital rights.

One of the most valuable incidents of separate estate is destroyed if the husband is held to have a right of curtesy therein. He is thereby given practically an absolute veto upon her power of alienation, and the trend of the law would seem to be against the recognition of such right. This is well illustrated by *BINGHAM v. WELLER*, notwithstanding the fact that in *Frazier v. Hightower*, 12 Helsk. 94, it is said that it is settled law in Tennessee that a man is entitled to curtesy in the property held by a trustee for the separate use of his wife.

And in *Wood v. Polk*, 12 Helsk. 222, it is held that to exclude the marital rights of the husband that intention must have been expressly declared. Yet the court in the *BINGHAM CASE* holds that a man cannot convey property to the separate use of his wife, and still retain a veto power over it.

That decision finds support in decisions from some of the other states.

Thus, a conveyance in trust for the use and benefit of grantor's wife, so that the same shall not be subject in any case to the future control, debts, or liabilities of her present or any future husband, deprives her husband of any right of curtesy in the property. *Rigler v. Cloud*, 14 Pa. 361.

So, property conveyed by a man to his wife is within the operation of a constitutional provision abolishing his rights of curtesy in her separate estate. *Walker v. Long*, 109 N. C. 510, 14 S. E. 299.

A husband is not entitled to curtesy in the statutory separate estate of his wife which he has created for her benefit. *Ratliff v. Ratliff*, 102 Va. 880, 47 S. E. 1007.

A separate estate created in the wife by a conveyance from her husband excludes his

rights of curtesy. *Dugger v. Dugger*, 84 Va. 130, 4 S. E. 171.

Where the husband is not entitled to curtesy in the separate estate of his wife an absolute deed of property from him to her, which vests the title in her as her separate estate, deprives him of his right to curtesy in the property. *Sayers v. Wall*, 6 Gratt. 373, 21 Am. Rep. 303.

A husband is not entitled to curtesy in an equitable estate of the wife created by himself. *Jones v. Jones*, 96 Va. 749, 32 S. E. 403. And the court says a husband, if he survives his wife and the common-law requisites exist, is entitled to any curtesy in any real estate held by her as her equitable separate estate which may remain at her death undisposed of by her during the coverture, or by will, under a power to that effect vested in her by the instrument creating the separate estate, just as in any other real estate of inheritance owned by her, unless his marital rights are excluded by such instrument. Where the equitable separate estate is created by the husband, the intention to exclude is presumed, or results from the transaction itself, except so far as he may have reserved his marital rights in the instrument creating the separate estate. The law attaches to every absolute conveyance complete alienation of the entire interest of the grantor so far as the alienation is permitted by the rules of law and equity. Upon this point the law presumes that a husband, by an absolute conveyance creating an equitable separate estate in the wife, intended to vest in her his entire interest in the subject conveyed, including all his marital rights, present and future; and the conveyance is so construed.

But other courts have taken the opposite view.

Thus, where a deed from a man to his wife creates in her an equitable estate he has an estate for life in it as tenant by the curtesy. Such a deed does not convey the estate by the curtesy unless it is so expressed. *Ball v. Ball*, 20 R. I. 520, 40 Atl. 234.

In *Reagle v. Reagle*, 179 Pa. 89, 36 Atl. 191, it is assumed that the husband has curtesy in land which he has conveyed to his wife.

In *Tremmel v. Kleiboldt*, 75 Mo. 255, affirming 6 Mo. App. 549, it was held that the husband had the right of curtesy in real estate

The construction contended for by Mrs. Bingham cuts out the after-born children from any interest in the property, and also cuts out the husband from any interest as tenant by curtesy.

We are of opinion that the language used by the chancellor in fixing the rights of the wife and children of Jacob Weller in the Main-street property intended to place the title and interest in the property exactly as it existed under the deed from Joiner to Caroline I. Weller to the Market-street property. The decree is confusing and contradictory in its terms, in that it vests the title in the Main-street property in the wife and children of Jacob Weller, to be held by them, their heirs and assigns; but it further provides that they should hold it and own it

in like manner as they owned and held the Market-street property under the deed from Joiner to them. Now, the deed from Joiner to Caroline I. Weller recites that the property is conveyed to Caroline I. Weller and her "body" heirs; and under the uniform course of our decisions this vested a fee-simple estate in Caroline I. Weller, and vested no estate in her children. *Middleton v. Smith*, 1 Coldw. 144; *Kirk v. Furgerson*, 6 Coldw. 483; *Wynne v. Wynne*, 9 Heisk. 309; *Owen v. Hancock*, 1 Head, 563.

Under these contradictory terms of the decree, we are of the opinion that the court intended to vest the title to the Main-street lot in Caroline I. Weller in fee-simple, just as she took title to the Market-street lot under the Joiner deed.

conveyed by him to trustees for the sole and separate use of his wife.

A conveyance by a man of real estate to the sole and separate use of his wife does not deprive him of his rights of curtesy, and she has no power to will the property in such a way as to do so. *Soltan v. Soltan*, 93 Mo. 307, 6 S. W. 95.

A man is entitled to curtesy in the equitable separate estate of his wife. *Cornwell v. Orton*, 126 Mo. 355, 27 S. W. 536.

A wife cannot deprive the husband of curtesy in her lands by will. *Casler v. Gray*, 159 Mo. 588, 60 S. W. 1032.

The husband was entitled to curtesy in the equitable estate vested in the wife by a conveyance from him prior to the passage of the married woman's acts. *Miller v. Quick*, 158 Mo. 495, 59 S. W. 955.

A man is not barred of his rights of curtesy in property which he conveys to his wife by deed of general warranty. *Deming v. Miles*, 35 Neb. 739, 37 Am. St. Rep. 464, 53 N. W. 665.

In Indianapolis, *B & W. R. Co. v. McLaughlin*, 77 Ill. 275, it is held that in property conveyed by a man to his wife he has no estate during coverture; but it is intimated that on the birth of a child he may have a tenancy by the curtesy initiate.

A conveyance of real estate by a man to his wife vests in her the equitable title leaving the legal title in him; and upon her death he is entitled to curtesy. *Ogden v. Ogden*, 60 Ark. 70, 46 Am. St. Rep. 151, 28 S. W. 796.

VIII. Rights against husband's heirs.

If the husband does not attempt to revoke the conveyance during his lifetime the attempt by the heirs to set it aside will meet with little favor.

A conveyance of all his property by a man to his wife upon a strong, meritorious consideration will be upheld in equity against the heirs of the husband. *Jones v. Obenchaln*, 10 Gratt. 259.

A gift by a man to his wife of all his property will be upheld against his heirs if it is no more than a reasonable provision for the wife. *Wood v. Broadley*, 76 Mo. 23, 43 Am. Rep. 754.

The heirs of a man cannot assert title in a slave which he procured to be conveyed to his

wife in consideration of one which, being her property, came to him by the marriage. *Avery v. Avery*, 12 Tex. 56, 62 Am. Dec. 513.

Where the intention of a man is clear and manifest to make a gift to his wife equity will uphold it against his personal representatives. *Ratliffe v. Dougherty*, 24 Miss. 181; *Wells v. Treadwell*, 28 Miss. 717; *Fatheree v. Fletcher*, 31 Miss. 265.

In *Horder v. Horder*, 23 Kan. 391, 83 Am. Rep. 167, the court, in upholding a conveyance of property by a man to his wife as against his heir, says: "Men of sound minds and not under guardianship should have the privilege of disposing of their property as they please, so long as they do not interfere with the rights of creditors, or of persons dependent upon them for support."

In *Hartwell v. Jackson*, 7 Tex. 576, although there were elements of estoppel in the case, the court seems to have proceeded upon the theory that a man may make a valid bill of sale or deed of gift to his wife, which will be enforced against his heirs.

A gift by a man to his wife of bank shares may be upheld against the claims of his heirs. *Adams v. Brackett*, 5 Met. 280.

The widow may hold gifts of personal property from her husband, which he has not revoked at the time of his death, against his personal representatives. *Fisk v. Cushman*, 6 Cush. 20, 52 Am. Dec. 761.

A gift of money by a man to his wife gives her a valid title thereto after his death as against his legal representatives. *McCluskey v. Provident Sav. Inst.* 103 Mass. 300.

Although the husband retains the legal title to personalty given by him to his wife, upon his death, which removes her disabilities, the title will vest in her *eo instanti*, and will not descend to his personal representatives. *Thomas v. Harkness*, 13 Bush, 27, Overruling *Bridges v. Wood*, 4 Dana, 610.

A gift of land will be sustained in equity as against the heirs of the husband. *Majors v. Everton*, 89 Ill. 56, 31 Am. Rep. 65.

An absolute gift of property by a man to his wife makes her the absolute owner as against his representatives, and upon his death the legal and equitable titles unite in her so as to permit her to recover possession of the property in an action at law. *Underhill v. Morgan*, 33 Conn. 105.

If the husband makes an actual gift of

It follows that, upon the death of Caroline I. Weller, her husband, Jacob Weller, became entitled to an estate by curtesy in the Main-street lot; and that, subject to this curtesy interest, the estate vested in the heirs of Mrs. Caroline I. Weller, but no estate vested in them until her death, and then only as her heirs.

As to this feature of the case the decree of the chancellor is reversed and modified so as to give to Jacob Weller a curtesy interest in the Main-street lot or its proceeds.

The title to the Beale-street lot was vested in Caroline I. Weller by deed from her husband, Jacob Weller, executed April 10, 1876. The husband conveys this property to the wife to her sole, separate, and exclusive use as a separate estate, free and discharged

from all his control and liabilities, but with full power to her to sell, convey, or mortgage the same at her pleasure. The habendum recites that she is to have and to hold it as separate estate as above stated, with power of alienation, and it contains a general warranty.

It is insisted for complainant that the terms and the language of this deed deprive her husband, Jacob Weller, of any interest in the estate, both during the life of the wife and after her death.

In the answer filed in this case two of the children—Carrie I. and Forrest L.—set out over their signatures that they desire their father, Jacob Weller, to retain possession of this Beale-street lot, and receive the rents therefrom as long as he lives.

money to the wife, which she retains until after his death, though he could have reclaimed it during his lifetime the personal representative cannot recover it of her. *Puryear v. Puryear*, 12 Ala. 13.

Courts of equity may recognize and enforce contracts between husband and wife in her favor as against his administrator. So that where he purchases slaves in her name, and treats them as her property, during his lifetime, and the property purchased is a reasonable portion for her, equity will uphold the transaction. *Williams v. Mauil*, 20 Ala. 721.

A gift by a man to his wife will be upheld in equity as against his heirs. *Riley v. Riley*, 25 Conn. 154. The court says of *Dibble v. Hutton*, 1 Day, 221, that, so far as it holds a contrary doctrine, the question can no longer be considered as standing where it stood when that case was decided; that that case is an anomaly in the law, and its doctrine is not at this time satisfactory to the profession; that the doctrine of the case so viewed is an illiberal and obsolete relic of the ancient law of baron and *feme*.

Taking security for money loaned in the joint names of husband and wife will entitle the wife to claim it against the personal representatives of the husband in case he dies leaving the securities outstanding. *Christ's Hospital v. Budgin*, 2 Vern. 683.

A deposit of money in the name of husband and wife becomes hers upon his decease without disturbing it. *Roman Catholic Orphan Asylum v. Strain*, 2 Bradf. 34.

A note given by husband to wife may be enforced against his estate. *Templeton v. Brown*, 86 Tenn. 55, 5 S. W. 441.

But it has been held that equity will not enforce a conveyance to the wife against a child for whom no provision has been made. *Crooks v. Crooks*, 34 Ohio St. 610.

IX. Homestead and community.

The rule which permits the husband to make valid conveyance to his wife applies to property in which they have a common interest.

Since the passage of the married women's acts a grant by a man to his wife of his interest in property held by entireties with her is valid. *Meeker v. Wright*, 76 N. Y. 262.

A gift by a man to his wife of the com-

munity property is valid. *Higgins v. Higgins*, 46 Cal. 259; *Jackson v. Torrence*, 83 Cal. 521, 23 Pac. 695; *Carter v. McQuade*, 83 Cal. 278, 23 Pac. 348.

A gift by a man to his wife of the community property by purchasing real estate and having the title transferred to her is valid. *Peck v. Brummagin*, 31 Cal. 440; *Wright v. Wright* (Cal.) 41 Pac. 695; *Alferitz v. Arivillaga*, 143 Cal. 646, 77 Pac. 657.

If a man causes a deed for property purchased with community funds to be made to his wife reciting that it is for her separate use, the title will vest in her as her separate estate. *McCutchen v. Purlinton*, 84 Tex. 604, 19 S. W. 710.

The husband may, by direct conveyance, convert community property into separate estate of his wife. *Story v. Marshall*, 24 Tex. 305, 76 Am. Dec. 106; *Smith v. Boquet*, 27 Tex. 507; *Lewis v. Simon*, 72 Tex. 470, 10 S. W. 554; *Callahan v. Houston*, 78 Tex. 494, 14 S. W. 1027.

And a deed of community property will convert it into separate estate. *Hunter v. Hunter* (Tex. Civ. App.) 45 S. W. 820.

A deed by a man to his wife of community property will vest the title in her as against his subsequent grantees. *Taylor v. Opperman*, 79 Cal. 468, 21 Pac. 869.

But the presumption that the property became the separate property of the wife may be rebutted. *Smith v. Strahan*, 25 Tex. 100.

And a conveyance by a man to his wife of community property may be shown by parol evidence not to have been intended to become her separate estate, notwithstanding the deed recites the consideration paid out of her separate property, where the recital of consideration was without the knowledge of the grantor. *Kahn v. Kahn* (Tex. Civ. App.) 56 S. W. 946.

If the property is purchased with community money, and, at the instance of the husband, conveyed to the wife, the presumption is that the property remains community property; but this presumption may be rebutted. *Hall v. Hall*, 52 Tex. 294, 36 Am. Rep. 725.

Community property conveyed by the husband to a third person, and by the latter to the wife, remains community property. *Parker v. Chance*, 11 Tex. 513. The court says it is immaterial whether the reconveyance be to the wife or husband, or whether it be to the name of either or both, the property conveyed

It has been held by this court that a deed made by a third person to the wife, her heirs and assigns, forever, to be free from the control and liabilities she may hereafter have, with full power to dispose of the same at all times as she deems proper, does not deprive the husband of this curtesy estate in such property after her death. *Carter v. Dale*, 3 Lea, 710, 31 Am. Rep. 660; *Frazer v. Hightower*, 12 Heisk. 94; *Baker v. Heiskell*, 1 Coldw. 641.

Clearly there is nothing in this deed to deprive the husband of his curtesy interest in this land if the deed had been made by a third person; and this is virtually admitted. But it is said that, inasmuch as the deed was made by the husband to the wife, a different rule prevails.

belongs to the community. The direction of the husband that the deed shall be made out in the name of the wife is not of itself sufficient to rebut the presumption that the property belongs to the community. When the husband intends to relinquish his right in the community property and transfer it to his wife, his act must be explicit and such as to leave no doubt as to his intentions. A mere transfer of the property to a stranger, with directions to reconvey to the wife, will not accomplish the object, and show that a donation was intended.

The presumption is that purchases by a man in the name of his wife with community funds do not change the character of the community property. *Smith v. Strahan*, 16 Tex. 314, 67 Am. Dec. 622; *Higgins v. Johnson*, 20 Tex. 389, 70 Am. Dec. 394.

But this presumption may be rebutted by proof of intention to make the property her separate estate. *Higgins v. Johnson*, 20 Tex. 389, 70 Am. Dec. 394.

So, in *Story v. Marshall*, 24 Tex. 805, 76 Am. Dec. 106, the court says, in the absence of any intention outside of the deed it must be taken as evidencing the intention which upon its face it imports; that is, to convey to the wife the estate of the husband in the property. The court further says, such a deed must have been intended to have some operation upon the estate of the grantor, and that must be taken to have been to change the estate from community into separate property of the wife, in the absence of evidence of any other or different purpose in the making of the conveyance. To deny it that effect would be to render the deed wholly inoperative and void.

The gift of homestead property by a husband to his wife vests in her the legal estate subject to his rights in the homestead. *Oaks v. Oaks*, 94 Cal. 66, 29 Pac. 330; *Re Lamb*, 95 Cal. 397, 30 Pac. 568.

Where, by statute, a husband and wife may enter into an agreement or transaction with each other respecting property, which either might if unmarried, a conveyance to his wife, by a man, of property upon which he has declared a homestead, will vest the title in her, so that upon their separation she will be the former owner, within the provision of a statute requiring the court to assign homestead property to the former owner upon dissolving

The case of *Barnum v. Le Master*, 110 Tenn. 638, ante, 353, 75 S. W. 1045, is cited to sustain this contention. In that case the court undertook to say what effect should be given a deed from the husband to the wife, and the court held that it should be held to pass to the wife the highest estate that the husband could convey. In the course of the opinion the court uses language as follows: "If a transfer of personal property to the wife by her husband did not, of its own force, vest in her a separate estate, the transfer would be a farce, and perhaps a fraud upon her, because the husband would immediately become again the owner of it by virtue of his marital rights, and the wife would take nothing. If the same result did not follow a conveyance of land by a husband to his

a marriage. *Burkett v. Burkett*, 78 Cal. 310, 3 L. R. A. 781, 12 Am. St. Rep. 58, 20 Pac. 715.

A conveyance of the homestead by the husband to the wife does not render it liable to her prior debts. *Green v. Farrar*, 53 Iowa, 426, 5 N. W. 557.

Under a statute requiring the acknowledgment of both husband and wife to convey the homestead, the acknowledgment of the wife is not necessary when the homestead is conveyed to her by her husband. *Furrow v. Athey*, 21 Neb. 671, 59 Am. Rep. 867, 33 N. W. 208; *Harsh v. Griffin*, 72 Iowa, 608, 34 N. W. 441.

If the wife declares a homestead upon property which has been given her by her husband the title thereto upon the death of the wife becomes vested in the husband. *Ions v. Harblson*, 112 Cal. 260, 44 Pac. 572.

X. Effect of divorce.

The marital rights of a man in land, which by his direction have been conveyed to his wife, are cut off by a decree of divorce in her favor adjudging him to be the guilty party. *Schuster v. Schuster*, 93 Mo. 438, 6 S. W. 259.

A settlement of real estate by a man upon his wife will not be set aside because of her subsequent divorce for her previous adultery. *Lister v. Lister*, 35 N. J. Eq. 49.

When a woman is granted a divorce from bed and board because abandoned by her husband, gifts of real estate which he has made to her will not be restored to him. *Orr v. Orr*, 8 Bush, 150.

The husband cannot regain the title, although the divorce is granted for the fault of the wife. *Kinzey v. Kinzey*, 115 Mo. 496, 20 L. R. A. 222, 22 S. W. 497.

But, since it is inequitable that a woman suing for divorce should retain property which has been settled upon her, she may be required by the court to make a reconveyance of it before her prayer for relief will be granted. *Oliver v. Oliver*, 5 Ala. 75.

And in *Fitts v. Fitts*, 14 Tex. 443, the court, upon granting a divorce according to the requirements of the Texas statute, placed property which had been conveyed by the husband in trust for the wife in the hands of a trustee to be managed for the benefit of the husband, wife, and children. The court said she derived the property from him. He could not

wife, he would, by the same marital rights, become seised of an estate therein during their joint lives; and, if they have a child born alive, for his life, if he survives her as tenant by the curtesy."

It is admitted that in that case the husband and wife were both alive, and he could not, therefore, be tenant by the curtesy; and it is said that the question as to the right of the husband to curtesy, after the wife's death, was not involved in that case.

In *Frazer v. Hightower*, 12 Heisk. 94, the husband had conveyed to a trustee for his wife certain lands; and the question was whether the husband, after the death of the wife, took an estate by curtesy in the lands so conveyed to the trustee. In that case it

was said: "By a fair construction, then, we think that, while Daniel Hightower, by this deed, did surrender to his wife, during the coverture, the rents, profits, and possession of this land, yet, as we have already said, he made no settlement of the estate beyond her lifetime. The death of the wife renders the tenancy by curtesy consummated or complete. Inasmuch, therefore, as this deed makes no settlement of the land in the event of the wife's death but provides only for dominion and control over it during the coverture, the husband thereby abridged his estate for that period only, and, having survived her, he is entitled to take as tenant by the curtesy. We see no reason why he shall not be taken to have intended, when

have supposed by his transfer or other deed that he was about to deprive himself of the use of the property. By law he was entitled to the management of the separate property of his wife and to support out of its proceeds, having no property of his own. If there ever was a case when the court would depart from the ordinary rule of decision, and under its power of doing what is just and right make such provision as would meet the extraordinary circumstances of the particular case, this is one which strongly demands the interposition of the court.

XI. Form and provisions of conveyances.

When a deed is not sufficient to pass the estate out of the hands of the conveyer, but the party must come into equity, the court has never yet executed a voluntary agreement. To do so would be to make him who does not sufficiently convey, and his executors after his death, trustees for the person to whom he had so defectively conveyed; and there is no case where a court of equity has ever done that. Whenever you come into equity to raise an interest by way of trust you must have a valuable, or at least a meritorious, consideration. *Colman v. Sarrel*, 1 Ves. Jr. 54.

In *Machen v. Machen*, 15 Ala. 373, the court, upon the authority of *Gamble v. Gamble*, 11 Ala. 986, held that parol declarations by a man that slaves belonged to his wife did not have the effect of vesting the title in her as against his executors.

And the *Machen Case* was followed in *Friereson v. Friereson*, 21 Ala. 549, and *Machen v. Machen*, 38 Ala. 364.

A gift of notes and mortgages by husband to wife may be effected by handing them to her with directions to take care of them, accompanied with the statement that they are for the donee and the children. *Mack v. Mack*, 8 Hun, 325, 5 Thomp. & C. 530.

The settlement must be in such form as to place the property within the power and under the control of the wife. *Townsend v. Maynard*, 45 Pa. 198.

To be enforced in equity a bill of sale from husband to wife must have been delivered. *Dyer v. Bean*, 15 Ark. 519.

A mere written transfer upon the back of a mortgage without seal, although it purported to be a sealed transfer, is not sufficient to vest any interest in the wife. *Tiffany v.* 69 L. R. A.

Clarke, 6 Grant, Ch. (U. C.) 474. The court says that where a gift is intended to be made of property, but in the mode in which it is intended to be made it is imperfect, a court of equity will not compel the donor or his representatives to complete it. The court admits that a husband may make a gift to his wife, and that the intention to do so was manifest, but states that the gift was imperfect. All was not done that might have been done; and the court will not, at the instance of a volunteer, compel its completion.

A provision in a conveyance by a man to his wife that the property shall revert to him upon her death without having disposed of the property will be given effect. *Pollard v. Union Nat. Bank*, 4 Mo. App. 408.

If the conveyance to the wife is made under the express agreement on her part to reconvey to the husband on his request, she has no interest which will descend to her heirs. *Cotton v. Wood*, 25 Iowa, 43.

The mere fact that a deed of separation provides that no suit shall be brought against the husband on behalf of the wife to compel him to make her a further allowance does not preclude her, in case of her bringing a bill for divorce because of his subsequent adultery, demanding alimony from his estate. *Morrall v. Morrall*, L. R. 6 Prob. Div. 98.

A gift from husband to wife will not bar dower unless given with a condition to that effect, or granted as a jointure. *Bubler v. Roberts*, 49 Me. 460; *Reed v. Dickerman*, 12 Pick. 148.

Where a man who, by marriage articles, had agreed that his wife should have a third of his personal property in case of his death, gave to her during his lifetime certain annuities which she claimed to hold in addition to the portion provided for by the articles, the court said that the transfer is not a good transfer so as to affect the marriage articles by making an alteration in the gross estate of the testator, the whole of which was liable by the marriage articles to be divided into such proportions which he could not voluntarily alter, and therefore this grant is a fraud on the articles, yet it is good as against the testator himself, and to be answered out of his testamentary share if sufficient; and in this court gifts between husband and wife have often been supported, though the law does not allow the property to pass. *Lucas v. Lucas*, 1 Atk. 270.

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he made this conveyance to his wife, that she was to hold the estate as every estate of inheritance is held by a wife; that is, subject to curtesy."

Referring again to the case of *Barnum v. Le Master*, the court said, in support of its holding that "otherwise the wife would not only be deprived of all the fruits of ownership during all this time (that is, during the marital relation), but she could not sell or convey it without his consent and joinder in the conveyance. A power in the husband over the disposition of the property often enables him to control and reacquire title by reducing to possession the proceeds of the sale of it. The wife would acquire a bare right to sell with the concurrence of her husband while he lived, and only comes into full ownership and enjoyment in the event she should survive him. An estate more in the nature of a remainder than an absolute one taking effect immediately, which the deed purports to pass, and wholly inconsistent with the terms of the instrument."

We are of opinion that the conveyance of real estate by the husband to the wife should have the same effect as the gift or transfer of personal property,—that is, to divest out of the husband all interest, present or contingent, in the land; and upon the death of the wife the real estate should go to the devisees of the wife, if she make a will,

and, if she die intestate, to her heirs, free from any claim on the part of the husband for curtesy or other interest; and that the case of a conveyance from a husband to the wife of real estate must, to this extent, be distinguished from a conveyance by a third person to the wife for her separate estate.

This case is distinguishable from the case of *Carter v. Dale*, 3 Lea, 710, 31 Am. Rep. 660, which was a conveyance from a third person to the wife, and not from the husband.

This case is distinguishable, also, from the case of *Frazer v. Hightower*, 12 Heisk. 94. In the latter case the conveyance was in trust for the wife, and the court construed the language of the conveyance to indicate that the object of the husband was merely to secure to the wife the rents and profits of her real estate during the marital relation, and no longer.

The decree of the chancellor as to the Beale-street property is also reversed; Jacob Weller having no interest therein or claim thereon.

The costs of appeal will be paid equally by complainants and defendants, and of the court below as directed by that court, and the cause is remanded for further proceedings under this holding and the agreements of parties heretofore made, as shown by the record.

MISSOURI SUPREME COURT.

STATE of Missouri, *Respt.*,

v.

Jasper COLEMAN, *Appt.*

(186 Mo. 151.)

1. That threats made by one on trial for murder to kill his victim were made a year or eighteen months before the homicide does not render evidence of them inadmissible.
2. The jury in a murder case cannot infer that a verdict was rendered by a coroner's jury, merely because the prosecuting attorney asked a witness whether or not he, as a member of such jury, did not render such verdict, which question the witness was not permitted to answer, so as to make the conduct of the prosecuting attorney ground for reversal.
3. In the absence of exception to the conduct of the prosecuting attorney

NOTE.—As to homicide by officers of justice, see also, in this series, *State v. Phillips*, 67 L. R. A. 292, and *note*.

As to admissibility of record of coroner's inquest in evidence, see also *United States L. Ins. Co. v. Kleigast*, 6 L. R. A. 65; *Consolidated Ice Mach. Co. v. Kelfer*, 10 L. R. A. 696; and *Cox v. Royal Tribe of Joseph*, 60 L. R. A. 620. 69 L. R. A.

in reading the verdict of a coroner's jury in propounding a question to a witness, the supreme court will not set aside a verdict of guilty in a murder case merely because the coroner's verdict stated that the homicide for which accused was on trial was unjustified.

4. A police officer who kills a person whom he is attempting to arrest is guilty of a criminal offense if he uses more force than is reasonably necessary to effect his purpose.
5. Charging the jury as to the effect of verbal statements of accused, when there is no evidence that he made any, is not reversible error, where the facts disclosed by the record show that accused was not prejudiced thereby.
6. It is misleading to charge that municipal ordinances do not justify the shooting of a person by an officer in attempting to arrest him for their violation, in connection with a charge that the ordinances are admissible to prove the good faith of the officer in attempting to effect the arrest.
7. An instruction contained in the general charge need not, at the instance of the parties, be repeated in special instructions.
8. Mere failure of a person to submit to arrest does not give the officer the right to take his life, although the of-

licer has good reason to believe that he has authority to make the arrest; and, if the officer acts in malice and with premeditation because the one he is attempting to arrest does not remove his hand from his pocket upon command, the officer will be guilty of murder in the second degree.

9. Failure to give an instruction which is not requested upon a matter to which the attention of the court is not called is not reversible error.

10. Instructions predicated on facts which do not exist are properly refused.

11. The omission of the recital that an information for murder is upon the oath of the prosecuting attorney is fatal to its validity.

12. The question of the invalidity of an information may be raised for the first time in the appellate court.

13. Failure of the clerk to indorse the word "Filed" upon an affidavit is a mere irregularity which may be amended at any time before or during trial, and objection to it cannot be made for the first time on appeal.

(*Valiant, J., dissents from proposition 5.*
Gantt, J., dissents from proposition 11.)

(February 2, 1905.)

A PPEAL by defendant from a judgment of the Circuit Court for Chariton County convicting him of murder. *Reversed.*

The facts are stated in the opinion.

Messrs. Ball & Sparrow and A. W. Johnson, for appellant:

The reading of the verdict of a coroner's jury as evidence is error in any cause, civil or criminal.

State v. Garth, 164 Mo. 553, 65 S. W. 275.

The fact that the court permitted the verdict of the coroner's jury to be read in the form of a question, and then sustained an objection by defendant, does not cure the error.

State v. Thomas, 99 Mo. 235, 12 S. W. 643; *State v. Kuehner*, 93 Mo. 193, 6 S. W. 118; *State v. Fredericks*, 85 Mo. 145; *State v. Mia*, 15 Mo. 153.

It was the duty of defendant, under the facts in this case, to arrest the deceased. Therefore, as such officer, he must, of necessity, have been the aggressor. As such officer it was his duty to use sufficient force to accomplish the arrest, and he must, of necessity, have been the judge of the force necessary to make the arrest, and to bring the deceased within his control.

State v. Dierberger, 96 Mo. 666, 9 Am. St. Rep. 380, 10 S. W. 168; 2 Bishop, Crim. Law, 6th ed. §§ 647, 651, pp. 354, 356; *State v. Rose*, 142 Mo. 418, 44 S. W. 329; *State v. Lane*, 158 Mo. 572, 59 S. W. 965; *State v. McNally*, 87 Mo. 644.

The information omits the words, "on his oath aforesaid," and is insufficient.
69 L. R. A.

State v. Furgerson, 152 Mo. 92, 53 S. W. 427; 1 Bishop, Crim. Proc. 2d ed. § 712, p. 442; *State v. Stacy*, 103 Mo. 11, 15 S. W. 147; *State v. Meyers*, 99 Mo. 107, 12 S. W. 516.

Messrs. Edward C. Crow, Attorney General, and *C. D. Corum*, for respondent:

The competency of threats is not affected by remoteness.

State v. McNally, 87 Mo. 644; *State v. Glahn*, 97 Mo. 679, 11 S. W. 260; Underhill, Crim. Ev. p. 392.

The rule that an officer has the right, in making an arrest, to use all the force necessary to overcome resistance, even to the taking of life, does not apply as to a misdemeanor.

State v. Dierberger, 96 Mo. 666, 9 Am. St. Rep. 380, 10 S. W. 168; 2 Bishop, Crim. Law, § 649; *State v. McMullin*, 170 Mo. 629, 71 S. W. 221.

Burgess, J., delivered the opinion of the court:

At the September term, 1903, of the circuit court of Chariton county, the defendant was convicted of murder in the second degree, and his punishment fixed at twenty years' imprisonment in the penitentiary, under an information filed in the circuit court of said county by the prosecuting attorney of said county, charging him with having shot to death with a pistol at said county on the 8th day of August, 1903, one Rufus Cox, against the peace and dignity of the state. Defendant appeals.

The facts, briefly stated, are that at the time of the homicide the defendant was marshal of the town of Dalton, in said county. Deceased lived in the county, and on the day he was killed had gone to Dalton, taking some fish with him for sale, and was vending them upon the sidewalks of the town, in violation of a resolution of the board of aldermen of the town, which the marshal understood had theretofore been adopted. When Cox arrived in town he established himself upon the sidewalk, and began selling his fish. The defendant, as marshal, advised Cox that an ordinance had been passed prohibiting the use of the pavement for such purposes, and requested him to move his fish to some other place. It seems that the deceased at first demurred, but finally reluctantly removed his fish, at the request of the defendant, to the inside of a store, and remained in the store until late in the afternoon, when he again placed his fish upon the sidewalk. The defendant again remonstrated with him against using the sidewalk for the purpose, and attempted to get him to remove his fish. This the deceased declined to do, whereupon the defendant attempted to arrest him and lead

him away, in pursuance of which defendant laid his hands upon the deceased upon three different occasions, and on each occasion the deceased freed himself from the grasp of defendant. The testimony on behalf of the state tends to show that the deceased did little more than decline to accompany the defendant, and that because of his declination, and without other provocation, the defendant drew his pistol from his pocket and shot him to death. The evidence shows that the defendant fired four shots, from the effects of which the deceased immediately died. The evidence on behalf of the defendant tends to show that after he had tried to place the deceased in his custody the deceased put his hand in his pocket, and that thereupon the mortal shot was fired. The defendant states on direct examination that he shot deceased in order to protect himself from bodily harm, but his cross-examination shows that he shot the deceased because the deceased failed to remove his hand from his pocket when defendant requested him to do so. His own testimony does not suggest that he was in imminent danger of attack, or that he had any cause to believe that he was in imminent danger. His whole testimony goes to show that he murdered the deceased because the deceased would not remove his hand from his pocket.

There are a number of assignments of error which we do not think of sufficient importance to demand our attention, for in no event could the judgment be reversed because of the rulings of the court below upon them, so that we will direct our attention to such matters as seem to require more serious consideration.

The first of these is in relation to the testimony of one James Winkler, a witness for the state, who testified over the objections of defendant to threats made by defendant a year or eighteen months before the trial that he was going to shoot Rufus Cox, having prepared himself with a shotgun for the purpose, and was lying in wait for him, but that the witness discovered defendant, and dissuaded him from his purpose. The contention is that the threats were too remote to be competent, and especially so since there was no evidence of any threats or bad blood on the part of the defendant since that time. But it is well settled that, in trials for murder, threats made by the defendant towards the deceased are competent, and the nearness or remoteness of the time when made to the date of the homicide does not affect their competency as evidence. *State v. Adams*, 76 Mo. 357; *State v. Grant*, 79 Mo. 137, 49 Am. Rep. 218; *State v. McNally*, 87 Mo. 644; *State v. Glahn*, 97 Mo. 679, 11 S. W. 260. 60 L. R. A.

Defendant complains of the action of the court in permitting the attorney for the state to read to the court in the presence of the jury the verdict of the coroner's jury. It was not read in evidence, but the attorney for the state asked witness Davenport whether he, as a member of the coroner's jury, returned a certain verdict. The question was objected to, and the objection sustained. No objection was made to the action of the prosecuting attorney in propounding the question. Under such circumstances, it should not be assumed that the jury could have inferred that the witness returned such a verdict as the attorney for the state suggested, nor could the jury have inferred that the witness returned any verdict as a member of the coroner's jury. While statements of attorneys in the presence of a trial jury, or questions they propound, are not evidence, they should not be permitted to make statements or ask questions from which the jury could infer that the matter about which such statements may be made, or questions asked, is in fact true. But we do not think any such inference could have been drawn by the jury in this instance. Had the witness answered that he did return such a verdict, there would be more merit in the contention. There is no question but that the verdict of the coroner's jury was inadmissible for any purpose, and when the prosecuting attorney asked the witness if he returned the verdict, to wit, "Upon formal inquiry concerning the facts, and careful examination of the body, we find the deceased came to his death by a wound from a pistol fired from the hands of Jasper Coleman, of Dalton, Missouri, and from evidence we find that the killing of Rufus Cox by Jasper Coleman was unjustified," objection was made by defendant, and was promptly sustained by the court. The killing is admitted, but attempted to be justified upon the ground of self-defense, so that, if defendant was in any way prejudiced by propounding the question to the witness with respect to the verdict, and reading the verdict in the presence of the jury, it was by the use of the words that the killing "was unjustified," at the conclusion of the verdict, but we do not think the verdict should be set aside on that ground. And, as there was no exception taken to the action of the prosecuting attorney in propounding the question, we do not think he was guilty of such impropriety as would justify this court in interfering with the verdict upon that ground,—especially as the trial court refused to set aside the verdict on that ground. *Hollenbeck v. Missouri P. & Co.* 141 Mo. 97, 38 S. W. 723, 41 S. W. 887.

It is said for defendant that the evidence was insufficient, under all the facts in the case, to convict the defendant of any offense with which he is charged in the information. That the defendant was an officer of the law, and that the deceased knew him to be such, are clear. It is equally clear, under the facts of this case, that it was the duty of defendant, as such officer, to arrest the deceased, and to use sufficient force to accomplish the arrest, and bring the deceased within his control; but, if he used more force than was reasonably necessary for that purpose, and killed Cox, he was guilty of a criminal offense, its grade depending upon the facts and circumstances in evidence. *State v. Dierberger*, 96 Mo. 666, 9 Am. St. Rep. 380, 10 S. W. 168; *State v. Rose*, 142 Mo. 418, 44 S. W. 329; *State v. Lane*, 158 Mo. 572, 59 S. W. 965. There was, we think, an abundance of evidence to take the case to the jury upon this feature of the case.

It is also claimed by defendant that the court erred in giving instruction No. 4, because of the want of testimony upon which to base it. It reads as follows: "(4) Court instructs the jury that, if verbal statements of the defendant have been proved in the case, you may take them into consideration, with all the other facts and circumstances proved. What the proof may show you, if anything, that the defendant has said against himself, the law presumes to be true, because said against himself; but anything you may believe from the evidence the defendant said in his own behalf you are not obliged to believe, but you may treat the same as true or false, when considered with a view to all the other facts and circumstances in the case." Conceding that there was no evidence upon which to base the instruction, we are not inclined to think the judgment should be reversed upon that ground. Certainly this could not be done unless the error was prejudicial to defendant, and, while the presumption is that an error made against a defendant when on trial for crime is prejudicial, this presumption may be overcome by the facts and circumstances in evidence, if sufficient, and we can but conclude from the facts disclosed by the record that the error was not prejudicial. In fact, we are unable to see in what way defendant was prejudiced, and we are of the opinion that he was not; hence the error was not prejudicial.

Instruction numbered 8, given on the part of the state, is also complained of. This instruction reads as follows: "The records and ordinances, and as well, also, the verbal testimony of Mayor Seigle, have been

admitted in evidence before the jury as tending to prove defendant's good faith in attempting to arrest deceased; but the jury are instructed that under the said ordinances and records the selling of fish, or an obstruction of the sidewalk, did not constitute an offense thereunder, and does not justify or excuse the defendant for shooting deceased." This instruction seems to us to be misleading, in that, while it tells the jury that the records, ordinances, and the verbal testimony of Mayor Seigle are admitted in evidence as tending to prove defendant's good faith in attempting to arrest deceased, it proceeds to say, "but . . . under said ordinances and records the selling of fish, or an obstruction of the sidewalk, did not constitute an offense thereunder, and does not justify or excuse the defendant for shooting deceased," and so couples the absence of excuse for shooting deceased with the preceding part of the instruction as to neutralize the question of good faith on the part of defendant in his efforts to make the arrest. In a word, want of excuse, as here used, seems to be inconsistent with good faith.

It is insisted by defendant that instruction numbered 9, given on the part of the state, is erroneous, in that it omits the question of reasonable doubt; but this question is covered by one general instruction given upon the part of the state, by which the jury were told that before they could convict the defendant they must find him guilty as charged, beyond a reasonable doubt. This was all that was necessary. It is not essential that it should be repeated in any other instruction.

It seems that the court struck out that part of instruction numbered 11 asked by defendant which told the jury that defendant had the right to take the life of the deceased in the event of the failure of deceased to submit to arrest, and then gave it, and, in so doing, defendant insists, committed error. If the attempt to arrest deceased had been for felony committed by him, defendant's contention would be correct; but, where the attempt to arrest is for a misdemeanor or breach of the peace, "it is not lawful to kill the party accused if he fly from the arrest, though he cannot otherwise be overtaken, and though there be a warrant to apprehend him. . . . But, as in case of felony, so here, if the officer meet with resistance and kill the offender in the struggle, he will be justified." 1 East, P. C. 302. "When, as a general proposition, one refuses to submit to arrest after he has been touched by the officer, or endeavors to break away after the arrest is effected, he may be lawfully killed, provided

this extreme measure is necessary." 2 Bishop, Crim. Law, § 647. In the case of *State v. Dierberger*, 96 Mo. 666, 9 Am. St. Rep. 380, 10 S. W. 168, it was said: "These authors, ancient and modern, lay down the law in substantially the same terms. They show that the protection which an officer is entitled to receive is a different thing from self-defense. The officer, when making an arrest, may, of course, defend himself, as may any other person who is assaulted, but the law does not stop here. The officer must of necessity be the aggressor. His mission is not accomplished when he wards off the assault. He must press forward and accomplish his object. He is not bound to put off the arrest until a more favorable time. Because of these duties devolved upon him, the law throws around him a special protection. As we said in the recent case of *State v. Fuller*, 96 Mo. 165, 9 S. W. 583, his duty is to overcome all resistance and bring the party to be arrested under physical restraint, and the means he may use must be coextensive with the duty." *State v. Rose*, 142 Mo. 418, 44 S. W. 329. But in the case at bar the deceased was not guilty of either a felony or misdemeanor, nor even of the violation of the town ordinances; and the court, in effect, so declared. But defendant had the right to arrest for the violation of a town ordinance committed in his presence, had such been the case. Deceased had been selling, or offering for sale, fish on the sidewalks, to defendant's personal knowledge, and in his presence, whereupon he reported the fact to the chairman of the town board, who advised him that it would be necessary to go and kindly ask Mr. Cox to take his fish off the sidewalk, and, if he refused to do so, it would be his duty to remove the fish from the sidewalk himself, and, in case he became loud or noisy or swearing, he should arrest him for disturbing the peace of the town; and, in attempting to comply with the direction of the chairman of the board, the homicide occurred, as before stated. It thus seems that defendant had good reason to believe that he had the authority to arrest deceased, and if, when making such arrest, he was acting in good faith, and deceased resisted, he had the right to apply force to accomplish it; and if it became necessary to kill him to save his own life or person from great bodily harm, he had a right to do so. *State v. McNally*, 87 Mo. 644. As was, in effect, said in *State v. Dierberger*, 96 Mo. 666, 9 Am. St. Rep. 380, 10 S. W. 168, the defendant had a right, in his effort to make the arrest, to use all force that was necessary to overcome all resistance, even to the taking of life; and, if 69 L. R. A.

he used no more force than was reasonably necessary to then and there accomplish the arrest, then he should be acquitted. But although defendant may have believed he had authority to arrest the deceased, yet if, in so doing, he used more force than was reasonably necessary to accomplish the arrest, and shot and killed the deceased in malice and with premeditation because he did not remove his hand from his pocket when commanded to do so by defendant, defendant was guilty of murder in the second degree, unless acting in self-defense. But if defendant used more force than was reasonably necessary in making the arrest, he was guilty of manslaughter in the fourth degree. *State v. Rose*, 142 Mo. 418, 44 S. W. 329. But no instruction was asked on manslaughter in the fourth degree, nor was the court's attention called to its failure to instruct upon the law of the case; hence there was no error in its failure to do so. *State v. Cantlin*, 118 Mo. 100, 23 S. W. 1091; *State v. Waters*, 156 Mo. 132, 56 S. W. 734; *State v. Furgerson*, 162 Mo. 668, 63 S. W. 101.

Defendant insists that the court erred in refusing to give the first, second, third, and fourth instructions asked by him. These instructions are all predicated on the theory that the deceased was violating an ordinance of the town when defendant attempted to arrest him, when in fact there was no ordinance prohibiting the sale of fish on the streets of said town, and were therefore properly refused.

Another contention is that the information is bad, in that it only charges manslaughter in the fourth degree, if in fact it charged any offense at all. The objection to the information is that it does not conclude, "and so the said L. N. Dempsey, prosecuting attorney within and for Chariton county, Missouri, as aforesaid, upon his oath, says that he, the said Jasper Coleman, him, the said Rufus Cox, in the manner and form and by the means aforesaid," etc., but omits the words "upon his oath says," etc. Indictments for murder concluding substantially the same way have frequently been held bad by this court. *State v. Meyers*, 99 Mo. 107, 12 S. W. 516; *State v. Stacy*, 103 Mo. 11, 15 S. W. 147; *State v. Furgerson*, 152 Mo. 92, 53 S. W. 427. At common law all indictments for murder were prosecuted by indictment, and concluded as follows: "And so the jurors aforesaid upon their oath aforesaid do say that the said A. B., him, and the said E. F., in manner and form aforesaid, feloniously, wilfully, and of his [own] malice aforethought, did kill and murder." 1 Whar- ton, Prec. of Indictments & Pleas, 114; 5

Chitty, *Crim. Law*, 738; Kelley, *Crim. Law & Pr.* 309. In *State v. Meyers*, 99 Mo. 107, 12 S. W. 516, Sherwood, J., in speaking for the court, said: "All the authorities show the proper conclusion of an indictment for murder marks the feature of that offense which distinguishes it from manslaughter. Without such conclusion, the previous words charge but the latter offense. 2 Bishop, *Crim. Proc.* §§ 536, 548, 550; 3 Chitty, *Crim. Law*, 243, 737. Hence the importance of the conclusion in the count for murder. That conclusion, in order to be valid, charges murder as the result of the previously made allegations." Without such conclusion, the offense charged would be but manslaughter. In 2 Hawkins, *Pleas of the Crown*, pp. 369, 370, it is said: "Having already, in the chapter of indictments, incidentally shown the principal points relating to this matter, I shall only take notice in this place that, seeing an information differs from an indictment in little more than this: That the one is found by the oath of twelve men, and the other is not so found, but is only the allegation of the officer who exhibits it, whatsoever certainty is requisite in an indictment, the same, at least, is necessary also in an information; and consequently, as all the material parts of the crime must be precisely found in the one, so must they be precisely alleged in the other, and not by way of argument or recital." In *State v. Kelm*, 79 Mo. 515, it is said that an information differs principally from an indictment in this: That an indictment is an accusation found by the oath of twelve men, whereas an information is only the allegation of the officer who exhibits it; citing Bacon, *Abr.* pp. 167-170, 174; 2 Hawk. P. C. 26, § 4. Therefore, being of the same dignity, and for the same purpose, they must, in cases of murder, be governed in their material allegations by the same law. Therefore the information is invalid, and, being so, the question may be properly raised for the first time in this court; and, while it cannot be amended in this court, it may be amended as to matter of form or substance at any time by leave of court before trial. Rev. Stat. 1899, § 2481. Our conclusion is that an information for murder should conclude, "And so the prosecuting attorney aforesaid upon his oath does say that the said ——— him, the said ———, in manner and form, feloniously, deliberately, premeditatedly, and of his malice aforethought, did kill and murder."

Depositing of the affidavit of Robert Cox with the clerk of the circuit court of the county was sufficient filing, within the meaning of § 2477, Rev. Stat. 1899. But, even 69 L. R. A.

if it were not, the failure of the clerk to indorse upon it "Filed," and the date thereof, was at most an irregularity which could have been amended at any time before or during trial, and cannot be raised for the first time in this court.

For these intimations, the judgment is reversed and the cause remanded.

Brace, P. J., and Fox and Lamm, J.J., concur. Valliant, J., concurs, except as to the state's fourth instruction, which he thinks is erroneous. Gantt, J., concurs in all that is said, except as to the form of the information, from which he dissents. Marshall, J., absent.

Gantt, J., dissenting:

As said by my learned brother, I concur in all the conclusions reached by him in the foregoing opinion, save and except that the information is invalid for the sole reason that the prosecuting attorney, in his conclusion, does not say, "And so L. N. Dempsey, prosecuting attorney as aforesaid, upon his oath, or official oath doth say," etc. It will be observed that all the words of a proper conclusion of an indictment for murder are employed by the prosecuting attorney, save and except the words "upon his oath," or "official oath." There is no difference of opinion amongst us as to the necessity of concluding an indictment for murder with the words, "and so the grand jurors, upon their oath aforesaid, do say that he [the said defendant, naming him] wilfully, deliberately, premeditatedly, and of his malice aforethought, him [the said deceased, naming him], in the manner and form and by the means aforesaid, did kill and murder, against the peace and dignity of the state." Such was the essential requirement of the common law, and when the people of Missouri, in their organic law, ordained "that no person shall, for felony, be proceeded against criminally otherwise than by indictment," they meant an indictment as understood at common law. Long prior to the adoption of our Constitution the word "indictment" had been construed, and was well understood by our people; and it had uniformly been held that, in an indictment for murder, it was essential that it should conclude, "and so the grand jurors, upon their oath, do say," etc. The settled construction from Coke down to *State v. Meyers*, 99 Mo. 107, 12 S. W. 516, I accept, and have followed during my incumbency here.

The question here is, Are those words "upon his oath," or "upon his official oath," as necessary to a valid information for murder since the adoption of the amendment

permitting the prosecution of murder by information as they are in an indictment? The conclusion of the majority of my brethren is that they are, and that the information in this case is invalid for that reason. With the utmost respect for the judgment of my colleagues on this point, I am constrained by my investigation to take the contrary view, and dissent. At the outset, I agree that both at common law and under our Constitution an information should and must be as certain and definite as to its statement of the essential facts constituting an offense as an indictment, because the defendant is entitled to know the nature and cause of the accusation against him, in order to enable him to prepare his defense. 2 Hawk. P. C. p. 369; Wharton, Crim. Pl. 9th ed. § 87. It will hardly be controverted that this information measures up strictly to every requisite of a good common-law indictment as to the statement of every fact necessary to advise the defendant of the nature and cause of the accusation against him. The only possible objection urged against it, or that can be lodged against it, is that the prosecuting attorney, who preferred the information in his official character, did not repeat his conclusion that "upon his oath" or "official oath," he made the charge of murder.

As I understand the reasoning of my brethren, it is held that, because an indictment was required to conclude that, "upon the oath of the grand jurors," the charge of murder was made, it must follow that, where an information is resorted to by the prosecuting attorney, he must conclude by saying "upon his oath," or "official oath," that he makes the charge. I have already adverted to the fact that we have held that an indictment for murder must conclude with a charge that the defendant did kill and murder, upon the oath of the grand jurors, because we have adopted the common-law indictment. The same reasoning necessarily applies to an information, for, when we incorporated an information, in the Constitution, as a mode of prosecuting felonies, we likewise imported it from the common law, and, by the same token, it must be understood in its common-law sense. *State v. Kyle*, 166 Mo. 303, 56 L. R. A. 115, 65 S. W. 763; *Ex parte Slater*, 72 Mo. 102; *State v. Kelm*, 79 Mo. 515. Bishop in his new Criminal Procedure, Vol. 1, 4th ed. § 144, says: "The criminal information should be deemed to be such, and such only, as in England is presented by the attorney or solicitor general. This part of the English common law has plainly become ours. And as, with us, the powers which in England are exercised by the attorney general and 69 L. R. A.

the solicitor general are largely distributed among our district attorneys, whose office does not exist in England, they would seem to be entitled, under our common law, to prosecute by information, as a right adhering to their office, and without leave of court." This statement of Bishop met the express sanction of this court in *State v. Kyle*, 166 Mo. 306, 56 L. R. A. 115, 65 S. W. 763.

Having settled that the information of our Constitution is the common-law information, in the absence of a statute prescribing a form or additional safeguards, let us inquire what was the form of the common-law information. A form for an information for murder at common law is not to be found, because murder was prosecuted by indictment of a grand jury; but obviously it was the purpose of the people, in adopting information as a method of procedure, to adopt the common-law information, as far as applicable to the prosecution of felonies. Nowhere in the criminal informations of the common law was the attorney general or solicitor general or the Crown officer of the King required to allege that "upon his oath of office," or "upon his official oath," he gave the court to understand and be informed that an offense had been committed. Mr. Bishop, in his first volume of New Criminal Procedure, § 712, says "that only in formal parts, at the beginning and close, does this information differ from an indictment." But it does differ in these respects. The reason, I submit, is this: When the attorney general in England filed his information, he did so *virtute officii*, and it was an official act; and the courts took *ex officio* notice of his office, and of his right to file and prosecute the offense without leave of the court. As the law never requires a useless thing, why should he have been required to state that his official act was under his official oath? The answer is, the courts of England never required him to allege that he preferred an information upon his oath of office. Whenever he filed an information, it was his official act, and was done under the sanction of his oath of office; and so I say the same official character is stamped upon the information filed by the prosecuting attorneys. The courts are bound to recognize their official acts, without alleging the nontraversable statement that they have filed their informations under their oaths of office. Our statute (Rev. Stat. 1899, § 2535) provides that no indictment or information shall be deemed invalid for want of the averment of any matter not necessary to be proved. Every circuit court is bound to take judicial notice of the incumbent of the office of prosecuting

attorney in the counties in which it is held, and it is entirely unnecessary to prove the prosecuting attorney's title to the office, or that what he asserts as such officer is under his oath of office. *State v. Sickle*, Brayton (Vt.) 132; *Territory v. Cutinola*, 4 N. M. 305, 14 Pac. 809; 3 Burn, Justice of the Peace, 911; 1 Chitty, Crim. Law, 845, 847. In *Kelm's Case*, 79 Mo. 515, it was pointed out that "the text-books are uniform in defining an information to be an accusation or complaint exhibited against a person for some criminal offense, 'either immediately against the King, or against a private person, which, from its enormity or dangerous tendency, the public good requires should be restrained and punished, and differs principally from an indictment in this: That an indictment is an accusation found by the oath of twelve men, whereas an information is only the allegation of the officer who exhibits it.' 5 Bacon, Abr. pp. 167, 170, 172; 2 Hawk. P. C. chap. 26, § 4." The usual and accepted formula was that the attorney general, or the solicitor general if the office of attorney general was vacant, and in certain cases the Crown officer in the King's bench as a matter of right, and without leave of court, filed the information, and, in behalf of the King, "gave the court to understand and be informed that the defendant, at," etc., committed the particular offense. It was required that he state with certainty all the material parts of the alleged crime, and not by way of argument or recital, but it was not necessary for him to state that he made such allegations under his official oath, either in the commencement or conclusion of his information. Whereas, as the grand jury could only make their presentment under their oath, it was essential that their indictment should show that they charged the defendant by virtue of their oath. As said by Judge Sherwood in *State v. Meyers*, 99 Mo., loc. cit. 116, 12 S. W. 518: "Of course, if a crime is to be charged, it must be done by the grand jurors upon their oaths. It does not appear that the grand jurors have charged murder in the conclusion before us." In that case the conclusion altogether omitted any charge by the grand jurors under their oath, but merely stated, "and so said Charles Meyers and John Bogard in manner and form," etc. Whereas in this case the conclusion is, "And so the said L. N. Dempsey, prosecuting attorney within and for Chariton county, Missouri, as aforesaid, says that he, the said Jasper Coleman, him, the said Rufus Cox, in the manner and form and by the means aforesaid, feloniously, wilfully, deliberately, premeditatedly, and of his malice aforethought, at the county of Chariton, in 69 L. R. A.

the state of Missouri, on the 8th day of August, 1903, did kill and murder, against the peace and dignity of the state." The only omission, therefore, that can be suggested, is the failure to state that "upon his oath aforesaid" he makes said information and charge. It was pointed out in *Rex v. Wilkes*, 4 Burr. 2527, by Lord Mansfield, that there is a difference between informations and indictments. Indictments are found upon the oaths of a grand jury, and can only be amended by themselves. Whereas, "informations are as declarations in the King's suit." I have, after the most careful research, been unable to find any case in which at common law it was ruled that it was essential to the validity of an information that the attorney general or solicitor general or the Crown officer of the King's bench should state that he made his charge "upon his oath," or "official oath;" and, as we have no statute prescribing such a form, I think it should be ruled that such an allegation is not essential, and that this objection to this information is not tenable. That the prosecuting attorneys of the several counties in this state may prosecute by information, as a right adhering to their office, and without leave of the court, is now the accepted law of this state. *State v. Kelm*, 79 Mo. 516, 517; *State v. Ransberger*, 106 Mo. 145, 17 S. W. 290; *State v. Kyle*, 166 Mo. 303, 56 L. R. A. 115, 65 S. W. 763. Prosecuting attorneys are officers whose duties and terms of office are prescribed by law, and the several courts take judicial knowledge of the incumbent of this office in the several counties. When, therefore, a prosecuting attorney files an information in a criminal cause, he is presumed to do so by virtue of his office, and it is not necessary for him to allege his right to do so. As he is authorized by his official position to file an information and prosecute the alleged offender, the presumption is that when, as in this case, he informs the court in his official character, as prosecuting attorney, it should be held that what he alleges is under and by virtue of his oath of office; and no good reason can be seen why he should allege that he makes the information upon his oath, or official oath, as the very filing in his official character necessarily implies that he does so in obedience to the obligations of his official oath, and in the performance of the duties of his office. As already said, the information in this case having been made by the prosecuting attorney in his official character, it would add nothing to the security of the defendant for that officer to state that he charged the defendant with the offense upon his oath as such officer. All that he

alleges, all that he charges, must be conclusively presumed to be upon that oath, which was one of the prerequisites to his qualifications for the office itself.

To guard against groundless and vindictive prosecutions, and to secure good faith in the institution of criminal proceedings, the general assembly has required the information to be verified by the prosecuting attorney or some competent witness; but I submit this is the only requirement of an oath by the prosecuting attorney, and that nowhere is he required to state in the body of his information that it is under oath, or official oath.

Fannie R. MARKOWITZ, *Respt.*,

v.

METROPOLITAN STREET RAILWAY
COMPANY, *Appt.*

(186 Mo. 350.)

1. The owner of a wagon, seated beside the driver whom he employs, is chargeable with the driver's negligence in attempting to cross a street car track in front of an approaching car which is in plain sight.
2. It is negligence to attempt to drive across a street car track in dangerous proximity to an approaching car which is in plain sight, whether the car is actually seen or not.
3. A motorman in charge of a street car, upon seeing a wagon approaching the track, has the right to presume that the driver will use his senses to avoid driving onto the track in front of the car.
4. To hold a street car company liable for the results of a collision with a team attempting to cross the track in front of a car notwithstanding the negligence of the driver, those in charge of the car must have been guilty of gross negligence, or reckless and wanton conduct.

(December 22, 1904.)

APPEAL by defendant from a judgment of the Circuit Court for Jackson County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Reversed.*

The facts are stated in the opinion.

Mr. John H. Lucas for appellant.

Messrs. Leon Block and William C. Hock, for respondent:

Respondent's negligence, if she was neg-

ligent, in not observing the approaching car, does not relieve the appellant of liability where the motorman saw respondent in a perilous situation in time to have avoided injuring her.

Bunyan v. Citizens' R. Co. 127 Mo. 12, 29 S. W. 842; *Klockenbrink v. St. Louis & M. River R. Co.* 172 Mo. 678, 72 S. W. 900.

Respondent's perilous situation is not confined to the time her horse came upon appellant's track. It arose the moment the motorman saw the respondent approaching the track in a manner indicating that she was intending to cross in front of a near approaching car, which she seemingly did not see.

Bunyan v. Citizens' R. Co. 127 Mo. 12, 29 S. W. 842; *Ennis v. Union Depot R. Co.* 155 Mo. 20, 55 S. W. 878; *Klockenbrink v. St. Louis & M. River R. Co.* 172 Mo. 678, 72 S. W. 900; *Jackson v. Kansas City, Ft. S. & M. R. Co.* 157 Mo. 621, 80 Am. St. Rep. 650, 58 S. W. 32.

This accident was not the result of mutual or concurring negligent acts of the respondent and the motorman. The causal connection between respondent's negligence and her resulting injuries ceased the moment the motorman observed her in a position of peril and in time to have avoided the injury to her.

Watson v. Mound City Street R. Co. 133 Mo. 251, 34 S. W. 573; *Bunyan v. Citizens' R. Co.* 127 Mo. 12, 29 S. W. 842.

On motion for rehearing.

In declaring the law to be that the motorman must not only have been guilty of negligence, but of gross negligence, or reckless or wanton conduct, after discovering plaintiff's peril, the decision is contrary to—

Sullivan v. Missouri P. R. Co. 117 Mo. 214, 23 S. W. 149; *Kreis v. Missouri P. R. Co.* 131 Mo. 533, 30 S. W. 310, 33 S. W. 64, 1150; *Morgan v. Wabash R. Co.* 159 Mo. 262, 60 S. W. 195; *Klockenbrink v. St. Louis & M. River R. Co.* 172 Mo. 678, 72 S. W. 900; *Moore v. Lindell R. Co.* 176 Mo. 529, 75 S. W. 672; *Clauhi v. St. Louis, I. M. & S. R. Co.* 139 Mo. 291, 40 S. W. 890; *Hanlon v. Missouri P. R. Co.* 104 Mo. 390, 16 S. W. 233; *Reardon v. Missouri P. R. Co.* 114 Mo. 385, 21 S. W. 731.

Even if this court should insist that it must be shown that the motorman was grossly negligent, would not any neglect whatever in operating and guiding an elec-

NOTE.—For other cases in this series as to imputing negligence of driver to person injured while driving with him, see *Nisbet v. Garner*, 1 L. R. A. 152, and *note*; *Becke v. Missouri P. R. Co.* 9 L. R. A. 157, and *note*; *Union P. R. Co. v. Lapsley*, 16 L. R. A. 800; *Mullen v. 69 L. R. A.*

Owosso, 23 L. R. A. 693; *Illinois C. R. Co. v. McLeod*, 52 L. R. A. 954; *Kopflitz v. St. Paul*, 58 L. R. A. 74; *Neal v. Rendall*, 63 L. R. A. 668; *Duval v. Atlantic Coast Line R. Co.* 65 L. R. A. 722.

tric car through a crowded market street be gross neglect?

Cobb v. St. Louis & H. R. Co. 149 Mo. 627, 50 S. W. 894; *Hanlon v. Missouri P. R. Co.* 104 Mo. 390, 16 S. W. 233; *Klockenbrink v. St. Louis & M. River R. Co.* 172 Mo. 679, 72 S. W. 900.

Valliant, J., delivered the opinion of the court:

Plaintiff alleges that she suffered a personal injury in consequence of a collision between a wagon in which she was riding and a street car of defendant. She sues for \$5,000 damages, alleging that the collision was the result of defendant's negligence.

The scene of the accident was in Fifth street, between Walnut and Main, in Kansas City. Fifth street runs east and west; Walnut and Main cross it at right angles, running north and south; Walnut is east of Main. Between Walnut and Main streets, and parallel to them, is an alley which also crosses Fifth street at right angles. Defendant operates a double track street railroad along Fifth street; a car going west runs on the north track, crossing Walnut, the alley, and Main street. Just west of the alley on the north side of Fifth street is the city market.

On December 24, 1901, the plaintiff was seated beside the driver, a colored man, on the driver's seat, on an open one-horse spring wagon, driving through the alley northward, aiming for the market house. They emerged from the alley on the south side of Fifth street, drove across the south track, and, just as the front wheel of the wagon got on or sufficiently near the south rail of the north track, a car of defendant going west struck the wagon with a blow sufficient to break the shaft from the axle on that side, and the jar caused the plaintiff's injury. She testified that the car struck the wagon, "and it jolted very hard, and I went on the end of the seat, and that gave me an awful pain in the back, and I felt kind of funny in my whole body. Otherwise I would have went over on the left side on the street, but the colored boy held me back. And he helped me down from the wagon; I couldn't sit there."

The petition alleges negligence in four specifications: "First, the motorman of said defendant in charge of said car negligently failed to stop the same in time to avoid said collision, which by the exercise of ordinary care he might have done. Second, the servants of said defendant in charge of said car negligently failed to ring any bells, or to give other warning of the approach of said car. Third, the motorman

of said defendant in charge of said car negligently failed to keep a vigilant watch ahead, and negligently failed to observe said wagon on or approaching said north track in a position of danger in time to have stopped said car and thereby avoid said collision, which said motorman might have done had he been exercising ordinary care. Fourth, the motorman of said defendant in charge of said car negligently failed to stop the same within a reasonable time after he saw, or by exercising ordinary care might have seen, the dangerous situation of this plaintiff."

The testimony on the part of the plaintiff tended to prove as follows: It was a clear winter day. The car going west stopped at Walnut street to take on some passengers, and then moved on its course. It was going slowly, not to exceed 4 miles an hour. The street was crowded with vehicles and people. The wagon on which the plaintiff was riding came out of the alley into Fifth street, aiming northward across the tracks. The driver testified: "When we was coming out through the alley between Walnut and Main we didn't see any car at all; but when we got on the second track we seen the car about as far as from here over there. . . . I couldn't tell exactly how far; but, anyhow, we were beckoning him to stop, . . . for him to hold up, because I couldn't go either forward or back; the people was ahead of me in the crowd, and wagons behind me. . . . He just came right on up and hit the wagon, and broke the shaft loose, and jostled us both up." Witness said he did not stop or check up at all when he came into the street from the alley, and was going tolerably fast when he got on the north track; he was aiming to get out of the crowd. The car stopped in almost the same instant that it struck the wagon. It shoved the wagon about 2 feet. The plaintiff herself testified that they saw no car until they were on the second track,—the north track. She said: "It was awfully crowded with people, and we looked, and, of course, I did not see any car at all. Of course, there was so many people in front of us, and we drove right in; and when we got to the second track I saw the car, and hallooed and screamed as much as possible, and it looks to me like there was a car that struck the wagon, and it jolted very hard." She was asked how far the car was from her when she hallooed to the motorman. She said: "About as far as from here to that wall; about 25 feet; I couldn't tell you exactly. I began to make motions and to halloo and scream, and the rest of the people right in front of our wagon they began

to make motions to the motorman, and he was keeping on going slowly." She said that when they came out of the alley they saw no car; that they could not see either east or west more than 25 feet; and when asked to explain why she could not see farther, seated as she was above the heads of the people on the driver's seat in the wagon she said she could not explain it, but that 25 feet east or west was as far as she could see. Her attention was called to her statements on a former examination in which she was asked if she could not see for the distance of half a block, her answer being, "I suppose so; I couldn't tell exactly; I saw quite a distance:" to which she replied, "Well, that is 25 feet." She testified that her eyesight was good. She and the negro driver of her wagon testified that they did not hear any bell or gong. There was testimony tending to show that the jar of the collision caused serious injury to the plaintiff. At the close of the plaintiff's evidence the defendant asked an instruction in the nature of a demurrer to the evidence, which the court refused, and exception was taken.

On the part of defendant the testimony tended to prove as follows: The car stopped at Walnut, and then moved on westward, going slowly. It was a fine, clear day, and there was nothing to prevent one seeing the car coming distant a block away. The track was slippery at that point; it was downgrade, and the motorman was moving cautiously. The wagon came out of the alley, the horse going at a trot, aiming straight across the tracks, the driver and the plaintiff looking to the west. The motorman saw the wagon coming, and at once began ringing his gong, and, when it seemed as if the driver intended to cross the north track in front of the car, the motorman continued sounding the gong, halloed at the driver, applied his brakes, reversed the power, turned on the sand, and used all the means at hand to stop the car, and had brought it almost to a stop when the collision occurred.

The case was submitted to the jury. The verdict was for the defendant. The court sustained the plaintiff's motion for a new trial on the ground that it had erred in giving certain instructions for defendant. Defendant appeals.

If it should be conceded that the defendant was guilty of negligence in either of the three particulars first specified in the petition, still the plaintiff would not be entitled to recover in consequence thereof, because her own negligence contributed to produce the result. It was her wagon, the driver

was her servant, and his negligence is chargeable to her. The plaintiff and her driver both testified that they did not see the car that struck them until they were on the north track. The car was there in plain view to be seen by anyone who would look, and, if they did not see it, it was because they did not use their eyes. There is no suggestion of an excuse in the record for their failure to see the car. The motorman saw the wagon as soon as it came out of the alley, and he was in no better position to see the wagon than were the plaintiff and her driver to see the car. If the driver saw the car coming (and, even in the face of his assertion to the contrary, it is as probable under the circumstances that he did as that he did not), yet ventured to cross in such dangerous proximity to the car, it was failure to observe that degree of care that an ordinarily prudent person in his situation would have observed. If he did not see it, it was because he did not look, and the act of not seeing, for that reason, was as negligent as an act of seeing and not heeding. It is unnecessary to decide, under the circumstances of this case, whether the car or the wagon had the right of way, because, if it should be conceded that the wagon had the right of way (which is not even contended), and that, as soon as the motorman saw the wagon emerge from the alley and attempt to cross the street, he ought to have stopped his car, yet kept on in his course, still the driver of the wagon, seeing the car coming (or shutting his eyes so he could not see), and knowing that it could not stop as quickly as the horse could, was guilty of negligence in driving immediately in front of it, or so close to it as to render a collision inevitable, or, if not inevitable, at least not improbable.

Counsel for respondent in their brief seem to rely more on the fourth specification of negligence in the petition than the three preceding; that is, that the motorman failed to stop the car "within a reasonable time after he saw, or by the exercise of reasonable care might have seen, the dangerous situation of the plaintiff." The motorman saw the wagon when it first came out of the alley, and saw the course the driver was aiming to take. He saw that the driver and the plaintiff had their faces turned to the west as they crossed the south track, and, if the motorman drew any inference from that fact, the natural inference was that they were taking proper care, because the danger they were in while crossing the south track was from a car coming from the west, and the motorman had a right to infer that when they had passed over the

south track, and were approaching and about to enter upon the north track, they would, for the same reason, turn their faces to the east. Turning from the west to the east was but the occupation of a moment, a space of time too short to be measured. But whether he noticed how their faces were in fact turned, and drew inferences therefrom or not, he saw the wagon and the driver, and the course they were taking, and he had the right to presume that the driver would use his senses. Even though he saw the horse approach close to the north track, yet if he still presumed that the driver would exercise the care that a man of ordinary prudence and common sense in his situation would exercise, and stop until the car would pass, we cannot say with certainty that he was guilty of negligence in acting on that presumption. And even if it could be said that under those circumstances a question at least of negligence arises, which, as a question of fact, ought to be submitted to the jury, still we cannot say that it is a question of such gross negligence or reckless or wanton conduct as justifies the court in submitting to the jury to say whether or not the plaintiff ought to recover in spite of her own negligence. It requires more than the showing of a mere possibility that the accident might have been avoided in order to bring a case within the humanitarian doctrine announced in *Kelley v. Missouri P. R. Co.* 101 Mo. 67, 8 L. R. A. 783, 13 S. W. 806; *Morgan v. Wabash R. Co.* 159 Mo. 262, 60 S. W. 195, and *Klockenbrink v. St. Louis & M. River R. Co.* 172 Mo. 678, 72 S. W. 900. If it be conceded that the plaintiff's evidence tends to show that the defendant was guilty of any negligence at all, it is the utmost that can be claimed for it, while it shows the negligence of her driver very much more conspicuously. Though the street may have been crowded, yet there was nothing to prevent him from stopping until the car could pass. Even the horse showed a more intelligent appreciation of the situation than did the driver, because, when it was attempted to urge him onto the north track in the face of the danger, he shied as far to the west as he could, and thus saved himself from being struck.

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An argument is built upon the estimates of witnesses as to the distance the car was from the horse when he got on the north track and the distance in which it was possible to have stopped the car after the motor-man saw the horse on that track, and the conclusion is drawn that the car was 20 or 25 feet distant, and could have been stopped in 15 feet. No witness measured any distance, and no one pretended to speak with precision; under the excitement and confusion of the occurrences the so-called estimates were little, if any, better than guesses. So far as the plaintiff's estimate of the distance is concerned, she showed by her answers, when she was asked as to the distance she could see when elevated on the seat of the open wagon, that her faculty in measuring distances by the eye was not great. Counsel for the plaintiff place reliance as to this point on the testimony of the motor-man as helping out his case. But the motor-man spoke with no precision on that subject,—said, in fact, he could not do so; but he did speak with precision when he said that the moment he saw that the horse was coming on the north track he reversed the power, applied the brake, turned ~~and~~ on the track, and stopped the car in the shortest time and space possible.

It is unnecessary to cite authorities to sustain the conclusion that under the plaintiff's own evidence in this case she was not entitled to recover. And since, in no view of the case, could a verdict for the plaintiff be sustained, it is unnecessary to look at the instructions. Whether the instructions were right or wrong, the verdict was for the right party; it was the only verdict that the evidence warranted. The court therefore erred in granting a new trial.

The judgment granting a new trial is reversed, and the cause remanded with directions to the Circuit Court to overrule the motion for a new trial and enter judgment for the defendant on the verdict.

All concur, except **Robinson, J., absent.**

Petition for rehearing denied.

NEW JERSEY COURT OF ERRORS AND APPEALS.

George W. SLACK *et al.*, *Appts.*,
v.

Eliza E. REES, *Resp't.*

(.....N. J.....)

A deed without power of revocation, from a parent who is incapacitated physically, and weak mentally, to his daughter, who has for some time had the care of him, made without the benefit of competent and independent advice, will be set aside by equity.

(November 15, 1904.)

A PPEAL by complainants from a decree of the Chancery Court in favor of defendant in a suit brought to set aside a deed. *Reversed.*

The facts are stated in the opinion.

Mr. Aaron V. Dawes for appellants.

Mr. Edwin R. Walker for respondent.

Gummere, Ch. J., delivered the opinion of the court:

The two complainants and the defendant are the only children and heirs at law of George H. Slack, deceased, who died on the 13th day of August, 1902, at the age of sixty-eight years. On the day before his death he executed a deed to his daughter, Mrs. Rees, conveying to her two houses and lots in the city of Trenton. He owned no other real estate, and his personal estate was insufficient for the payment of his debts. His sons seek to have the conveyance set aside and declared void upon the following grounds: That their father lacked mental capacity to make the deed, that it was the product of undue influence exercised by their sister upon him, and that, in making the deed, he did not have the benefit of competent and independent advice.

The deceased, for a number of years before his death, suffered from the disease known as "locomotor ataxia." By the progress of the disease his physical powers became gradually weakened, and his mental powers also were somewhat affected. But, although his mind was somewhat weakened, we fully concur in the conclusion of the learned vice chancellor, who heard the case below, that he retained sufficient mental capacity to dispose of his property.

The second ground of attack upon the conveyance—that it was the product of undue influence—presents a more difficult question.

NOTE.—As to effect of settlor's failure to understand the legal import of his act, see *Ricards v. Safe Deposit & T. Co.* 63 L. R. A. 145.

As to power to revoke voluntary settlements, see *Neisler v. Pearsall*, 52 L. R. A. 874, and *note*.
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For a period of nearly three months prior to his death he was an inmate of his daughter's home. He was, during all that time, dependent upon her for the care and service which a man in his weakened physical and mental condition constantly requires. The normal relation of parent and child, as it had existed in earlier years, had been reversed, and the daughter had become the guardian of the father. In this situation the law presumes that a gift made by the parent to the child is the product of undue influence, and casts upon the latter the burden of proving the contrary. It was considered by the vice chancellor, before whom the case was tried, that she had discharged this burden. After a careful review of the testimony, we are not at one as to the soundness of this conclusion. A decision upon this point in the case, however, is rendered unnecessary, as we conclude that the conveyance must be set aside because, in making it, the donor did not have the benefit of competent and independent advice as to its effect. That the absence of such advice will invalidate a deed of gift which contains no power of revocation, where a relation of trust and confidence exists between the donor and donee, is not denied, and indeed, it was so held by the vice chancellor. He seems to have considered, however, that such relationship was not shown unless it was made to appear that the donee occupied such a dominant position toward the donor as to raise the presumption that the latter was without power to assert his will in opposition to that of the donee. But this is not the situation. The rule has a much broader sweep. Its purpose is not so much to afford protection to the donor against the consequences of undue influence exercised over him by the donee, as it is to afford him protection against the consequences of voluntary action on his part, induced by the existence of the relationship between them, the effect of which upon his own interests he may only partially understand or appreciate. The following citations from our own decisions make this plain: "In all transactions between persons occupying relations, whether legal, natural, or conventional in their origin, in which confidence is naturally inspired, is presumed, or in fact reasonably exists, the burden of proof is thrown upon the person in whom the confidence is reposed, and who has acquired an advantage, to show affirmatively not only that no deception was practised therein, no undue influence used, and that all was fair, open, and voluntary, but that it was well understood." *Hall v. Otterson*, 52 N. J. Eq. 528, 28 Atl.

907, on appeal, 53 N. J. Eq. 695, 35 Atl. 1130. "Where parties hold positions in which one is more or less dependent upon the other, courts of equity hold that the weaker party must be protected; and they set aside his gifts, if he had not proper advice independently of the other." *Haydock v. Haydock*, 34 N. J. Eq. 575, 38 Am. Rep. 385. "The rule to be gathered from the English and American cases is that the burden of proof was cast upon the donee to establish that the donor fully appreciated what he was doing, or, at all events, in the doing had the benefit of disinterested and competent advice." *Coffey v. Sullivan*, 63 N. J. Eq. 302, 49 Atl. 520. The present case is a marked example of the wisdom of the rule. The deed was made by Mr. Slack almost immediately after a prostrating attack, which was a phase of the disease from which he was suffering. Neither of the physicians who were in attendance upon him expected the attack to be fatal. As soon as he was sufficiently recovered from its violence to permit it, an attorney, who had previously been employed by him in other matters, was sent for; and, upon his arrival, Mr. Slack stated to him that he wished him to draw a deed conveying to Mrs. Rees certain property which he owned in Trenton, and asked the attorney whether he had better make a will or a deed. He was advised by the attorney that it would be better to make a deed, and did so. No power of revocation was reserved in the deed, and its effect, if valid, was to practically strip him of his whole estate; for his personal property, as has already been stated, was insufficient to pay his debts. If the opinion of his physicians as to the effect of the attack upon him had turned out to be accurate, he would, for the rest of his life, have been dependent upon the charity of others, except so far as a pension which he received from the national government would have sufficed to support him. From his inquiry made of the attorney,—whether it would be better for him to make a will or a deed,—it seems quite probable that he considered the one would be more effective than the other to presently deprive him of all further interest in the estate to be embraced in the instrument which he proposed to execute. It is difficult to understand the failure of the attorney to advise Mr. Slack as to the effect of such a deed as was executed. He not only should have done this, but, in the language of Malins, V. C., in *Coutts v. Acworth*, L. R. 8 Eq. Cas. 558, he should have insisted upon inserting in it the reservation to the donor of the power to revoke the gift, unless Mr. Slack had distinctly refused to have it done.

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The decree will be reversed, and the record remitted to the Court of Chancery, with instructions to that court to enter a decree setting aside the conveyance in question, and declaring it to be null and void.

Salina A. CHARLTON, *Appt.*,

v.

COLUMBIA REAL ESTATE COMPANY.

(.....N. J.....)

*A signed, but undelivered, lease may be given in evidence to prove an agreement upon the details of a lease pursuant to one of the terms of a previously signed memorandum in writing of an oral agreement for a lease; and if said previous memorandum of agreement for a lease, and the signed, but undelivered, lease, taken together, show a completed agreement upon the terms of a lease, the statute of frauds is satisfied, and specific performance may be decreed.

(*Dixon, Garrison, Swayne, and Gray, JJ., dissent.*)

(March 6, 1905.)

APPEAL by complainant from a decree of the Chancery Court in favor of defendant in a suit to compel specific performance of an agreement to make a lease. *Reversed.*

The facts are stated in the opinion.

Messrs. Alden B. Endicott and E. A. Higbee for appellant.

Mr. George A. Bourgeois for appellee.

Fort, J., delivered the opinion of the court:

The bill in this case is filed for the specific performance of an alleged agreement to make a lease. The written memorandum in evidence to prove the alleged agreement consisted of two writings, as follows:

Agreement made this Seventh day of May between Columbia Real Estate Co., of the first part, and Mrs. Charlton, of Atlantic City, of the second part, Witnesseth, that the party of the first part will make a lease for ten years of a certain building on their grounds in rear of stores to contain about eighty feet in width by one hundred feet in

*Headnote by **Fort, J.**

NOTE.—As to when several papers may constitute a sufficient memorandum within the statute of frauds, see also *note* to *Louisville Asphalt Varnish Co. v. Lorick*, 2 L. R. A. 212, and the later cases in this series of *Freeland v. Ritz*, 12 L. R. A. 561, and *White v. Breen*, 32 L. R. A. 127.

As to sufficiency of memorandum of contract embodied in telegrams, see *Brewer v. Horst-Lachmund Co.* 50 L. R. A. 240, and *note*.

depth with a fourteen-foot entrance from boardwalk, the consideration to be a rental of twelve hundred dollars per annum payable yearly in advance, lease to date from June 15th, 1901. The party of the first part to be put to no expense whatever in this matter, and security to be given for the rent.

Columbia Real Estate Co.,
By H. G. Bergman, Agt.
S. A. Charlton,

Witnesseth by Ida J. Atkinson.

Received, Atlantic City, May 7th, 1901, of Mrs. S. A. Charlton one Hundred dollars on acc. of agreement for lease to be made to Mrs. Charlton, for which details are to be settled on.

Columbia Real Estate Co.
By H. J. Bergman, Agt.

The vice chancellor found that these two papers were signed and passed at the same time, and relate to the same transaction, and must be deemed parts of one instrument. With this conclusion we agree.

These papers, standing alone, would not justify a decree for specific performance. By their terms it is stated that other details are to be settled between the parties. Unless it was shown, therefore, by other writing signed by the defendant, that such details had been agreed upon, the bill must be dismissed.

There was proof in the cause of negotiations between the parties looking to an agreement as to the details of the proposed lease, under the terms of the writing of May 7, 1901; and a draft of a lease was offered in evidence, signed by the complainant, which it was alleged embraced all the details under the said writings of May 7, 1901, as finally agreed upon in the negotiations between the parties. It was not disputed that a draft of lease containing all the details was prepared for the purpose of carrying out the agreement contained in the writings of May 7, 1901. It was admitted that it was so prepared for the defendant by his attorney. A duplicate of this detailed lease was sent by the defendant to the complainant for her acceptance and signature. That these details were accepted by the complainant is evidenced by her signature to the paper sent to her, as it appears in evidence. To establish that these details had also been agreed upon and accepted by the defendant in compliance with the writings of May 7, 1901, the complainant offered to prove that the defendant had signed a duplicate of paper in evidence signed by the complainant.

To make this proof, the complainant

called for the production of said duplicate as signed by the defendant, and upon this point the record is as follows:

Henry J. Bergman sworn for complainant.
Direct examination.

By Mr. Higbee:

Q. You are one of the officers of the Columbia Real Estate Company?

A. Yes, sir.

Q. You are the Mr. Bergman who had negotiations with Mrs. Charlton, the complainant, are you not?

A. I am.

Q. Look at exhibit Cl. Did you ever see that before?

A. I think I have.

Q. When and where?

A. About the latter part of May or the early part of June, at Mr. Bourgeois's office.

Q. You know whether or not there was a duplicate prepared of that?

A. Yes, sir.

Q. Who has the duplicate?

A. I have it.

Q. Where is it now?

A. Mr. Bourgeois has it.

Mr. Higbee: We ask for the production of the duplicate.

Mr. Bourgeois: Here it is (producing it).

Q. Paper produced by Mr. Bourgeois being handed to counsel for complainant, he shows it to the witness and asks: Who is Orro G. Leonard, who has signed his name as president? (Objected to as irrelevant.)

The vice chancellor: What significance has this?

Mr. Higbee: We want to show that this lease in duplicate was executed by the Columbia Real Estate Company.

The vice chancellor: What difference does that make?

Mr. Higbee: If the lease which was produced to us, having been prepared by their attorney, and which we signed, and also the duplicate, which they acknowledge to be a duplicate, is signed by the defendant himself, it certainly goes to show, it seems to me, that those were the terms agreed upon by the parties.

The vice chancellor: An undelivered, though signed, contract, remaining in the possession of the parties bound by it, has no legal efficacy. It is only when the party obligated has passed it over to the other party that it becomes of any binding effect. The paper marked "exhibit Cl" is in no way obligatory upon Mrs. Charlton, because it remained in her possession. The paper here produced on call by the attorney for defendant is no obligation whatever upon the Columbia Real Estate Company, because it remained in the hands of the attorney

for the Columbia Real Estate Company. The mere execution gave it no force or effect. It is its delivery that gives it force.

In excluding this offer of proof, we think the learned vice chancellor erred. The writing was admissible in evidence. This offer was not made to prove a lease, but to prove by this writing, taken in connection with the writings of May 7, 1901, that all the terms or details of the proposed lease had been fully agreed upon by writings signed by the party to be charged therewith. It is clear, as the vice chancellor held, that the duplicate signed by the defendant's president could not become a lease until it was delivered; but it was none the less a memorandum in writing, signed by the defendant, showing the details of the proposed lease as they had been agreed upon between the parties pursuant to the memoranda of May 7, 1901. Our statute reads as follows: "That no action shall be brought . . . (4) upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them, . . . unless the agreement, upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him or her lawfully authorized." 2 Gen. Stat. § 5, p. 1603. The signing by the complainant is immaterial. Only the party to be charged therewith need sign. *Reuss v. Picksley*, L. R. 1 Exch. 342, 35 L. J. Exch. N. S. 218; 1 Benjamin, Sales, § 255, p. 279; *Laythoarp v. Bryant*, 2 Bing. N. C. 744; *Fry*, Spec. Perf. § 346; *Hatton v. Gray*, 2 Ch. Cas. 164; *Green v. Richards*, 23 N. J. Eq. 32; *Reynolds v. O'Neil*, 26 N. J. Eq. 223; *Hawralty v. Warren*, 18 N. J. Eq. 124, 126, 90 Am. Dec. 613; *Brooks v. Wentz*, 61 N. J. Eq. 474, 49 Atl. 147; *Howland v. Bradley*, 38 N. J. Eq. 288; *Stoutenburgh v. Tompkins*, 9 N. J. Eq. 332, 334. Nor is it necessary that all the terms of the contract be agreed to at one time, nor written down at one time, nor on one piece of paper. If all the papers, taken together, contain the whole bargain, they form such a memorandum as will satisfy the statute. 1 Benjamin, Sales, § 220, p. 236; *Johnson v. Buck*, 35 N. J. L. 338, 343, 10 Am. Rep. 243; *Peck v. Vandemark*, 99 N. Y. 30, 1 N. E. 41; *Ide v. Leiser*, 10 Mont. 5, 24 Am. St. Rep. 17, 24 Pac. 695; *Rauditschek v. Blank*, 80 N. Y. 478; 29 Am. & Eng. Enc. Law, p. 852, note 2 for cases. Nor does it signify to whom the memorandum is addressed. It may be to a third person, and yet be a good writing to satisfy the statute of frauds. Form is not important. *Brown*, Stat. Fr. § 354; *Bateman v. Phillips*, 15 69 L. R. A.

East, 272; *Lee v. Cherry*, 85 Tenn. 707, 4 Am. St. Rep. 800, 4 S. W. 835; *Moss v. Atkinson*, 44 Cal. 3; *Hollis v. Burgess*, 37 Kan. 487, 15 Pac. 536; *Moore v. Mountcastle*, 61 Mo. 424; *Barnett v. McCree*, 76 Hun, 610, 27 N. Y. Supp. 820; *Singleton v. Hill*, 91 Wis. 51, 51 Am. St. Rep. 868, 64 N. W. 588. The reason for this is clear. The memorandum is only necessary to evidence the contract, not to constitute it. As Tindal, Ch. J., says in *Laythoarp v. Bryant*, 2 Bing. N. C. 744: "The contract is made before any signature thereof by the parties." The memorandum or note is only to evidence what the contract was. To prevent perjury as to such contracts, the statute declares that evidence of what the contract was must be contained in some memorandum or note in writing signed by the party to be charged therewith. When the memorandum exists, and is legally given in testimony, it becomes evidence of the contract claimed to have been made. The memorandum is not the contract, but only evidence of the contract.

We think that the complainant had the right to put in evidence the signed duplicate of the detailed proposal for a written lease which she contended had been prepared by the defendant and signed by it. It was evidence of an agreement upon the details mentioned in the writings of May 7, 1901; and if such writings, when taken together, show a completed agreement for a lease, they satisfy the requirements of the statute of frauds. This is not a question of the admission of a signed deed in evidence to prove an oral agreement to convey, where no previous written memorandum of any part of the oral agreement exists. Nor is it a question whether the delivery of an undelivered deed, duly signed and acknowledged, said to have been drawn to carry out an oral agreement to convey, will be decreed by the court. The question here is simply this: Will the court, in a suit for specific performance of an oral agreement to make a lease, admit in evidence all the paper writings signed by the parties to the negotiation, even though some of the papers be signed but undelivered instruments, in order to see, when all the papers are taken together, whether they contain the completed terms for a lease as agreed, so that a decree may be made? We think this question must be answered in the affirmative. Judge Harlan, speaking for the Supreme Court of the United States in a case where a memorandum of the agreement of sale was made, in which details were left to be fixed, and a deed was executed and sent for examination, as the duplicate lease was in this case, says: "Whatever may be

said as to the effect of this deed in passing title, if it was delivered only for purposes of examination, or if the previous memorandum of sale had been for any reason . . . defective, under the statute of frauds, its recitals, coming as they do from the vendor, are competent for the purpose of showing the precise locality of the property which the memorandum of sale was intended to embrace." *Ryan v. United States*, 136 U. S. 68, 84, 34 L. ed. 447, 453, 10 Sup. Ct. Rep. 913.

Whether, where no signed memorandum of the oral agreement has been made, a signed, but undelivered, instrument, said to have been drawn to carry out the oral agreement, will alone be resorted to to satisfy the statute, it is not necessary to decide in this case. The courts differ upon that proposition. In the second edition of *Am. & Eng. Enc. Law*, vol. 29, p. 855, title, *Verbal agreements*, notes 12 and 13, will be found a citation of all the authorities in the several states affirming or denying that an undelivered executed deed will satisfy the statute. They are so variant that I shall not attempt to reconcile them, and, indeed, it is not necessary to do so, upon the only question necessary to be decided in this case. If *Brown v. Brown*, decided by this court, can be taken as an authority for an undelivered, executed instrument not being a sufficient memorandum to satisfy the statute, which is not decided, still that case is not in conflict with the view here expressed, as there was not there any written memorandum of the agreement to give the assignment there sought to be specifically enforced, unless it was permissible to gather it from the signed, but undelivered, assignment in evidence, alone. 33 N. J. Eq. 650.

There was error in the refusal to admit the offer of the signed duplicate of the undelivered lease in evidence, and for this *there must be a reversal*.

Upon all other questions raised in the case, we think the complainant had complied with the terms of the agreement on her part, and that for none of these should specific performance of the agreement have been denied her.

I shall vote to reverse the decree, and to remit the record to the court of chancery, for further proceedings in accordance herewith.

Gammere, Ch. J., and Pitney, Bogert, Vroom, and Green, JJ., concur.

Dixon, Garrison, Swayze, and Gray, JJ., dissent.
69 L. R. A.

Howard WATKINSON, Appt.,
v.
Adele Louise WATKINSON.

(.....N. J.....)

- *1. The object of a bill of review is to procure the reversal, alteration, or explanation of a decree in a former suit, and must rest on error in law upon the face of the decree, fraud in procuring the decree, new or newly discovered matter which could not have been used before the decree was made.
2. When it is sought to reverse a decree upon the discovery of some new matter, leave of the court must first be obtained by petition, supported by affidavit that the evidence is not only new, but could not have been discovered by reasonable diligence before the hearing.
3. Although there is no express statutory limitation as to the filing of bills of review, the analogous limitation of the right of appeal should govern, and a bill of review cannot be filed after the lapse of three years from the final decree, except in case of new or newly discovered matter.
4. The temporary absence from this state of one domiciled here will not be held a change of residence, unless to the factum of residence elsewhere be added the *animus manendi*; for a domicile, having once been acquired, continues until a new one is actually acquired *animo et facto*.
5. Condonation of the adultery on which the decree for divorce was based will not justify the granting of leave to file a bill of review; if intended to be interposed, it should have been pleaded and proved in the original suit.

(May 8, 1905.)

A PPEAL by plaintiff from a decree of the Court of Chancery setting aside upon a bill of review a decree of divorce. *Reversed*. The facts are stated in the opinion.

Mr. John H. Baekes, for appellant:

There is nothing to indicate appellant's design to make New York his permanent habitation,—his future home,—from whence he had then no present intention of departing.

State, Sharp, Prosecutor, v. Casper, 36 N. J. L. 367; *Kempson v. Kempson*, 61 N. J. Eq. 303, 48 Atl. 244, 63 N. J. Eq. 783, 58 L. R. A. 484, 92 Am. St. Rep. 682, 52 Atl. 360, 625; *Magowan v. Magowan*, 57 N. J. Eq. 322, 73 Am. St. Rep. 645, 42 Atl. 330; *Streitwolf v. Streitwolf*, 58 N. J. Eq. 563, 78 Am. St. Rep. 630, 41 Atl. 876, 43 Atl. 683.

The proceedings to review were begun more than four years after notice of the di-

*Headnotes by VROOM, J.

NOTE.—As to effect of delay in applying for bill of review, see also, in this series, *Priestley's Appeal*, 4 L. R. A. 503.

voiced proceedings was served upon the complainant.

The time prescribed for taking appeals from final decrees limits the period within which a bill to review may be filed.

Clayton v. Clayton, 59 N. J. Eq. 316, 44 Atl. 840; *Kempson v. Kempson*, 16 N. J. Eq. 330, 48 Atl. 244.

Delay in the application by one having notice of the fraud will, unless satisfactorily explained, operate to the prejudice of the applicant, and, if unreasonably continued, will bar his rights.

Bishop, Marr. & Div. ed. 1891, § 1153; *Nichols v. Nichols*, 25 N. J. Eq. 60; *Yorston v. Yorston*, 32 N. J. Eq. 495; *Caswell v. Caswell*, 120 Ill. 377, 11 N. E. 342; *Nicholson v. Nicholson*, 113 Ind. 131, 15 N. E. 223; *Everett v. Everett*, 60 Wis. 201, 18 N. W. 637; *Perry v. Perry*, 15 Phila. 242; *Firmin v. Firmin*, 16 Phila. 75.

Messrs. James Steen and W. D. Tyn-dall, for appellee:

Condonation destroyed the right to divorce.

Clayton v. Clayton, 59 N. J. Eq. 310, 44 Atl. 840.

There is no limitation to a bill of review. *Fitton v. Macclesfield*, 1 Vern. 287; *Edwards v. Carroll*, 2 Bro. P. C. 98; *Lytton v. Lytton*, 4 Bro. Ch. 441; *Smith v. Clay*, 2 Ambl. 645.

The decree is not merely voidable, but void, for want of jurisdiction.

Paul v. Willis, 69 Tex. 261, 7 S. W. 357; *People ex rel. Davis v. Sturtevant*, 9 N. Y. 263, 59 Am. Dec. 536; *Wilcox v. Jackson*, 13 Pet. 511, 10 L. ed. 270; *Yates v. Yates*, 13 N. J. Eq. 280.

Vroom, J., delivered the opinion of the court:

The appeal in this cause is from a decree advised by Vice Chancellor Pitney upon a bill of review filed by Adele Louise Watkinson, the respondent, against Howard E. Watkinson. The bill was filed to review and set aside a decree of divorce obtained by the said Howard E. Watkinson in the court of chancery of this state on December 11, 1896, and actually filed on December 17th following. The ground of the decree was adultery.

The record in this case shows that on November 5, 1900, nearly four years after the signing of the above decree, the defendant in said cause and the respondent here filed a petition in the court of chancery which was entitled a petition of defendant to open decree, to which was annexed the affidavit of the defendant that the said petition was true in all respects, and on the 28th of November, 1900, she exhibited a bill of review praying that the decree of divorce, for the reasons in said bill set forth, 69 L. R. A.

be set aside and declared to be fraudulent and void.

The object of a bill of review, or a bill in the nature of a bill of review, is to procure the reversal, alteration, or explanation of a decree in a former suit. 2 Dan. Ch. Pl. & Pr. 1576. If the decree has been signed and enrolled, the practice is to file a bill of review; if not, a bill in the nature of a bill of review. As stated by Judge Story in *Dexter v. Arnold*, 5 Mason, 310, Fed. Cas. No. 3,856: "This distinction between a bill of review and a bill in the nature of a bill of review, though important in England, is not felt in the practice of the courts of the United States, and perhaps rarely in any of the state courts of equity in the Union. I take it to be clear that in the courts of the United States all decrees as well as judgments are matters of record, and are deemed to be enrolled as of the term in which they are passed. So that the appropriate remedy is by a bill of review." See also *Wiser v. Blachly*, 2 Johns. Ch. 489. Such a bill must rest on error in law upon the face of the decree, without further examination of matters of fact, fraud in procuring former decree, new facts, or upon some new matter which has been discovered after the decree, and could not possibly have been used when the decree was made. 2 Dan. Ch. Pl. & Pr. 1576; Mitford, Ch. Pl. 101; *Taylor v. Sharp*, 3 P. Wms. 371; *Wiser v. Blachly*, 2 Johns. Ch. 489.

It seems to be the settled practice in equity, when it is sought to reverse a decree signed and enrolled upon the discovery of some new matter, to first obtain the leave of the court to the filing of the bill, and the usual practice is to make the application by petition, supported by affidavit that the evidence is not only new, but could not have been discovered by reasonable diligence before the hearing; and, as said by Daniels, the court must be satisfied that the new matter has come to the knowledge of the applicant and his agents for the first time since the period at which he could have made use of it in the suit, and that it could not with reasonable diligence have been discovered sooner, and that it is of such a character that, if brought forward in the suit, it would have altered the judgment. 2 Dan. Ch. Pl. & Pr. 1563; *Wilkinson v. Parish*, 3 Paige, 653.

Presumably, leave was given to the filing of the present bill of review, although the fact of the granting such leave does not appear in the record before us, nor is the fact of such leave having been granted set out in the bill, as it should be where new matter is alleged upon which it is sought to impeach the decree. Mitford, Ch. Pl. 106.

At that time the posture of affairs was this: The appellant had filed his bill for divorce against the respondent upon the ground of adultery on June 13, 1896. An order of publication against her as an absent defendant was made returnable August 31, 1896, and an affidavit made and filed by the solicitor of the appellee that he had personally delivered a copy of the usual printed notice in cases of divorce to the respondent on the 9th day of July, 1896, at her place of abode in the city of New York. She did not appear to the suit, and an order of reference was made to James S. Aitkin, special master, and the hearing came on before him in October of the last-named year, and on the 28th of October the master filed his report advising that a decree of divorce should be made for the crime of adultery, and on the 11th of December, 1896, a decree of divorce was duly made pursuant to said report.

The depositions thus taken before the master showed that the complainant was then a resident of the city of Trenton, in this state, and that he had lived there for fifteen years then last past. The crime of adultery charged in the bill was proved satisfactorily to the master, and he reported in favor of a divorce, which was granted. The petition before mentioned as having been filed to open the decree, or, if it may be considered, for leave to file a bill of review, alleges that the petitioner first positively heard that a decree of divorce had been granted to her husband during the year 1900. She further alleges that she and her husband removed to New York city in November, 1895, and lived there together until August, 1896, at which time he secured certain letters, was indignant at the contents thereof, and blamed the petitioner therefor, and left her; that in August or September, 1896, the petitioner signed some papers which she understood to be in an action of divorce, but she was without means or any friends or advisers, and her health broken down, and her condition and mind were such that she was unable to even consider or think of the matter; that subsequently, in September or October, 1896, her husband returned to New York and cohabited with her pending the action brought for divorce, and informed petitioner that no suit was pending, and in other ways imposed upon the petitioner and the court.

The bill of review filed in November of 1900 admits that the complainant therein in July or August, 1896, was informed of the institution of a divorce suit against her by her husband, and charges that subsequently he returned to her, assured her that he had abandoned his suit for divorce and cohabited with her, and that notwithstanding

that he was living with her as husband and wife, and assuring her that he had abandoned said divorce proceedings, he was in fact prosecuting the same, and in fact in December 1896, obtained a decree of divorce against the complainant, and that she did not defend said cause because she believed that the same had been abandoned; that said defendant was at the time of filing his said bill a resident of the state of New York; that after filing his said bill he condoned any fault or misconduct of complainant; and that his conduct was a fraud upon the court, and made the decree null and void; and that the complainant had but recently discovered the fraud practised upon her, and only recently had heard that a decree of divorce had been granted in said cause.

The answer of the defendant denies specifically the allegations of the said bill of review, that he had condoned the offense of the complainant, or had assured her that he had abandoned the suit for divorce. He further denies the allegation that the divorce proceedings were a fraud upon the court or the complainant, and that he was at the time of the filing of his bill for divorce, or at any other time, a resident of the state of New York.

After the hearing of witnesses, the vice chancellor advised a decree in favor of respondent upon the ground that the complainant had no domicile or residence in the state of New Jersey at the time of the filing of the bill which resulted in the decree attacked, or during the pendency of that suit, and that the adultery on the part of the wife upon which the decree therein was based had been thoroughly condoned by the husband, and that the allegation of condonation pending that suit and before the decree therein was sustained by the weight of the evidence, and that the complainant's delay in asserting her right had not been such as to bar her from relief.

In his opinion the learned vice chancellor sets out at some length what, to use his own language, is termed a statement of the undisputed facts of the case, and adds that it would seem that the husband, the appellant here, had no residence or domicile in New Jersey at the time he was carrying on his suit here for divorce. If this could be considered an undisputed fact, or even a fair deduction from the proved facts, in this case, it would decide this case, for it would have to be admitted that he committed thereby a fraud upon the court; but in my opinion the testimony does not by any means establish this as a fact. The testimony of the appellant before the master in this suit for divorce, on October 9, 1896, disclosed that he then resided in Trenton, New Jersey, and

that he had lived in Trenton for fifteen years then last past. This was corroborated by the testimony of the father of the appellant, a clergyman of the Baptist denomination, who testified that at the time he married his son to the respondent, on the 6th of November, 1889, his son was a resident of Trenton; that he had resided in Trenton ever since, and still resided there on the day he testified, October 10, 1896. It is true that in his examination before the vice chancellor the appellant said that after his wife left him and had gone to New York and resided there in a flat he went there and lived with her for four or five months, when he again went back to Trenton. I find it difficult to perceive how this temporary residence in New York city can be held to affect his residence or domicile in Trenton in the absence of any evidence of intention on his part to abandon it. The fact that he did not intend to change his domicile is manifested by appellant's beginning his suit for divorce after he returned to Trenton, and this established his belief, not only as to his residence, but his domicile in this state. The learned vice chancellor, for the purpose of sustaining the view that the appellant had abandoned his residence in New Jersey by residing in New York city a few months, cited the case of *German Sav. & L. Soc. v. Dormitzer*, 192 U. S. 125, 48 L. ed. 373, 24 Sup. Ct. Rep. 221, as "directly in point." An examination of that case discloses that it is far from being in point. In the opinion in that case Mr. Justice Holmes said that it appeared from the testimony of the husband that before he made a contract for part of the land in question he had sold out his property and business in Kansas and had gone in search of what he called a new location, and that when he bought this land he desired to locate there. These facts, the court held, were sufficient for the courts of Kansas to find that he had changed his domicile.

It seems unnecessary to point out how absolutely the facts in the case under consideration are at variance with those in the case cited; the intent in that case of the husband to change his domicile being apparent from his own testimony, while here there is no evidence whatever to warrant the belief, or to enable a court to find, that the appellant intended to change his domicile.

To construe the temporary residence by appellant with his wife in New York to be a change of domicile seems to me unwarranted; for, as Mr. Justice Depue said in *Harral v. Harral*, 39 N. J. Eq. 279, 51 Am. Rep. 17, "to the *factum* of residence there must be added the *animus manendi*, and 69 L. R. A.

that place is the domicile of a person in which he has voluntarily fixed his habitation, not for . . . temporary or special purpose, but with a present intention of making it his home, unless or until something which is uncertain or unexpected shall happen to induce him to adopt some other permanent home." The doctrine laid down by the courts of the United States is that a domicile, having been once acquired, continues until a new one is actually acquired *animo et facto*. 10 Am. & Eng. Enc. Law, p. 15; *Cadwalader v. Howell*, 18 N. J. L. 138; *Clark v. Likens*, 26 N. J. L. 209.

I am unable to agree with the conclusion reached below, that, as alleged in the bill of review at the time of beginning his suit for divorce, the appellant was a resident of the state of New York, and therefore am of opinion that there was no fraud practised on the court of chancery by the appellant in swearing that he was a resident of the state of New Jersey.

The second ground upon which below was based the right of the respondent to relief is because, as stated in the opinion, after the adultery charged in the bill, and after the commencement of the husband's suit, and the service upon the wife of process, and before decree, the husband returned to the wife and cohabited with her, and led her to believe that he had abandoned the suit.

Condonation, standing alone, would not have justified the granting leave to file a bill of review; for how can that be considered new matter, which could have been produced and used by the respondent at the time when the decree was made? Every allegation relating thereto, if true, was known to the respondent during the pendency of the divorce suit, and before the entering of the decree, and if intended to be interposed as a defense should have been pleaded and proved in that suit. It is too late if it is first made known in an application for a bill of review; for, as was well said by Lord Chancellor Talbot in *Taylor v. Sharp*, 3 P. Wms. 371, "unless this relief were confined to such new matter, it might be made use of as a method for a vexatious person to be oppressive to the other side and for the cause never to be at rest." Now, after the lapse of four years from the entering of the final decree of divorce, and years after the taking from her of the child pursuant to the terms of said decree, she came before the court of chancery charging that she was deceived by her husband as to the abandonment of the suit for divorce; that during the pendency of that suit he condoned her guilt; and, further, that she never knew of the granting of the final

decree of divorce until after her time for taking an appeal had expired. No extended review of the testimony is, it seems to me, necessary in the matter of the alleged deception on the part of the appellant as to the abandonment of the divorce proceedings, for the extent to which the respondent goes in her testimony is that she supposed from appellant's conduct he had abandoned the proceedings, but there is no pretense whatever that the appellant ever told her that he had done so, and in fact she testifies distinctly that she never had any conversation with him relating to the suit for divorce pending the suit. The testimony of the appellant is that he never visited his wife during the pendency of the proceedings, and never saw her save when he visited the boy, who was then living with her. The charge that the respondent had been led to believe that the appellant had abandoned his suit for divorce is not sustained in fact. This being so, the charge of fraud falls, and no ground can exist for the consideration of the alleged condonation, which, as before stated, could not be held to be new matter warranting the giving leave to file a bill of review, but was a personal defense of the respondent, which she could set up as a defense or waive, as she saw fit.

This brings us to the consideration of the respondent's alleged denial of knowledge of the existence of the granting of the decree of divorce until shortly before the time she filed the petition for a bill of review. An examination of her petition discloses that upon that very vital part of the respondent's case the allegation in the petition is that "your petitioner first heard positively that a divorce had been granted to her husband, Howard Watkinson, for infidelity on the part of your petitioner, through William D. Tyndall, an attorney and counselor at law of New York and New Jersey, who examined your petitioner in supplementary proceedings during the year 1901." Again the averment in her bill of review is: "And your oratrix having but recently discovered the fraud practised upon her, and having only recently learned that a decree of divorce had been granted in said cause so as aforesaid instituted by her said husband, she expressly charges said decree, so fraudulently obtained as hereinbefore mentioned, ought to be set aside," etc.

The evident intent of the above allegation was to excuse the laches of the petitioner, the respondent here. An examination of her testimony on this point is interesting.

When examined in this cause *de bene esse* on June 30, 1902, before Samuel C. Mount, 69 L. R. A.

one of the masters in chancery, she was asked and replied:

Q. Did you know that he had obtained the decree of divorce at that time [summer of 1897]?

A. He said that he had.

Q. When did he say that?

A. Well, he told me that when I first saw him after he left home, November. The next time I saw him he said he had the divorce. When it was granted I don't know; he didn't say when he got it.

Now, in the testimony before the vice chancellor, in referring to the summer of 1897, she was asked and said:

Q. (By the Court). I understand you to say he came to your father's house and stayed a week the next summer (1897). He asked you when was the last time he had sexual intercourse?

A. The last time was in the summer of 1897, at home.

Mr. Tyndall: That was after the decree.

The Court: After the decree, if she was willing to accept him as a concubine would a stranger.

A. I didn't know the divorce was granted.

Q. (By the Court). He never told you the divorce was granted?

A. He never told me, and I never knew it any way to be positive of it.

Mr. Backes: Did I understand the witness to say she didn't know and he never told her?

A. He never told me, no, that the divorce had been granted; nobody ever told me.

It is difficult to reconcile the very material variance between the testimony of the respondent given at two different times in the same cause. One thing, however, it does demonstrate, and that is the truth of the vice chancellor's comment that the wife clearly is not to be implicitly believed.

No attempt was made to reconcile these statements of the respondent, and, in my opinion, the respondent has failed to sustain the allegation of the petition and bill that she had only learned of the granting of the divorce in the year 1900, and she has no standing to urge it as new matter, then only brought to her knowledge, to enable her to file a bill of review.

The respondent having failed to make out a case either on the question of residence or of condonation and fraud, we are brought to the consideration of the very serious and important question of whether her laches and delay in petitioning for the filing of a bill of review has barred her right to the relief prayed for. The record in this case

shows that the petition for leave to file a bill of review was not filed until nearly four years after the entering of the final decree in the suit for divorce, and the question to be determined is whether the laches and delay of the respondent in asserting her rights is a bar to this suit.

The rule in the English courts is that, when twenty years have elapsed from the time of pronouncing a decree which has been signed and enrolled, a bill of review cannot be brought, unless the plaintiff was under disability. Dan. Ch. Pl. & Pr. 1580; Mitford, Ch. Pl. 105; *Lytton v. Lytton*, 4 Bro. Ch. 441; *Deloraine v. Browne*, 3 Bro. Ch. 633.

And in the Supreme Court of the United States, in the case of *Thomas v. Brockebrough*, 10 Wheat. 147, 6 L. ed. 288, Washington, J., in commenting upon the question of the limitation of the right to file a bill of review, said: "It must be admitted that bills of review are not strictly within any act of limitations prescribed by Congress, but it is unquestionable that courts of equity, acting upon the principle that laches and neglect ought to be discountenanced, and that in cases of stale demands its aid ought not to be afforded, have always interposed some limitation to suits brought in those courts." And this case explicitly declares the rule, never since departed from, in that court, as follows: "There is no statute expressly limiting bills of review, but the courts of the United States are governed in this particular by the analogous limitation of the right of appeal, and therefore a bill of review cannot be filed after the lapse of five years from the final decree." Applying this rule to the practice in our state, after the lapse of three years leave would not be granted to file a bill of review.

There is, however, one exception to the general rule in England as noticed by Mitford, and that is the discretionary power of the court in the case of newly discovered evidence, and this exception Judge Washington recognizes in *Thomas v. Brockebrough*, 10 Wheat. 147, 6 L. ed. 288, saying: "Whether a bill of review, founded upon matter discovered since the decree is in like manner barred by the lapse of five years after such decree, is a question which need not be decided in the present case, since we are all of opinion that it is in the discretion of the court to grant leave to file a bill of review for that cause." My examination of the authorities leads me to the conclusion that the law as above laid down in the Supreme Court of the United States has been almost uniformly followed in this country.

69 L. R. A.

The time of appeal having expired when this application for leave to file the bill of review was made, the petitioner was barred unless her case could be brought strictly within the exception of newly discovered evidence, or of some special equity that would give the court the discretionary power to make the order.

The question of fraud being eliminated from the case, there is left only one matter which could in legal contemplation have been urged, either as a newly discovered fact or as a ground of special equity upon which to rest an application for a bill of review, *viz.*, the ignorance of the petitioner of the existence of a decree of divorce until after the time for appeal had expired. But it has already been shown that this has no foundation in fact, for the petitioner in her own testimony admits and swears to her knowledge of the final decree in the divorce suit within a year after the entry of the same.

But in the court below the learned vice chancellor said that he was unable to see how any delay beyond the time limited for taking an appeal on the part of the respondent could on any known principle affect her right to a declaration by the court that the decree of divorce was invalid and void *ab initio* by reason of the lack of jurisdiction of the court of chancery to proceed in the cause. He then adds that where there is a lack of jurisdiction by reason of a want of residential domicile on the part of both parties, combined with extraterritorial service and the absence of any formal appearance by the defendant, it followed that the decree was absolutely void. It was for this reason that he held that the respondent's belief was not affected by her laches. But, as we have already shown, there was a residential domicile on the part of the appellant when he filed his bill for divorce, and, although the service on the wife of process was extraterritorial, it conformed to the law of this state, and the decree, instead of being void, was valid and binding upon the parties.

There is, however, another consideration why the laches of the respondent should not be overlooked, and that is that on the strength of the decree in the court of chancery the appellant has married again, so that other rights have now intervened, and an entirely innocent party will suffer should the decree be revoked.

I am clearly of the opinion that the earlier decision of the court of chancery that the appellant had a legal domicile and residence in this state when he filed his bill

for divorce has not been successfully impeached, that there was no condonation on his part of the adultery of his wife that she is now entitled to set up, and that the de-

lay of the respondent in asserting her rights bars her from the relief prayed for by her.

The decree below should be reversed, and the bill of review dismissed.

NORTH CAROLINA SUPREME COURT.

H. S. HANCOCK

v.

WESTERN UNION TELEGRAPH COMPANY, *Appt.*

(..... N. C.)

1. The validity and interpretation of the contract, as well as the rule measuring the damages arising upon its breach and the company's liability therefor, are to be determined by the laws of the state where a telegram is filed for transmission in case the points of inception and termination are in different states.
2. The credibility and value of the testimony of a lawyer of another state as to what the rule upon a certain subject is in that state may be submitted to the jury.
3. The exercise by the trial court of its discretion as to the setting aside of a verdict as being contrary to the clear weight of the evidence will not ordinarily be reviewed on appeal.
4. Mere disappointment and regret are not included in the rule allowing damages for mental anguish upon failure of a telegraph company promptly to deliver a death message.
5. One claiming damages for delay in the preparations for interment of his relative because of failure promptly to deliver a telegram has the burden of showing that the preparations would have been made had the telegram been promptly delivered, and such fact will not be presumed.

(March 8, 1905.)

APPEAL by defendant from a judgment of the Superior Court for Craven County in favor of plaintiff in an action brought to recover damages for failure promptly to transmit and deliver a telegram. *Reversed.*

The facts sufficiently appear in the opinion.

NOTE.—As to damages for mental anguish because of default of telegraph company, see also, in this series, *Western U. Teleg. Co. v. Rogers*, 13 L. R. A. 859; *Wilcox v. Richmond & D. R. Co.* 17 L. R. A. 804; *Connell v. Western U. Teleg. Co.* 20 L. R. A. 172; *Western U. Teleg. Co. v. Wood*, 21 L. R. A. 706; *International Ocean Teleg. Co. v. Saunders*, 21 L. R. A. 810; *Francis v. Western U. Teleg. Co.* 25 L. R. A. 400; *Mentzer v. Western U. Teleg. Co.* 28 L. R. A. 72; *Morton v. Western U. Teleg. Co.* 32 L. R. A. 735; *Peay v. Western U. Teleg. Co.* 39 L. R. A.

Messrs. W. W. Clark and F. H. Busbee & Son, for appellant:

When the law of the place whence the message was sent, and that of the place of delivery, both refuse to recognize such damages, they cannot be recovered, although the action may have been brought in a jurisdiction which recognizes the right to recover them.

Thomas v. Western U. Teleg. Co. 25 Tex. Civ. App. 398, 61 S. W. 501.

Such damages cannot be recovered in Maryland.

Sloan v. Edwards, 61 Md. 106; *United States Teleg. Co. v. Gildersleeve*, 29 Md. 232, 96 Am. Dec. 519; *Francis v. Western U. Teleg. Co.* 58 Minn. 252, 25 L. R. A. 406, 49 Am. St. Rep. 507, 59 N. W. 1078; *Connelly v. Western U. Teleg. Co.* 100 Va. 52, 56 L. R. A. 663, 93 Am. St. Rep. 919, 40 S. E. 618.

The law of the state in which the contract was entered into should control.

Bryan v. Western U. Teleg. Co. 133 N. C. 603, 45 S. E. 938.

Disappointment and regret are not synonymous with mental anguish.

Hunter v. Western U. Teleg. Co. 135 N. C. 458, 47 S. E. 745.

Mr. W. D. McIver for appellee.

Brown, J., delivered the opinion of the court:

We gather from the record these facts: The plaintiff and his brother resided in North Carolina, and their father, S. M. Hancock, at New Church, Virginia. The family burial ground is Goodwill cemetery, in Maryland, 8 or 10 miles from the father's home. Its nearest depot is Pocomoke City, Maryland, $4\frac{1}{4}$ miles away. New Church and Pocomoke City are about 11 or 12 miles distant. On Saturday, July 11, 1903, the plaintiff was at Johns Hopkins Hospital, with his brother, Thomas, and his wife.

Co. 39 L. R. A. 463; Western U. Teleg. Co. v. Robinson, 34 L. R. A. 431; *Cashion v. Western U. Teleg. Co.* 45 L. R. A. 160; *Western U. Teleg. Co. v. Ferguson*, 54 L. R. A. 846; *Gray v. Western U. Teleg. Co.* 56 L. R. A. 301; *Connelly v. Western U. Teleg. Co.* 56 L. R. A. 663; *Robinson v. Western U. Teleg. Co.* 57 L. R. A. 611; *Western U. Teleg. Co. v. Crocker*, 59 L. R. A. 398; *Cowan v. Western U. Teleg. Co.* 64 L. R. A. 545; *Barnes v. Western U. Teleg. Co.* 65 L. R. A. 606; and *Green v. Western U. Teleg. Co.* 67 L. R. A. 985.

Thomas had gone there for an operation, under which he died. At the defendant's office in the hospital, about 6 P. M. Saturday, the plaintiff filed a telegram as follows: "S. M. Hancock, New Church. Thomas dead. Will arrive at Pocomoke 3 A. M. H. S. Hancock." This telegram was not delivered until Monday, 13th. There being no earlier train, the plaintiff, with his brother's body, and the widow, arrived at Pocomoke City Monday morning a half hour late, at 4 o'clock. A storm prevailed, which prevented the plaintiff leaving the train until 6:30 A. M. There was no one to meet him, and no preparation had been made for the burial. The plaintiff again telegraphed by the Postal Company to his father, who arrived between 9 and 10 A. M. Preparations were made, and the interment took place about 5 P. M.

1. The contract in this case was made in Maryland, and the contracting parties are presumed in law to have had in contemplation only such damages arising from the breach of it as could be awarded under the law of Maryland at the date of the telegram. In this case the sender was in Maryland at the time he filed his telegram. The sendee was in Virginia. The defendant, we judge by depositions in the record, was under the belief that the law of Virginia in some way affects this contract. The law of Virginia has no relation to it. If a telegraphic message is delivered to the company in one state to be transmitted by it to a place in another state, the validity and interpretation of the contract, as well as the rule measuring the damages arising upon a breach and the company's liability therefor, are to be determined by the laws of the former state, where the contract originated. *Bryan v. Western U. Teleg. Co.* 133 N. C. 607, 45 S. E. 938, Citing *Reed v. Western U. Teleg. Co.* 135 Mo. 661, 34 L. R. A. 492, 58 Am. St. Rep. 609, 37 S. W. 904. If under the law of Maryland, as interpreted and expounded by its highest court, damages on account of mental anguish, not connected with or growing out of a physical injury to the plaintiff's person, could not be awarded, then the plaintiff in this action can recover only the costs of the telegram and costs. Where, as on the trial had in this case, the defendant relied upon the testimony of an attorney at law in Maryland, who testified by deposition as to what he believed the law of that state to be, the court very properly submitted to the jury the testimony to be passed on by them as to its credibility and value. If the jury render a verdict in any case contrary to the clear weight of the evidence, the remedy is, and it is the duty of the trial judge, to set it aside; but we cannot

ordinarily review the exercise of such power. Possibly the jury were not satisfied from the deposition of the attorney (Mr. Cross) as to what is the law of Maryland. The defendant will have an opportunity on the next trial to further enlighten the court and jury more specifically upon the law as to the proper measure of damages for mental anguish as it is administered in Maryland.

2. The judge, among other things, charged the jury that, "upon the question of damages, the message upon its face disclosing its urgency and relating to death, the defendant had notice that a failure to deliver might reasonably cause mental anguish to the sender; and in such case the damages for mental anguish are such damages as the jury shall find the plaintiff has suffered from disappointment and regret occasioned by the fault or neglect of the company in its failure to notify the sendee, in order that preparations and arrangements might be made for the reception and interment of the body." The court erred in using the words "disappointment and regret." There is a very material difference between the significance of those words and that keen and poignant mental suffering signified by the words "mental anguish." The right to recover damages for purely mental anguish not connected with or growing out of a physical injury is the settled law of this state, and it is too late now to question it. Our authorities are up to this time uniform and unanimous as to the general doctrine. Differences, of course, arise as to its application in particular cases. *Young v. Western U. Teleg. Co.* 107 N. C. 370, 9 L. R. A. 669, 22 Am. St. Rep. 883, 11 S. E. 1044, to *Hunter v. Western U. Teleg. Co.* 135 N. C. 459, 47 S. E. 745. The language used in nearly all the cases in this and other states where such damages are allowed is "grief and mental anguish." We do not find anywhere that damages are allowed for "disappointment and regret." The lexicographers define anguish to be "intense pain of body or mind." It is derived from the Latin word *anguis*, a snake, referring to the writhing or twisting of the animal body when in great pain. Stornmouth's Dict. Mr. Justice Douglas, speaking for the court, said: "We use the word 'anguish' as indicating a high degree of mental suffering, without which the plaintiff should not recover substantial damages. Mere disappointment would not amount to mental anguish, or entitle the plaintiff to more than nominal damages." *Hunter's Case*, 135 N. C. 459, 47 S. E. 745. The addition of the word "regret" by his honor does not help the matter. Regret indicates no greater degree

of mental suffering than does disappointment. Both are of very frequent occurrence in the lives of most men, and with some scarcely disturb their mental poise. In this connection we desire to supplement what was said by Judge Douglas in *Hunter's Case* as to what particular mental anguish is to be considered by the jury in awarding damages. Jurors may possibly confound the mental anguish naturally arising from the loss of a near relative with that which grows out of the defendant's negligence. The jury have no right to consider anything except the latter in awarding damages. We commend to the careful consideration of the superior-court judges the language of the opinion in the *Hunter Case*, upon that subject, and that they explain the law in reference thereto with great care to the juries, whether requested to do so or not, lest injustice be done the defendant by confounding the natural grief at the loss of a near kinsman with that anguish which is claimed to result from the negligence of telegraph companies.

3. The judge charged the jury that they might consider the failure of the father to arrange for the interment of the deceased, if they should find from the evidence that such arrangements would naturally be presumed to have been made by the sendee if the telegram had been delivered prior to the arrival of the train on Monday. It is plain that the plaintiff has no cause for complaint that his father did not meet the 3 A. M. train Sunday, for the plaintiff did not arrive until Monday at 4 A. M. The only contention the plaintiff makes is that, if the telegram had been delivered with reasonable promptness, his father would have met him promptly on Monday morning, and would have had all arrangements made for the interment, so that it would not have been delayed from about 10 A. M. until 5 P. M. Monday, in consequence of which delay the plaintiff avers he suffered great men-

tal anguish, and claims damages on that account. The plaintiff must therefore prove that his father could and would have met him promptly on Monday morning on arrival of the train at 4 o'clock, and that he could and would have made on Sunday, or prior to the plaintiff's arrival, all necessary arrangements for the prompt interment of his brother's body on Monday morning, and avoided the delay in the obsequies from 10 A. M. until 5 P. M., thereby saving the plaintiff from the pangs of mental anguish which he avers he endured. The law does not presume that the father could have done these things. Many contingencies, such as illness, absence from home, inability to get the work done on Sunday, may have prevented, however willing the father may have been to discharge such a parental duty. There was no evidence tending to prove such facts, and the jury had no right to presume them. In *Bright v. Western U. Teleg. Co.* 132 N. C. 326, 43 S. E. 844, Justice Walker says, referring to defendant's objection to the testimony of Cooper, the addressee, that he would have gone to Wilkesboro had he received the telegram, that the testimony was not only competent, but indispensable; and uses the following language: "We are unable to understand why this is not competent. It tended to prove the very fact which the defendant, in the last exception considered by us, asserted it was necessary for the plaintiff to prove in order to recover substantial damages; and it was necessary to prove this fact if the plaintiff sought, as she did by her complaint and evidence, to recover damages for the mental anguish which resulted from his failure to go to Wilkesboro."

As there is to be a new trial, it is unnecessary to consider the defendant's further exceptions. They relate to alleged errors that may not again occur.

New trial.

NORTH DAKOTA SUPREME COURT.

STATE of North Dakota, *Respt.*,
v.

Charles CURRIE, *Appt.*

(..... N. D.)

*1. Upon the trial of one charged with

*Headnotes by MORGAN, Ch. J.

NOTE.—As to effect of instigation or consent to crime for purpose of discovering criminals as defense to prosecution, see also, in this series, *Connor v. People*, 25 L. R. A. 341, and 69 L. R. A.

burglary, the mere fact that one who was present with and assisted him in the burglary was a detective is not a defense, if the detective did not instigate the crime, and it was committed as to every ingredient of it by the criminal.

2. Where a detective disclosed to the owner of the building that it was probably about to be burglarized by a person named, with the feigned assistance of

note; Com. v. Hollister, 25 L. R. A. 349; *Love v. People*, 32 L. R. A. 139; *People v. Gilman*, 46 L. R. A. 218; *State v. Abley*, 46 L. R. A. 362; and *People v. Mills*, 67 L. R. A. 131.

himself, acting for the purpose of securing evidence of the intended burglary and other crimes, the fact that the owner did not take steps to prevent the burglary, but passively allowed it to go on, is not a consent to the burglary that will be a defense to the burglar.

3. Where a detective apparently assists in a burglary for the purpose of securing evidence of the same and other offenses, the acts of the detective are not to be imputed to the criminal, as they are not acting in a common purpose. Nevertheless, if the offense is committed by the person charged as to every element thereof, he may be found guilty, notwithstanding the complicity of the detective.
4. An instruction by the court that the jury must not consider the failure of the defendant to become a witness in his own behalf in arriving at a verdict is not erroneous.

(March 6, 1905.)

APPEAL by defendant from a judgment of the District Court for Walsh County convicting him of burglary. *Affirmed.*

The facts are stated in the opinion.

Messrs. DePuy & DePuy, for appellant:

A confession must not be obtained by any direct or implied promise, however slight.

3 Am. & Eng. Enc. Law, pp. 449, 464; 14 Century Dig. § 1175; *Re Bowerhan*, 4 N. Y. City Hall Rec. 136; 14 Century Dig. § 1164; *Robinson v. People*, 159 Ill. 115, 42 N. E. 375; *Walker v. State*, 7 Tex. App. 245, 32 Am. Rep. 595; *Gallagher v. State* (Tex. Crim. App.) 24 S. W. 288; *Clayton v. State*, 31 Tex. Crim. Rep. 489, 21 S. W. 255; 3 Russell, Crimes, 9th Am. ed. 385; 3 Am. & Eng. Enc. Law, p. 460.

If an alleged burglary is instigated by a private detective with the approval of the proprietor of the place alleged to have been burglarized, accused is not criminally liable.

People v. McCord, 76 Mich. 200, 42 N. W. 1106; *Love v. People*, 160 Ill. 501, 32 L. R. A. 139, 43 N. E. 710; 8 Century Dig. col. 1567; *Williams v. State*, 55 Ga. 394.

If the scheme was concocted by the detective, and the particular building was selected by the detective with the consent of the proprietor, and defendant was persuaded by the detective to assist in the breaking and entry into this particular store, no burglary was committed.

4 Am. & Eng. Enc. Law, p. 686; 1 Bishop, Crim. Law, 2d ed. §§ 344, 345; *State v. Douglass*, 44 Kan. 618, 26 Pac. 476.

Currie's intent or belief was immaterial. *Spiden v. State*, 3 Tex. App. 156, 30 Am. Rep. 126; *Williams v. State*, 55 Ga. 391; *State v. Adams*, 115 N. C. 775, 20 S. E. 722.

10 L. R. A.

Morgan, Ch. J., delivered the opinion of the court:

The defendant was convicted of the crime of burglary in the third degree, and sentenced to five years in the penitentiary. His principal contention on the appeal is that the court erred in refusing to give certain requested instructions bearing on the relation of the owner of the building, and of a certain detective, to the commission of the alleged crime. His claim is that the owner of the building consented to the burglary, and that defendant was instigated to commit the burglary under the undue influence of the detective in causing him to become intoxicated.

The facts are uncontradicted in respect to what transpired before the burglary, and are as follows: About January, 1904, several crimes, including burglaries, larcenies, and arson, were committed in Minto, Walsh county, North Dakota, without any success by the local authorities in arresting the perpetrators and bringing them to trial. Thereupon the county authorities sought the aid of one Walker, a detective from St. Paul. The detective had an interview with the state's attorney upon his arrival in the county, and secured from him the names of the persons suspected of complicity in the past crimes, among them being the name of the defendant. The detective thereupon acted as a cook in a restaurant in Minto. This restaurant was kept in connection with a place kept by one Gile, where intoxicating liquors were unlawfully sold. The restaurant feature of the establishment was a pretense, as a matter of fact, and was resorted to for the purpose of giving to the detective the appearance of having employment at the place. After some days the defendant and Walker became acquainted, and soon became constant companions. They ate together, slept together, drank to excess together, and became confidential with each other and intimate in their relations. The detective loaned the defendant small sums of money at one time, and in conversation about money matters the detective told defendant that he had \$65 coming from Canada. The defendant then stated to Walker that he knew where "we could get some money," and, upon being asked where, answered, "in some of these stores around here." The defendant and Walker finally, and after much consideration of the time and place of a burglary, concluded to break into a store. The detective says in respect to the final conclusion: "We arranged a deal to break this store open." The first suggestion of a burglary, as between the defendant and Walker, came from the de-

fendant. Several stores were suggested by the defendant as ones that might be burglarized, and among them Zulesdorff's, the one that was broken into. Before the store to be burglarized was agreed upon, Walker secured a letter of introduction to the mayor of Minto from the state's attorney. Walker presented the letter to the mayor, and told him of the contemplated burglary, and further stated: "I told him what I was there for, and told him about the stores, this building to be broken open, and told him that I didn't want myself in some place where I might get shot, . . . and told the doctor, if he knew any store-keeper in town there that would keep a secret, he had better go and notify him, and afterwards I would see him." Dr. Evans, the mayor, suggested that Zulesdorff's store be selected, and saw Zulesdorff in pursuance of this request, and Zulesdorff sent Walker word that he wished to see him. Walker saw Zulesdorff thereafter, and testifies as to what transpired between them as follows: "And he said that he had seen Dr. Evans, and he said that things would be all right; and I told him that after it was broken into he was to keep still about it, and told him what I wanted to know on the outside; and I said, 'By doing that I can get in a little work, and can find out the rest of these people;' so that was about all that was said between I and Frank Zulesdorff."

Later, he testified as follows upon his further cross-examination:

Q. And Zulesdorff told you it would be all right?

A. Yes, sir.

Q. And that he would permit you to use his store in your plans, and would keep the matter a secret for a sufficient length of time to enable you to complete the job?

A. Yes, sir.

Zulesdorff did nothing further in reference to the burglary, except that he marked two \$5 bills that he left in the money drawer with other money on the Saturday night preceding the burglary, which was committed on Sunday night. The doors and safe and money drawers were locked, and left in the same manner as usual. He marked the bills so that he could identify them in case they were stolen. On these facts it is claimed that Zulesdorff consented to the breaking, and that the defendant cannot, in consequence of such consent, be rightfully convicted of the crime of burglary.

After the conversation between Zulesdorff and Dr. Evans and Walker, it was definitely decided by defendant and Walker that the Zulesdorff store was the one to

be burglarized. Walker says that he never made any suggestions to the defendant as to the burglary; that he simply acquiesced and agreed to defendant's plans. In answer to a question as to "why you didn't go on with your plans then, everything being all right," he testifies: "Yes sir, right enough if I had wanted to work the plan myself, but I didn't want to do that. I wanted him to do it himself, if he wanted to do it." Walker and defendant agreed to break into the store Saturday night, and went to the store for that purpose, but something happened after they got to the store causing the breaking to be abandoned on defendant's request. He then said, however, "We will try it to-morrow night." On Sunday night they again went to the store, and broke into it by joint force. The defendant removed the marked bills and other money from the money drawer, and a fur-lined coat was also taken from the store by defendant, and they left the building together. After leaving the building the money, \$18.60, was equally divided between them. The overcoat was hidden in a livery barn by the defendant, and subsequently found by an officer and returned to the owner. In a few days the defendant was arrested at the instance of one Gile, and his trial and conviction followed.

Upon these facts, two questions are presented for consideration which were raised at the trial by requests to instruct the jury, and they were also urged on a motion for a new trial: (1) Did the owner of the property consent to the breaking into of his building by the defendant? (2) Did the fact of the detective Walker's participation in the burglary entitle the defendant to a reversal of the judgment of conviction?

Upon the first question, the facts as narrated show that Zulesdorff did nothing by any act to aid in the burglary of his building. He remained passive after being informed of the intended burglary. The plan of a burglary had been arranged before he was advised of the plan of the detective to join the defendant in the proposed burglary as a feigned participant. Zulesdorff gave the detective no instructions. He did not advise him as to the manner of proceeding, nor do anything to assist in the burglary. The store was closed and locked in the usual manner. When he consented to remain away, at the request of the detective, for the purpose of securing evidence, it was not certain that his store was the one to be burglarized, nor when it was to occur. The Zulesdorff store was selected as the one to be burglarized after the detective's interview with him. Under these conditions it

cannot be said that he consented to the burglary. Before the owner's consent will be a defense to a burglary, the owner must participate, or in some way aid or solicit or encourage the burglary. Mere knowledge that a person's property is to be burglarized, followed by inaction on his part to thwart it, is not deemed a consent to it. His consent must be manifested by some act of assistance. Mere passiveness for the purpose of securing evidence of the burglary is not such consent as can be urged by the burglar as a defense. The detective was not the agent of Zulesdorff in the matter at all, nor did he have charge of the building in any sense, hence the detective's acts cannot be said to be those of the owner. In *People v. Hanselman*, 76 Cal. 460, 9 Am. St. Rep. 238, 18 Pac. 425, the court said: "And under the authorities we do not think that there is such consent where there is mere passive submission on the part of the owner of the goods taken, and no indication that he wishes them taken, and no knowledge by the taker that [he] . . . wishes them taken, and no mutual understanding between the two, and no active measures of inducement employed for the purpose of leading into temptation, and no preconcert whatever between the thief and the owner." In *State v. Sneff*, 22 Neb. 481, 35 N. W. 219, the court said: "The fact that those in charge of a building hear of an intended burglary to be committed by breaking into the building, do not prevent it, but put a force in the building to capture the burglar, and he is so captured, does not affect the guilt of any burglar." In a similar case to this, in *State v. Jansen*, 22 Kan. 498, in speaking of the conduct of the owner of the building the court said: "His willingness to assist in and facilitate the detection and arrest of a criminal was no consent to the commission of the crime." In *McAdams v. State*, 8 Lea, 456, the court said: "A man may direct his servant or a third person to appear to encourage the design of a thief and lead him on until the offense is complete, so long as he does not induce the original intent, but only provides for its discovery after it has been formed." See also *Thompson v. State*, 18 Ind. 386, 81 Am. Dec. 364; Clark, *Crim. Law*, p. 11; *Varner v. State*, 72 Ga. 745; *State v. Stickney*, 53 Kan. 308, 42 Am. St. Rep. 284, 36 Pac. 714; *State v. Adams*, 115 N. C. 775, 20 S. E. 722; 6 Cyc. Law & Proc. p. 182, and cases cited.

Upon the second question, the state's evidence shows that the detective did not instigate the commission of the offense. The suggestion of committing the crime, and the active planning of it, is shown to have come from the defendant. The detective fell in

and agreed with the defendant's plan. It is true the detective deceived the defendant as to the purpose of his complicity in the crime. He assisted by his acts, but with a hidden purpose. Without commending this practice, or commenting upon it as dangerous and generally of doubtful propriety, we will say that, if the defendant is shown to have committed the crime in its completeness, the feigned complicity of a detective in the crime should not be a shield to the defendant. The authorities almost unanimously hold that a detective may aid in the commission of the offense in conjunction with a criminal, and that the fact will not exonerate the guilty party. Mere deception by the detective will not shield the defendant, if the offense be committed by him free from the influence or instigation of the detective. The detective must not prompt or urge or lead in the commission of the offense. The defendant must act freely of his own motion, and, if he so acts, the fact that the detective was not an accomplice in fact will not accrue to his benefit. The defendant is not to be charged with what was done by the detective, as the two are not acting together for a common purpose. As was said by the court in *State v. Jansen*, 22 Kan. 498: "The act of a detective may, perhaps, not be imputable to the defendant, as there is a want of a community of motive. . . . But where each of the overt acts going to make up the crime charged is personally done by the defendant, and with criminal intent, his guilt is complete, no matter what motives may prompt or what acts be done by the party who is with and apparently assisting him." The cases cited above are all to the effect that the assistance of a detective in a burglary is no defense to a person who himself does every act essential to constitute the burglary.

The defendant did not testify at the trial, hence the facts as to what transpired between him and Walker at and before the burglary are all to be gathered from Walker's testimony. From this testimony, carefully scrutinized, there is no support, even by inference from the facts stated, for the contention that Walker instigated the crime, hence the proposed requests on the question of the instigation of the crime by him were properly refused as not applicable to the case under any theory or hypothesis to be drawn therefrom. The court gave the jury correct instructions on the question of consent. They were told that mere knowledge by the owner that the building was to be burglarized, without taking steps to prevent the same, would not be a consent to the commission of the offense. They were also in-

structed that, if the building was burglarized by the "procurement and consent" of the owner, the defendant would not be guilty. The jury were properly instructed on the effect of the intoxication of the defendant. Under such instructions the jury should have acquitted the defendant if the facts warranted a finding of intoxication as defined in the instructions. The evidence, in our judgment, would not warrant a finding that he was intoxicated at all when the crime was committed.

Complaint is made on the ruling of the court in admitting admissions in the nature of a confession made by the defendant in the presence of the state's attorney and others soon after the offense was committed. The ground of complaint is that such confession was made under the inducement of a promise made by the detective. The detective told the defendant while in jail after his arrest that "in order to help himself out" he had better tell who the parties were that were implicated in the crimes that had previously been committed in Minto. There was nothing said by him at this time as to the commission of the offense for which he was tried and what was there said by defendant was not admitted in evidence. In the conversation or presence of the state's attorney, the defendant admitted having assisted in burglarizing the Zulesdorff store. At this time defendant knew that Walker was a detective. But there was no promise made, and there is no ground for any claim that the admission was not voluntarily made, and without any suggestion even of any benefit to be gained by him by such admission. The admission was admissible. *Willett v. People*, 27 Hun. 460.

The court read to the jury the section of the Code relating to persons on trial for offenses not becoming witnesses for themselves, and the effect thereof, and that the jury should not consider that fact in making up their verdict. We have recently held that giving such instruction is not error. *State v. Wisniewski*, 13 N. D. —, 102 N. W. 883.

Exceptions were saved to the introduction and to the exclusion of certain evidence. We have carefully considered these exceptions, and find them without merit. One of these exceptions relates to excluded evidence of the defendant's condition as to sobriety when he was arrested two days after the burglary. Another relates to the ownership of the livery barn where the overcoat was hidden, and that the owner was defendant's father. Other assignments of error in refusing requests have been carefully considered, and found not prejudicial error, but 69 L. R. A.

properly refused. The evidence amply sustains the verdict, and the trial was without prejudicial error.

The judgment is affirmed.

All concur.

Thomas BEARE, *Respt.*,
v.

J. A. WRIGHT *et al.*, Impleaded, etc., *Appts.*

(..... N. D.)

- *1. In an action to recover damages for false and fraudulent representations, by which the plaintiff had been induced to exchange real property for stock in a corporation, and had affirmed the contract after discovering the deceit, the measure of plaintiff's recovery, in the absence of a claim for special or exemplary damages, is the difference in value between what was received or parted with, as the case may be, and what would have been received or parted with, had the representations been true.
2. Misrepresentation of the price paid for property by the vendor or others does not constitute actionable deceit, in the absence of fiduciary relations between the parties, or other facts or circumstances giving rise to an express or implied agreement that the price paid should determine the price in the contract.
3. Where the facts found in a special verdict are insufficient to support the judgment for plaintiff, by reason of the absence of findings on matters in dispute essential to the complete determination of the issues, a new trial must be granted.

(January 9, 1905.)

A PPEAL by defendants Wright and Bates from a judgment of the District Court for Grand Forks County in favor of plaintiff in an action brought to recover damages for alleged deceit in the exchange of property. *Reversed.*

The facts are stated in the opinion.

Mr. Tracy R. Bangs, for appellants:

Where one is deceived and defrauded he can recover as damages the difference between the value of what he would have obtained had the statement been true and the value of what he actually received.

Fargo Gas & Coke Co. v. Fargo Gas & Electric Co. 4 N. D. 219, 37 L. R. A. 593, 59 N. W. 1066.

*Headnotes by ENGERUD, J.

NOTE.—As to measure of damages for fraudulent misrepresentations of seller where contract is not rescinded, see also, in this series, *Rockefeller v. Merritt*, 35 L. R. A. 633; *Fargo Gas-light & Coke Co. v. Fargo Gas & Electric Co.* 37 L. R. A. 593; and *Gustafson v. Rustemeyer*, 39 L. R. A. 644.

Messrs. F. B. Feetham and Scott Rex for respondent.

Engerud, J., delivered the opinion of the court:

This is an appeal from a judgment for plaintiff in an action to recover damages for alleged deceit in the exchange of property. The case was submitted to the jury for a special verdict, upon which judgment was ordered and entered against these appellants. A motion for new trial was made, based in part upon a statement of the case specifying as grounds for a new trial numerous errors of law, and the insufficiency of the evidence to justify some of the findings of the jury, and the insufficiency of the verdict to support the judgment. The motion for a new trial was denied. This appeal is from the judgment.

The appellants contend that the facts found by the jury are insufficient to sustain the judgment, and we think the point is well taken. The facts upon which plaintiff must base his right to recover are those established by the admissions in the pleadings and by the special verdict. So far as material on this appeal, the pleadings disclose substantially the following facts: On or about December 28, 1901, respondent purchased and received from the appellants 750 shares of stock in a coal-mining corporation in which the appellants were stockholders. The par value of the stock was \$100 per share, but it was sold to the respondent at a valuation of \$20 per share, or \$15,000; and in exchange for said stock he sold and conveyed to the appellants a lot and business block owned by him, worth, exclusive of encumbrances, \$15,000. The respondent did not avail himself of the right to rescind the transaction when he discovered the alleged fraud on the part of appellant. He retains the stock, and has affirmed the contract. He seeks to recover compensation for the loss which he avers he has suffered by reason of the falsity of the representations of the appellants.

All that the jury found touching misrepresentation by these appellants appears in the following questions and answers of the special verdict: "Question 5. Did the defendant Wright represent to plaintiff, with intent to induce him to purchase said stock, that defendants Pringle and Bates, or either of them, had purchased stock of said corporation at the price of \$20 per share, for which they had paid the sum of \$20,000? Answer. Yes." In answer to question 6 the jury found that Bates made the same representation set forth in question 5. "Question 9. Did the defendant Wright represent to plaintiff, with intent to induce him to purchase such stock of said

corporation, that said corporation then had in its treasury a large amount of money available for the development of the mine of said corporation? Answer. Yes." In response to question 10 the jury found that Bates did not make the representation embodied in question 9. In response to other questions the jury found that the representations found to have been made were known by the persons making them to be false, and that plaintiff relied thereon, and was induced thereby to purchase the stock.

The only finding as to damage was the following: "What detriment did the plaintiff suffer by reason of purchasing such stock? Answer. \$9,995.75." The form of this question indicates the erroneous theory upon which the case was submitted to the jury. Bearing in mind that the plaintiff had voluntarily affirmed the trade after knowledge of the alleged deceit, it will be seen that the jury were asked to award the plaintiff compensation, not solely for the deceit, but also for the plaintiff's own folly in adhering to a bad bargain. The jury were instructed that the measure of damages was the difference between the actual value of the stock purchased and the value of the property given in exchange. It was undisputed that the real property traded for the stock was worth \$15,000. The method by which the jury were instructed to arrive at the answer to the question as to damages is shown by the following instruction: "The proof shows that at this time [December 28, 1901] there were 9,100 shares of the capital stock of this corporation outstanding, and each of such shares was therefore worth and of the value of the 1-9100 part of the entire assets of the corporation. Having, then, first determined the actual market value of the entire assets and business of said company at the time, you will divide such value by 9,100, the number of shares of stock then outstanding. This will give the actual value of each of such shares of stock at that time. Plaintiff purchased 750 shares of such stock, at the price of \$20 per share. If you find that said stock at said time was worth less than \$20 per share, then the difference between what you find to be the actual value of each share and \$20 will be the damage that plaintiff sustained on each share, and 750 times this will be the total sum at which you will assess plaintiff's damages in answer to the above question." These instructions were excepted to by the defendants, and are assigned as error.

The business of this corporation was in an undeveloped state. It owned a large quantity of land in the lignite coal belt, and that land was the principal part of its tangible assets. It was unknown as yet wheth-

er the enterprise would be a profitable one or not. In other words, it was a purely speculative venture. It was undisputed that the plaintiff knew it to be such when he bought the stock, and that one of the principal inducements for him to buy the stock was the hope of great and sudden wealth, which the investment promised to yield if the enterprise should prove to be a profitable speculation. It appears from the record of the evidence admitted and excluded, and the instructions of the court, that in determining the value of the stock the jury were permitted to take into consideration only the actual net value of the tangible assets of the corporation. It is apparent that, if the respondent's theory of this case shall prevail, the result will be that respondent will have all the advantages of the speculative features of the enterprise, without assuming all the risk of such a speculation. His position is precisely the same as if he were to claim a right to share in the distribution of prizes at a lottery without paying for the chance. It is no answer to this proposition to say that respondent would not have engaged in the enterprise if he had not been deceived by the appellants. The unanswerable objection to that argument is that respondent voluntarily chose to adhere to the bargain, and retain all the benefits and advantages of the speculation, after he knew he had been deceived. He thereby forever estopped himself to claim any compensation for loss resulting from the making of the trade. It was an affirmance of the contract. Whether the bargain was good or bad, he must abide by it and take the consequences of his speculation. He cannot affirm the contract to the extent of the actual, present value of the tangible property received, and repudiate the speculative feature of it. Upon the discovery of the deceit he had his election to rescind or affirm, but he could not rescind in part and affirm the remainder. An affirmance in part validated the entire contract. Rev. Codes 1899, § 3934; *Grannis v. Hooker*, 31 Wis. 474. Having thus validated the contract, the only remedy left to the respondent was to seek compensation in damages for the loss resulting from the falsity of the representations upon the faith of which he made the trade. The rule by which such damages are to be measured, where no special or exemplary damages are claimed, was announced by this court in *Fargo Gas & Coke Co. v. Fargo Gas & Electric Co.* 4 N. D. 219, 37 L. R. A. 593, 59 N. W. 1066, to be the difference between what the property received would have been worth if as represented, and what it was actually worth at the time of the sale. 69 L. R. A.

In other words, the measure of damages for deceit where the contract is affirmed is precisely the same as for a breach of warranty in a contract of sale. Respondent argues that the rule adopted and applied in that case is not a universal rule of general application, but is applicable only where the circumstances are like those in that case. Counsel cites § 4997, Rev. Codes: "For the breach of an obligation not arising from contract, the measure of damages, except when otherwise expressly provided by this Code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not." And § 3941, Rev. Codes 1899: "One who wilfully deceives another with intent to induce him to alter his position to his injury or risk is liable for any damage which he thereby suffers." He further cites § 3942, Rev. Codes 1899, defining actionable deceit, and § 3848, Rev. Codes 1899, defining actual fraud, and calls attention to the fact that actionable deceit and actual fraud are defined by the statute in the same language. From these provisions of the Code the conclusion is deduced that in all cases of actual fraud the defrauded party can waive rescission and recover damages, and that such damages are to be measured by the difference in value between what he received and what he parted with, regardless of the nature of the false representations. According to respondent's theory, it matters not whether the representations were such as to affect the value of the subject-matter of the contract, or not. If they come within the general definition of actual fraud, and the contract was induced thereby, the victim of the deceit can recover damages measured by the rule he has stated.

The provisions of the Civil Code cited by counsel are merely declaratory of well-established common-law principles. Deceit is actual fraud, and where the apparent consent of one party to a contract has been induced by the actual fraud of the other the contract is voidable. It is voidable not because of any supposed pecuniary damage done to the defrauded party, but because the consent of the latter was not free. Rev. Codes 1899, §§ 3836, 3841-3844. And fraud, actual or constructive, renders a contract voidable for the same reason that mistake, undue influence, duress, etc., have the same effect. Sections 3941, 3942, Rev. Codes 1899, merely declare that actual fraud is a tort for which the guilty party is liable to the injured party if any damage has been suffered by the latter. In other words, actual fraud, with damage, is a good cause of action, and constitutes actionable deceit. These statutory declarations of general principles throw no light

on the precise question in this case. It is conceded that a person guilty of deceit is liable for all damages proximately resulting from the wrong. The question to be determined is, What loss, if any, has the plaintiff suffered as the proximate result of the false representations? Respondent asserts that he was inveigled into the speculation by the deceit of the appellants, and therefore the false representations are the proximate cause of the loss he has suffered. The argument is more plausible than sound. While it is true that he was inveigled into the speculation under a false impression of the facts, it is also conceded that he voluntarily elected to retain his interest in the enterprise after he was aware of the defendants' misrepresentations, and notwithstanding that he could have escaped all the consequences of a bad speculation by withdrawing from it by rescission. It is therefore clear that that part of the loss which would have resulted from the making of such a trade on the same terms without deceit is due to plaintiff's own folly, and is not properly chargeable to the false representation.

An instructive case on this subject is that of *Page v. Parker*, 43 N. H. 363, 80 Am. Dec. 172. The plaintiff had been induced by false representations to purchase an interest in a marble quarry, and pay therefor a sum much greater than its actual value. The defendants had made many representations. Some were false, some true, and others immaterial. The plaintiff sued to recover damages for deceit. The court held that the measure of damages in such cases is the difference between the value of the property as it actually was, and its value as it would have been if it were such as it was represented to be *in those particulars in relation to which the false and fraudulent representations were made*. The qualifying clause which we have italicized was said to be advisable in order to make it clear to the jury that the damages must be confined to such items of loss as were proximately caused by the representations which were false and material. To illustrate: If there were ten material representations, and only one was false, the plaintiff was entitled to compensation only to the extent that the value of the quarry was diminished by the nonexistence of the one fact which was falsely represented to exist. In *Van Epps v. Harrison*, 5 Hill, 63, 40 Am. Dec. 314, a good illustration of the same proposition appears. The defendant had given his bond for an interest in certain land, which was supposed to be very valuable as a town site. The price paid for the land was far in excess of its real value, having been based up-

on "boom" prices of land then prevailing. The defendant, among other things, claimed that the plaintiff had been guilty of deceit in the sale by falsely representing that the land was even, level, and suitable for building purposes, and required no grading. Justice Bronson, in stating the measure of damages to be applied in that case, used this language: "As the land, whether the representations were true or false, was in reality worth only a small part of the price which the defendant agreed to pay, there may be some difficulty in answering the question. . . . We must not go back to the date of the contract for the price, and then come down to the present day for the actual value of the land, and charge the plaintiff with the difference. The defendant must bear the consequences of the prevailing delusion about prices and new towns under which the purchase was made. On the other hand, the plaintiff cannot say that his fraud has worked no injury, because everybody has now found out that the land never was worth anything for the purpose of building a town upon it. . . . The cause must, as far as practicable, be tried just as it would have been tried the day after the contract was made, if the question had arisen at that time. The jury must assume, what the parties then believed, that the land was valuable as the site for a town, and then inquire how much less the land was worth for building purposes, taking the surface as it actually existed, than it would have been worth for those purposes had the plaintiff's representation concerning the surface been true." We believe these cases are sound and in accord with the overwhelming weight of authority. They illustrate the application of the rule announced by this court in *Fargo Gas & Coke Co. v. Fargo Gas & Electric Co.* 4 N. D. 219, 37 L. R. A. 593, 59 N. W. 1066, in cases where the circumstances were analogous to those presented by the case at bar. We can conceive of no reason why the circumstances of this case should call for the application of different principles in determining the rights and liabilities of the parties than are applied in other cases of deceit. There are cases which seem to make such a distinction. Amongst them may be mentioned *Crater v. Binniger*, 33 N. J. L. 513, 97 Am. Dec. 737; *Smith v. Bolles*, 132 U. S. 125, 33 L. ed. 279, 10 Sup. Ct. Rep. 39; *Sigafus v. Porter*, 179 U. S. 116, 45 L. ed. 113, 21 Sup. Ct. Rep. 34; *Reynolds v. Franklin*, 44 Minn. 30, 20 Am. St. Rep. 540, 46 N. W. 139; *Higb v. Berret*, 148 Pa. 261, 23 Atl. 1004. These cases seem to hold that in such cases as this the measure of damages is that adopted by the trial court,—the difference in val-

ue between what is parted with and what is received. These cases seem to proceed upon the theory advocated by the respondent in this case,—that the entire loss resulting from a contract induced by false representation is proximately caused by the deceit, because the contract would not have been made if deceit had not been practised. For the reasons hereinbefore stated, that theory is, in our opinion, erroneous. The first case in this country which we can find in which such a theory is advanced is that of *Crater v. Binninger*, 33 N. J. L. 513, 97 Am. Dec. 737, where Chief Justice Beasley confidently asserts that the rule is well established. The chancellor, however, wrote a separate opinion in that case, from which it appears that he differed from the chief justice as to the ordinary rule of damages in cases of deceit. The chancellor proceeds to show that the ordinary measure of compensation for deceit is the same as for breach of warranty, but concludes his opinion with the following remarkable proposition: "In this case Crater was willing to go in with Binninger at the cost price. Had Binninger told him truly that the cost price was \$18,000, he would, no doubt, have been willing to go in at that price, and would have paid at that rate, and, if any subsequent loss was sustained, would have had no claim against Binninger; and the true measure of damages appears to me to be the excess which he was induced to pay by the false and fraudulent representation of Binninger. If that was the difference between \$18,000 and \$28,000, the one eighth would be \$1,250, which, with the interest, would be the real damage. And the plaintiff below would be entitled to recover these damages, although he had made double the amount out of the enterprise as clear profit. If, however, the jury would believe that Crater, if he had been told the real price, would not have entered into the transaction at that price, but would have taken a share in the lands only at the higher price, then his embarking in the transaction at all was the result of the fraud of Binninger, and the rule of the judge at the trial was the correct one; but it should have been so stated to the jury." If we understand the chancellor's language correctly, it was his opinion that in such a case the jury should be left to speculate as to the probable course of conduct which the injured party would or would not have pursued under one or the other supposed state of facts, and the measure of compensation would depend upon what the jury conjectured the plaintiff would have done if he had known the truth. As both opinions were for reversal of the trial court, it is impossible to tell which of

the two opinions received the sanction of the majority of the court. In *Smith v. Bolles*, 132 U. S. 125, 33 L. ed. 279, 10 Sup. Ct. Rep. 39, the opinion of Chief Justice Beasley in *Crater v. Binninger* is cited as authority. As an additional reason for adopting that rule, Chief Justice Fuller said that the defendant should not be held liable for "the expected fruits of an unrealized speculation." If it were true that the other rule imposed such liability, it is obvious that the argument of the chief justice would be fatal to the universal rule prevailing in case of breach of warranty. In cases of deceit or for breach of warranty, as well as in all other actions in tort or on contract for the recovery of damages, conjecture or speculation as a basis for estimating damages are excluded, for reasons familiar to the profession; and consequently the prevailing rule in breach of warranty and deceit does not in fact give the injured party "the expected fruits of an unrealized speculation." The decision in *Smith v. Bolles* was followed and approved in *Sigafus v. Porter*, 179 U. S. 116, 45 L. ed. 113, 21 Sup. Ct. Rep. 34. The same doctrine seems to have been given root in England by the case of *Peek v. Derry*, L. R. 37 Ch. Div. 541, decided in 1887. That case was reversed by the House of Lords (L. R. 14 App. Cas. 357) on the ground that the facts did not constitute actionable deceit, and hence there was no occasion to express any opinion as to the propriety of the measure of damages adopted in the lower court. The American cases which have adopted the rule advocated by Chief Justice Beasley in *Crater v. Binninger*, 33 N. J. L. 513, 97 Am. Dec. 737, seem to have been based upon the authority of *Crater v. Binninger*, *Smith v. Bolles*, 132 U. S. 125, 33 L. ed. 279, 10 Sup. Ct. Rep. 39, and *Peek v. Derry*, L. R. 37 Ch. Div. 541. The weight of authority as well as the better reason is against the rule supported by these cases. See cases cited in *Fargo Gas & Coke Co. v. Fargo Gas & Electric Co.* 4 N. D. 219, 37 L. R. A. 593, 59 N. W. 1066; 4 Sutherland, Damages, 3d ed. p. 3401, note 1.

It is plain to be seen that the rule advocated in the cases mentioned in some instances deprives the plaintiff of full compensation for the loss of what his bargain entitled him to, and in others imposes upon the defendant liability for losses not attributable to his fault. That rule sets up an arbitrary measure of damages, which violates that cardinal principle of the law of torts that the party at fault shall be held liable only for just compensation for the detriment proximately caused by his wrongful act. That principle is expressed in our

Civil Code by § 5014, Rev. Codes 1899, as follows: "Notwithstanding the provisions of this chapter, no person can recover a greater amount in damages for the breach of an obligation [contract of tort] than he could have gained by the full performance thereof on both sides except in the cases specified in the subdivisions on exemplary damages and penal damages and in §§ 4996, 5003, and 5004." (Breach of promise to marry, seduction, and wilful or grossly negligent injury to domestic animals.)

We can see no difficulty in applying to the facts of this case the same rule which was applied in *Fargo Gas & Coke Co. v. Fargo Gas & Electric Co.* 4 N. D. 219, 37 L. R. A. 593, 59 N. W. 1066. Compare what has been received with what would have been received if the facts had been as they were represented to be, or, if the deceit affected the amount of money or property parted with, compare the value of that property with what should have been given if there had been no deceit. The difference is the measure of compensation for plaintiff's loss if there are no penal or exemplary damages. It is apparent that the speculative feature of the transaction is common to both terms of the equation, and is therefore eliminated from the problem.

It follows from what has been said that the findings of the special verdict are insufficient to support the judgment. It is apparent that the representation as to what others paid for the stock did not affect its value. It has not been found that there were any fiduciary relations existing between the parties, or that there were any other facts or circumstances giving rise to an implied agreement that the price paid by the vendor or others should be the price to the plaintiff. It is not found or admitted that there was any express contract to that effect. In the absence of special circumstances of that nature, a mere false statement as to the price paid by the vendor or others is not actionable deceit. *Hauk v. Brownell*, 120 Ill. 161, 11 N. E. 416; *Teachout v. Van Hoesen*, 76 Iowa, 113, 1 L. R. A. 664, 14 Am. St. Rep. 206, 40 N. W. 96; *Kilgore v. Bruce*, 166 Mass. 136, 44 N. E. 108; *Davenport v. Buchanan*, 6 S. D. 376, 61 N. W. 47; *Coulter v. Clark*, 66 N. E. 739; *Sandford v. Handy*, 23 Wend. 260; *Smith v. Countryman*, 30 N. Y. 655; *Ellis v. Andrews*, 56 N. Y. 83, 15 Am. Rep. 379; *Fairchild v. McMahon*, 139 N. Y. 290, 36 Am. St. Rep. 701, 34 N. E. 779; *Miller v. Barber*, 66 N. Y. 558; *Hubbell v. Meigs*, 50 N. Y. 480; *Medbury v. Watson*, 6 Met. 246, 39 Am. Dec. 726; *Hemmer v.* 69 L. R. A.

Cooper, 8 Allen, 334; and other cases cited in notes 4 and 5, p. 492, Bigelow, Fr.

To avoid any misapprehension from the use of the term "fiduciary relation" in speaking of the special circumstances under which a misrepresentation as to cost or value may constitute deceit, we will say that we do not use that term in its technical sense. We apply it to any situation where trust and confidence are reposed by one party in another under such circumstances as to impose on the person trusted the obligation to act in good faith.

It has been said that the courts of Massachusetts and Maine have held that a misrepresentation as to cost is not material, and that those courts are at variance with the courts of New York and others. Bigelow, Fr. p. 492. This loose expression has led to the erroneous idea that some courts—especially those of New York—have held that a mere misrepresentation of cost may constitute actionable deceit. The language of Justice Bronson in *Van Epps v. Harrison*, 5 Hill, 63, 40 Am. Dec. 314, seems to give color to this idea. The learned justice seems to have entirely overlooked in that case the fact that the plaintiff had either expressly or impliedly agreed that the defendant and the other persons who contributed to the purchase price were to be let in "on the ground floor" in the speculation, on equal terms with the plaintiff, and were therefore entitled, under the contract, to receive their respective shares of the land on the basis of the price paid by the plaintiff. In other words, the terms of the contract itself made the price paid by the vendor a material fact, and hence the misrepresentation as to the price paid was clearly actionable deceit. It was doubtless for this reason that the majority of the court overruled Justice Bronson. Analysis of the other cases in New York and elsewhere, we think, will disclose that there is in fact no real difference of opinion as to when a misrepresentation as to the price paid by the vendor or others will or will not constitute actionable deceit. However inaccurately the idea may be expressed, the rule as exemplified by all the cases seems to be fairly uniform that a mere representation as to the price paid by the vendor or others is not actionable in the absence of special circumstances such as those we have mentioned. The finding that Wright wilfully misrepresented the amount of funds in the treasury convicted the defendant Wright of actionable deceit, but there was no finding or admission in the pleadings or evidence from which it can be ascertained how much he falsely exaggerated the assets in this respect. There are

therefore no means of determining the amount of loss by reason of this misrepresentation.

By reason of the erroneous theory as to the measure of damages upon which the case was tried, the findings neither support the judgment, nor exonerate the appellants. There must therefore be a new trial. The view we have taken of the case renders it

unnecessary to discuss the other assignments of error, as the questions presented by them are not apt to arise on another trial.

The judgment is reversed and a new trial granted as to both appellants.

All concur.

Petition for rehearing overruled May 31, 1905.

OHIO SUPREME COURT.

Simon W. CRAMER, *Plff. in Err.*,

v.

SOUTHERN OHIO LOAN & TRUST COMPANY.

(.....Ohio.....)

*1. Section 3836-3, Bates's Anno. Stat. p. 2130, which confers power on building and loan associations "to assess and collect from members and depositors such dues, fines, interest, and premium on loans made, or other assessments, as may be provided for in the constitution and by-laws," and which further provides that "such dues, fines, premiums, or other assessments, shall not be deemed usury, although in excess of the legal rate of interest,"—is a valid enactment, and is not in conflict with § 26 of art. 2, nor with § 2 of art. 1, of the Constitution of Ohio.

2. Under the provisions of said statute, the premium for a loan, if reasonable in amount, need not be ascertained by competitive bidding for precedence in obtaining the loan, but it may be fixed at a uniform rate by the constitution and by-laws of the association.

(May 2, 1905.)

ERROR to the Circuit Court for Paulding County to review a judgment reversing a judgment of the Court of Common Pleas in plaintiff's favor for a less amount than demanded in an action to foreclose a mortgage which had been given to secure the payment of a loan. *Affirmed.*

Statement by Price, J.:

The defendant in error began a suit in the court of common pleas of Paulding county against the plaintiff in error and his wife

*Headnotes by the Court.

NOTE.—For other cases in this series as to validity of statute exempting building and loan associations from operation of the usury laws, see *Smoot v. People's Perpetual Loan & Bldg. Assn.* 41 L. R. A. 589, and *Iowa Sav. & L. Assn. v. Heldt*, 43 L. R. A. 689.

As to usury in contracts by building and loan associations generally, see *note* to *Reeve v. Ladies' Bldg. Assn. Perpetual*, 18 L. R. A. 129; 69 L. R. A.

(who is now deceased) to foreclose a mortgage on certain real estate in that county, and for a personal judgment against the husband. The petition alleges that plaintiff is a corporation under the laws of Ohio, and organized for the purpose of raising money to be loaned among its members, and that it is engaged in that business; that on the 24th day of June, 1896, under an application in writing for that purpose, and submitted to said company, Cramer became a member of the company, and a stockholder to the extent of 17 shares of instalment stock of class B of \$100 each share; that on the same day he made application for a loan of \$1,700, and offered as security for the same the mortgage in suit, an assignment of all fire insurance on the buildings, and a transfer of the 17 shares of stock; that the application contained, besides a description of the real estate, several conditions with which he would comply; that, acting on the application, the company loaned to Cramer \$1,700, and as security for which he gave the mortgage, assigned the fire insurance, and transferred the said shares of stock.

It is alleged that Cramer, as one of the stipulations of the mortgage, "agreed to pay monthly, without demand therefor, until said loan was fully repaid, as follows: 'The dues upon said 17 shares of stock; the 5 per cent premium bid upon said \$1,700, 5 per cent interest on said \$1,700, and, in addition thereto, to pay all fines, penalties, and other charges which should become due against said shares, and all taxes, assessments, costs of insurance, and other charges upon said premises, in accordance with the constitution and by-laws theretofore duly adopted by said company.' " The dues were

Pioneer Sav. & L. Co. v. Cannon, 33 L. R. A. 112; *Falls v. United States Sav. Loan & Bldg. Co.* 24 L. R. A. 174; *Bennett v. Eastern Bldg. & L. Assn.* 34 L. R. A. 595; *Smoot v. People's Perpetual Loan & Bldg. Assn.* 41 L. R. A. 589; *Iowa Sav. & L. Assn. v. Heldt*, 43 L. R. A. 689; *Borrowers' & Investors' Bldg. Assn. v. Eklund*, 52 L. R. A. 637; and *Pacific States Sav. Loan & Bldg. Co. v. Hill*, 50 L. R. A. 163.

fixed at \$8.50 per month on the 17 shares. The company alleged that Cramer failed to keep and perform the agreement made in his application and mortgage, so that on the 14th day of October, 1902, the sum due upon said loan, including principal, interest, premiums, fines incurred on said stock, and cost of insurance paid by the company, according to the terms of the agreement, amounted to \$2,787.35 and that Cramer had paid thereon in cash and dividends to be applied only the sum of \$1,391.83, leaving a balance due at that date of \$1,395.52. For this amount the petition prays judgment and foreclosure.

The answer of Cramer admits that he obtained a loan from the Southern Ohio Loan & Trust Company for \$1,700, and gave his mortgage to secure the same; admits that he has paid thereon the sum of \$1,391.83; but he denies each and every other allegation of the petition. He further answered "that § 3836-3 of the Revised Statutes of Ohio (Bates's Anno. Stat. 2130), in so far as it presumes to authorize building and loan associations to collect dues, fines, interest, and premiums in excess of the legal rate of interest, is unconstitutional, against the public policy of the said state of Ohio, and void." He further claims in the answer "that any amount or sum of money exacted or attempted to be collected by the . . . company is usurious, and he claims the privilege of the usury statutes of the said state of Ohio." For the purpose of a settlement, and for no other purpose, he tendered in the answer the sum of \$900, and he prays that "all amounts collected and heretofore paid in excess of the legal rate of interest be credited to him as payments of that amount of principal, and, if the amount found to be due is less than the amount here tendered, that the plaintiff be decreed to pay all costs after the date of making of the said tender." A jury was waived, and the cause was heard and submitted to the court, who made findings of fact in substance, that the plaintiff in that court, on the 24th day of June, 1896, was, and at the time of the trial, a domestic building and loan association, duly organized and empowered under the laws of Ohio, as such associations are described and defined by § 1 of "An Act to Provide for the Organization, Regulation, and Inspection of Building and Loan Associations, passed May 1, 1891" (88 Ohio Laws, p. 469). Further, that on the 24th day of June, 1896, defendant purchased from said company 17 shares of its instalment stock of the par value of \$100 each, and became a member of said association, and that on the same day, and as part of the same transaction, he made application to the association for a loan of \$1,700

in all respects as stated in the petition, which loan was granted on July 24, 1896, and that sum was paid to Cramer, on the terms and conditions aforesaid, and that to secure the payment of the loan he gave to the association his mortgage deed on the real estate described in the petition; and that the mortgage contained by reference thereto all the provisions and agreements in the application for stock and for the said loan. This mortgage was filed for record on the same day and recorded the succeeding day.

The court found the terms and conditions of the mortgage to be as above stated, but found that the premium mentioned in said application and mortgage was not fixed by any competitive bidding, but by the terms and provisions of the constitution and by-laws of said association, the said defendant and all other borrowers from said association of class B therein referred to were required to pay interest on their respective loans at the rate of 5 per cent per annum, payable in equal monthly instalments, together with a so-called premium at the uniform rate of 5 per cent per annum on said loan, in addition to said so-called interest. In addition to the findings, it was conceded and agreed in open court at the trial that the application and mortgage were signed by Cramer, and that book exhibit C is a true copy of the constitution and by-laws of the association, and was such when the loan was negotiated and made, and that before the loan was made Cramer had issued to him on his application 17 shares of stock class B in said association, and that before he received his loan he transferred said stock to the association.

It was further conceded that, if plaintiff's contention in this case is sustained, and its basis of computation is correct, the amount due it would be \$1,480.89, but if the court should find the contract to be usurious, and determine that the rate of interest to be charged is 6 per cent, computed on the basis of partial payments, then the amount due is \$840.03 to December 10, 1902; but, if the contract be usurious, and the rate of interest the plaintiff should recover should be 5 per cent, then, computed on the basis of partial payments to the same date, the amount would be \$646.68. The court found the contract and mortgage to be usurious, and decided that the statute entitled "An Act to Provide for the Organization, Regulation, and Inspection of Building and Loan Associations," passed May 1, 1891 (88 Ohio Laws p. 469), in so far as it allows any such company to assess and collect from members and depositors such dues, fines, interest, and premium on loans made, or other assessments as may be provided in the constitu-

tion and by-laws," and that "such dues, fines, premiums, and other assessments shall not be deemed usury, although in excess of the legal rate of interest," is unconstitutional and void. The court also held that the plaintiff's claim should be computed on the basis of \$1,700 as a loan at 6 per cent interest, to be computed on the rule of partial payments for each payment, by which rule there was then due the sum of \$981.67, to draw interest from the first day of the term of court. Judgment was rendered for that amount, and foreclosure ordered. A motion for new trial was overruled, and the case taken on error to the circuit court, where the judgment was reversed, and that court rendered a judgment in favor of the association for \$1,480.89, with 6 per cent interest thereon from June 2, 1903, and ordered foreclosure of the mortgage. Cramer prosecutes error to reverse the judgment of the circuit court.

Mr. Vance Brodnix for plaintiff in error.

Messrs. A. M. Waters and Snook & Savage, for defendant in error:

The legislation in question is not class legislation, and does not grant special privileges.

State v. Nelson, 52 Ohio St. 88, 26 L. R. A. 317, 39 N. E. 22; *State ex rel. Schwartz v. Ferris*, 53 Ohio St. 314, 30 L. R. A. 218, 41 N. E. 579; *Fox v. Fox*, 24 Ohio St. 335; *Adler v. Whitbeck*, 44 Ohio St. 539, 9 N. E. 672; *Senior v. Ratterman*, 44 Ohio St. 661, 11 N. E. 321; *Marmet v. State*, 45 Ohio St. 63, 12 N. E. 463; *Kimblewecz v. State*, 51 Ohio St. 228, 36 N. E. 1072; *Cass Twp. v. Dillon*, 16 Ohio St. 38; *State ex rel. Anderson v. Harris*, 17 Ohio St. 608; *State ex rel. Cline v. Wilkesville Twp.* 20 Ohio St. 288; *State ex rel. Bates v. Richland Twp.* 20 Ohio St. 362; *Holst v. Roe*, 39 Ohio St. 340, 48 Am. Rep. 459; *Anderson v. Brewster*, 44 Ohio St. 576, 9 N. E. 683; *Hagerty v. State*, 55 Ohio St. 626, 45 N. E. 1046.

All questions of public policy are within the sole discretion of the general assembly, and, if the law is not unconstitutional, it will not be disturbed on that ground.

Probasco v. Raine, 50 Ohio St. 378, 34 N. E. 536.

Mutuality is the essential principle of a building association.

Eversmann v. Schmitt, 53 Ohio St. 184, 29 L. R. A. 184, 53 Am. St. Rep. 632, 41 N. E. 139.

The statute is valid.

Spies v. Southern Ohio Loan & T. Co. 24 Ohio C. C. 40; *Brooklyn Bldg. & L. Asso. Co. v. Desnoyers*, 2 Ohio Law Rep. No. 6, p. 337; *People's Sav. & L. Asso. v. Roberts*, 5 Ohio 69 L. R. A.

N. P. 86; *Thornton & B. Bldg. & Loan Asso.* § 19; 4 Am. & Eng. Enc. Law, 2d ed. pp. 1054-1056, 1073; *McLaughlin v. Citizens' Bldg. Loan & Sav. Asso.* 62 Ind. 264; *Shafrey v. Workingmen's Sav. Loan & Bldg. Asso.* 64 Ind. 800; *Vermont Loan & T. Co. v. Whithed*, 2 N. D. 82, 49 N. W. 318; *Central Bldg. & L. Asso. v. Lampson*, 60 Minn. 422, 62 N. W. 544; *Zenith Bldg. & L. Asso. v. Heimbach*, 77 Minn. 97, 79 N. W. 609; *Winget v. Quincy Bldg. & Homestead Asso.* 128 Ill. 67, 21 N. E. 12; *International Bldg. & L. Asso. No. 2 v. Wall*, 153 Ind. 554, 55 N. E. 431; *Security Sav. & L. Asso. v. Elbert*, 153 Ind. 198, 54 N. E. 753; *Reeve v. Ladies' Bldg. Asso.* 56 Ark. 335, 18 L. R. A. 134, 19 S. W. 917; *Bedford v. Eastern Bldg. & L. Asso.* 181 U. S. 227, 45 L. ed. 834, 21 Sup. Ct. Rep. 597; *Iowa Sav. & L. Asso. v. Heidt*, 107 Iowa, 297, 43 L. R. A. 689, 70 Am. St. Rep. 197, 77 N. W. 1050; *Smoot v. People's Perpetual Loan & Bldg. Asso.* 95 Va. 686, 41 L. R. A. 589, 29 S. E. 746.

Price, J., delivered the opinion of the court:

The amount in controversy between the parties is \$499.22, the difference between the judgment of the court of common pleas and that of the circuit court. This amount the plaintiff in error claims is all usury, and should not be charged against him. The Southern Ohio Loan & Trust Company is an Ohio corporation, organized under the provisions of §§ 3836-1 *et seq.*, Bates's Anno. Stat. p. 2130. That section provides: "A corporation for the purpose of raising money to be loaned among its members shall be known in this act as a building and loan association. Associations organized under the laws of this state shall be known in this act as 'domestic' associations, and those organized under the laws of other states or territories, as 'foreign' associations. Associations may be organized and conducted under the general laws of Ohio relating to corporations, except as otherwise provided in this act." While this company did not adopt a name directly indicating that it became and is a building and loan association, it organized as such, and announced its purposes in the second article of the constitution as follows: "The Southern Ohio Loan & Trust Company is a corporation organized for the purpose of raising money to be loaned among its members to aid them in the purchase and building of homes, and to provide the advantages usually expected from savings banks and other similar institutions." This article embraces in terms the definition of a building and loan association found in the above section of the statute. The name

of the corporation so organized is not material, if it has the purposes and characteristics named in the statute and in its own constitution. This requirement seems to have been fully met, for we find it further provided in the same article: "All stock is paid for in cash, or in monthly instalments, as provided for by the by-laws of this company. Whenever the amount of dues paid and dividends credited on any share shall equal the face value of said share, it shall be fully paid in and be considered to have fully matured, at which time it is subject to withdrawal." etc. Again, from same article: "Annually on the first business day of January, so much of the earnings as may be necessary shall be set aside to pay the current expenses of the company and the interest on deposits; so much as shall be decided by the board of directors shall be reserved for the payment of contingent losses, and the residue shall be transferred as a dividend and credited to the shares of stock in force in proportion to their average monthly balances. . . ." Article 10 of the by-laws provides that the funds of the company shall be loaned only to members on real estate security; and, further, that the borrower "shall in all cases receive the full amount applied for, for which he shall pay 5 per cent interest, and bid 5 per cent premium per annum. Interest and premium must be paid in monthly instalments, and accompany the dues to the home office." The same article provides that, if a member neglects to make his payments according to the terms of his mortgage and application, he shall be liable to an action at law for their recovery, besides the principal, all dues, interest, premiums, cost of insurance, taxes, fines due and owing the company (association). We have referred to so much of the constitution and by-laws of this association as seems necessary to show that its organization and operation are clearly within the scope of § 3836—1, *supra*. The clause in article 2 of the constitution of the corporation, "and to provide the advantages usually expected from savings banks and other similar institutions," is not involved in this case. It is not assumed by it that general banking powers will be exercised, and in the present case it is apparent that such powers were not exercised. *Dearborn v. Northwestern Sav. Bank*, 42 Ohio St. 617, 51 Am. Rep. 851. Therefore we find, as did the lower court, that the defendant in error, plaintiff in the foreclosure action, was and is a domestic building and loan association, organized and empowered under the laws of Ohio as described and defined by the act of the legislature above named.

The plaintiff in error desired to borrow
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\$1,700, and in order to obtain a loan of that sum subscribed for 17 shares of the stock in the association, and thereby became one of its members. He signed a written application for the loan to the full par value of the shares, and, according to the requirements of the association found in its constitution and by-laws, he executed and delivered to it a mortgage on real estate described in the petition, and as further security transferred back to the association the 17 shares of stock. The constitution and by-laws were made part of the covenants and stipulations of the application and mortgage. The condition of the mortgage now involved obligates Cramer to pay (1) the sum of \$8.50 per month, being the monthly dues on the 17 shares of stock, to be credited as provided in the constitution and by-laws; (2) the interest due on \$1,700. or money so advanced, payable monthly, as specified in the same instruments; (3) the premium bid on said \$1,700, or money so advanced, as specified in said constitution and by-laws; (4) all fines, penalties, and other charges which said Cramer shall incur as a member of the association; (5) all rents, taxes, assessments, costs of insurance, and other charges upon said premises, in accordance with the constitution and by-laws. When we turn to the by-laws for the rates of interest and premium, we find the interest charged to be 5 per cent and the premium fixed at 5 per cent. The court below found, as we do, that the premium was not ascertained by competitive bidding, or, as sometimes called, at auction in open meeting of the members; and on that account it is claimed that the association determined an arbitrary or level premium, which renders the contract usurious when such premium and interest are added together. Here it becomes necessary to examine the legislation of this state upon the authority committed to such associations, and we find their first statutory authority in the act of February 21, 1867 (64 Ohio Laws, p. 18). It authorized any number of persons not less than five to associate themselves together and become a corporation "for the purpose of raising moneys to be loaned among its members for use in buying lots or houses, or in building or repairing houses, and such corporation shall be authorized and empowered to levy, assess, and collect from its members such sums of money by rates of stated dues, fines, interest on loans advanced, and premiums bid by members for the right of precedence in taking loans as the corporation by its by-laws shall adopt. . . . Provided, that the dues, fines, and premiums so paid, . . . although paid in addition to the legal rate of interest on loans taken by them, shall

not be construed to make the loans so taken usurious." The act was amended in some respects May 5, 1868, and again May 9, 1868, but the feature of a competitive bidding was retained. Under these statutes we have the cases of *State ex rel. Atty. Gen. v. Greenville Bldg. & Sav. Asso.* 29 Ohio St. 92, *State ex rel. Colburn v. Oberlin Bldg. & L. Asso.* 35 Ohio St. 258, and *Bates v. People's Sav. & L. Asso.* 42 Ohio St. 655; and they decide that under the statutes then in force, in order to save the premium from being obnoxious to our laws against usury, it must have been paid for precedence in obtaining the loan, and at competitive bidding. Undergoing some changes subsequently, not important here, the statutes were recast in an act passed May 1, 1891 (88 Ohio Laws, p. 469), from which we have quoted in the earlier part of this opinion. Under the head of "Powers" (§ 3) it is now provided: "Such corporation shall have power, . . . to assess and collect from members and depositors such dues, fines, interest, and premium on loans made or other assessments, as may be provided for in the constitution and by-laws. Such dues, fines, premiums, or other assessments, shall not be deemed usury, although in excess of the legal rate of interest." *Bates's Anno. Stat.* § 3836-3, p. 2130. The statute now in force, and which was in operation when the mortgage in suit was executed, omits the former requirement, or, rather, condition, of competitive bidding as to the premium to be paid, and therefore, if the statute is valid, usury cannot be asserted as tainting the loan in question.

The legislature, we must assume, had a reasonable motive for this material change, for before that time this court, in the cases cited under the former law, held that, if the premium was not bid for precedence in obtaining the loan, it was usurious in case it and the interest exceeded the legal rate to be charged under the interest laws. We think a reason for the change in the statute may be readily found. Experience with competitive bidding did not tend to fairness and equality among the members. The amounts of premiums bidden at different times and by different borrowers were not uniform. At one time competition may be stronger than at another, thus increasing the sum to be paid. There was opportunity at least for fictitious competition to run the premium up. And, whatever the premium, high or low, the dividends were the same to all. The member who paid a high rate of premium received no greater dividend than the one who paid the lowest. There was no certain standard, and the rights of members thus varied with the

seasons, or the financial stress in which the borrower might be found. The old law defeated the principle of mutuality, which is the basic principle of such associations. Now all borrowers are treated as upon a common level, and the premium is uniform, and all fare alike in that respect, and, of course, share alike in the dividends to be credited. Therefore the present law is not vicious, as declared by one of our circuit courts, but, on the contrary, it is fair, and is sanctioned by the rule of mutuality. We do not judge these associations by the operation and powers of banking institutions. A member of the former sustains a relation of mutuality to each and all of the other members. If he becomes a borrower, he is at the same time one of the lenders. In making a loan it is not contemplated that the principal debt will be repaid in bulk, but in instalments of dues, interest, dividends, and perhaps premiums. When these amount to the sum borrowed, the mortgage is canceled, the stock returned to the borrower, which he may hold free of liens, or he may withdraw from the association under its rules for that purpose. Therefore the relation of debtor and creditor, it may be said, does not strictly exist.

In *Licking County Sav. Loan & Bldg. Asso. v. Bebout*, 29 Ohio St. 252-254, Gilmore, J., says: "The object of these associations, and the powers with which they are clothed on becoming incorporated, are expressed in very general terms in the statute authorizing their incorporation. Each association, when incorporated, is left at liberty to adopt such a scheme or plan for working out and accomplishing its object as the members of the association may, by its by-laws, provide; and so long as these do not violate any of the provisions of the statute, nor transcend the powers granted, they will be binding and obligatory upon and between the members and the association." In *Eversmann v. Schmitt*, 53 Ohio St. 174, 29 L. R. A. 184, 53 Am. St. Rep. 632, 41 N. E. 139, this court stated in the syllabus: "(1) The members of a building association, whether borrowers or non-borrowers, have a mutual interest in its affairs; and, sharing alike in its earnings, must assist alike in bearing its losses. (2) A borrowing member is one who receives in advance the par value of his shares, and agrees in consideration of such advance to pay the weekly dues on the shares and the interest on the loan until the dues paid and the dividend declared and not paid are equal to the par value of his shares. He then ceases to be a member, and is entitled to a cancellation of the mortgage given to secure the obligations arising from the loan." In

the opinion, on page 184 of 53 Ohio St., page 186, 29 L. R. A., page 635, 53 Am. St. Rep., and page 141 of 41 N. E., Minshall, J., uses this language: "Unlike other corporations for profit, a share in a building association has, at the inception, only a nominal value. Its value is expected to increase by the lapse of time and the success of the association. It is contrary to the purpose and genius of a building association that a share in it should be paid up at the time of the subscription. This is done by the payment of small dues, and the crediting, at stated times, of the earnings in the way of dividends. When the aggregate dues with the credited earnings equal . . . the par value of a share of stock, it is paid up, and the owner, for that share, ceases to be a stockholder." We deem these illustrations of the operation of such associations sufficient to show the subject of the legislation we are considering, and that bidding a premium for preference in obtaining a loan is not essential to avoid our statutes against usury. The law no longer requires it in order to suspend those statutes. Therefore the claim of plaintiff in error that he should pay no more than 6 per cent on his loan is not sustained.

But it is urged that, if our present statute authorizes an arbitrary rate of premium without competitive bidding, and the usury laws are suspended from operation on such associations, the statute is unconstitutional. This claim is urgently made, but in terms somewhat general and indefinite. It will now be seen that the foregoing discussion of the nature and characteristics of building and loan associations has an added value, and at the outset of what we shall say we suggest the difficulty of perceiving what the matter of bidding a premium for preference in obtaining a loan has to do with the constitutional question. Under the statutes in force prior to the present enactment, numerous cases came to this court involving a construction of the powers and operations of various building and loan associations. We have cited some of them. The constitutional validity of the former acts has never been seriously questioned in this court, and, while other questions as to the powers and rights of said corporations were thoroughly and ably argued by eminent counsel, it seems that it did not occur to any of them that the associations were proceeding under an invalid law. This suggestion is not conclusive of the question, but the incident is forcible at this day of the life of such institutions. And we are unable to see what the absence from the statute of the clause requiring competitive bidding of premiums can add to the constitu-

tional argument against the existing law. Its validity or invalidity does not play or turn on the presence or absence of that clause. The arguments made here could have been aimed as well at all the former legislation on the same subject.

But wherein is the law unconstitutional? The counsel say the law violates § 26 of article 2, which requires that "all laws of a general nature shall have a uniform operation throughout the state." But counsel fail to enlighten us upon this proposition, and it is not even suggested where the point of conflict exists. It cannot be disputed that the statute is general in its terms, and that its nature and objects are general, providing as it does for the organization and operation of corporations to be known as building and loan associations; those organized under the laws of this state to be known as "domestic" associations, and those organized under the laws of another state or territory to be known as "foreign" associations. It is available in any county, city, or village of the state, and beyond doubt it has uniform operation throughout the state. As said in *State v. Spellmire*, 67 Ohio St. 86, 65 N. E. 622: "With us, 'uniform operation throughout the state' means universal operation as to territory. It takes in the whole state. And as to persons and things it means universal operation as to all persons and things in the same condition or category. When a law is available in every part of the state as to all persons and things in the same condition or category, it is of uniform operation throughout the state." This clear statement of the rule disposes of this branch of the contention, as no one will gainsay that the law in question is available in every part of the state.

However, it is more seriously and confidently asserted that the legislation confers special privileges on these associations which tend to the creation of a privileged class of corporations, and therefore the statute conflicts with § 2 of article 1 of our Constitution. It provides that "all political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform, or abolish the same, whenever they may deem it necessary; and no special privileges or immunities shall ever be granted that may not be altered, revoked, or repealed by the general assembly." The seed of the evil said to be inhibited by a part of this section is supposed to consist of the following clause in § 3836-3, *supra*: "Such dues, fines, premiums, or other assessments shall not be deemed usury, although in excess of the legal rate of inter-

est." This statute applies peculiarly, and perhaps alone, to building and loan associations, leaving other corporations and persons subject to the statutes against usury.

It is asserted that the legislation unlawfully discriminates in favor of these building and loan associations, and against all others, whereby all do not have the equal protection and benefit of our laws. This question is not raised by the state, but by a member of the association, whose relation thereto we have already described; and his right to do so in this collateral manner may well be doubted. He is a part of the association, and, equally with the other members, amenable to the constitution and by-laws adopted, all of which were incorporated in and became a part of his contract with the association. However, we are not averse to a brief consideration of the point raised. The organization of building and loan associations being authorized under a general law, we find the limitations upon their powers and the grant of their authority in few and simple rules. The major part of the government of their internal affairs is placed within the hands of the associations themselves, and the mutual rights of the borrowing and nonborrowing stockholders are to be worked out according to their own regulations; of course being supervised by limitations set by the statute. The law creating these associations can confer upon them such reasonable and ample powers for their successful operation as the general assembly may deem necessary, within the purposes and scope of their organization, and in doing this the legislature may classify the subjects upon which the powers are conferred, and yet keep within constitutional limits. As touching the precise question under consideration, we have no adjudication of this court; but similar provisions to ours are found in the Constitutions of nearly all of the states of the Union, and we avail ourselves of some of the decisions of other states where the present question was considered. In *Iowa Sav. & L. Asso. v. Heidt*, 107 Iowa, 297, 43 L. R. A. 689, 70 Am. St. Rep. 197, 77 N. W. 1050, it is held that "statutes exempting building and loan associations from the operation of the usury law are not unconstitutional." On page, 303, 107 Iowa, page 692, 43 L. R. A., page 202, 70 Am. St. Rep., page 1052 of 77 N. W. in the opinion of the court, by Waterman, J., it is said: "First, it is said that the building and loan law of the state is unconstitutional because it is class legislation. Some of the arguments advanced in support of this claim assail rather the policy of such statutes than the power to enact them. In theory these institutions are profit shar-

ing. The amounts directly paid for the use of money go indirectly to the benefit of the stockholders through the increase in the value of their shares. Where the loans are confined to shareholders, we can see good reason for exempting such associations from the operation of the usury law. That the constitutional power exists to make the exemption we think is without serious doubt." In *Zenith Bldg. & L. Asso. v. Heimbach*, 77 Minn. 97, 79 N. W. 609-611, the supreme court of that state says: "It has been assumed by this court in several cases that the provisions of the statute . . . exempting building associations from the operation of our usury laws were constitutional, but the question was not directly raised or decided. In this case the defendant urges that such statutes are class legislation, and therefore unconstitutional. The operations of building and loan associations proper, when they adhere to the basic principles of their organization, differ so radically from ordinary loan transactions as to afford a proper basis for classification, and to justify the legislature in making a separate class of them; hence a statutory exemption of them from the operation of usury laws is constitutional. This proposition is sustained on principle and the great weight of authority, and we hold the statutes here in question constitutional." In November, 1899, the supreme court of Indiana, in the case of *International Bldg. & L. Asso. No. 2 v. Wall*, 153 Ind. 554, 55 N. E. 431, held that "the act of 1875 (Rev. Stat. 1881, § 3407), authorizing building associations, when loanable funds are on hand, to make loans to that 'member who shall take the same upon the terms most favorable to the company,' and declaring that premiums, fines, and interest on premiums should not be deemed usurious, does not contravene Const. art. 1. § 23, and art. 4, § 22, which prohibit the granting of special privileges and the passage of special laws relating to interest; since, under the essential nature of the contract, the member stands in the dual relationship of lender and borrower." The same court, in the month preceding, in *Security Sav. & L. Asso. v. Elbert*, 153 Ind. 198, 54 N. E. 753, made a similar holding, from which we need not quote. In *Archer v. Baltimore Bldg. & L. Asso.* 45 W. Va. 37, 30 S. E. 241, the supreme court of appeals of West Virginia held: "2. Building associations are authorized to adopt by-laws fixing a minimum premium at which to award loans to their members, such premiums to be deducted from the loans in advance or paid in periodical instalments. 3. Section 26, chap. 54, Code [1899], in so far as it exempts building

associations from the operation of the general law in relation to usury, is not unconstitutional." The opinion of the court in that case is a valuable contribution to the law of such associations. We cite, as bearing upon both provisions of our Constitution said to have been violated in this case, *Vermont Loan & T. Co. v. Whithed*, 2 N. D. 83, 49 N. W. 318. The case is a thorough discussion of each of the grounds contended for by the plaintiff in error, and is in harmony with the other cases from which we have quoted. In *People's Bldg. & L. Asso. v. Billing*, 104 Mich. 186, 191, 62 N. W. 373, 374, the supreme court of Michigan says: "It is contended that the statute authorizing the formation of building and loan associations is class legislation and unconstitutional. This contention is not supported by the authorities. On the contrary, such legislation has been upheld in a number of the states, while we have found but a single authority sustaining the contention of defendants' counsel,—the case of *Henderson Bldg. & L. Asso. v. Johnson*, 88 Ky. 191, 3 L. R. A. 289, 10 S. W. 787. We think the reasoning of the authorities which sustain the constitutionality of such statutes is in accord with sound principle and the previous holdings of this court. As was said in *Holmes v. Smythe*, 100 Ill. 413: 'The statute under which the association was organized is a general law, applicable to all the citizens of the state who choose to bring themselves within the relations and circumstances provided for by it.'"

Each of the above cases cited others for its support, until the array of authority is almost unbroken, and truly formidable. Most of them are modern decisions, and made in the light of rapidly increasing financial business and needs of our people. We are fully satisfied that our statute which is assailed in this case contravenes no provision of our Constitution.

The judgment of the Circuit Court is affirmed.

Charles IRWIN *et al.*, *Pliffs. in Err.*,
v.

Metta Elma JACQUES *et al.*

(71 Ohio St. 395.)

*1. In an action to contest a will on the sole ground that it was not signed at the end thereof as required by § 5916, Rev. Stat., its construction or interpretation is not

*Headnotes by the COURT.

NOTE.—As to sufficiency of signature to will when not placed at the end of the instrument, see also, in this series, *Warwick v. Warwick*, 6 L. R. A. 775; *Re Conway*, 11 L. R. A. 796; *Re Booth*, 12 L. R. A. 452; and *Re Andrews*, 48 L. R. A. 662.
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a subject for the consideration of the court or the jury, the only question being whether the will has been executed in substantial compliance with the formalities prescribed by the statute.

2. Where, in the trial of such issue, the original will is in evidence, and shows the body of it to be written on horizontal lines of several pages of foolscap or legal-cap paper, so that all its items and provisions are in consecutive order to the end on the last page, and under which the testator's signature appears; and it also shows that there is written in the margin of the last page to the left of and separated from the body of the instrument a dispositive clause, extending lengthwise of the page from near the bottom to near the top thereof, and in no manner connected with the body of the instrument by any words, mark, or character as a reference to indicate where the marginal matter is to be read in relation to the other provisions; and it is established by the testimony that the marginal matter was written after all the other provisions, at the request of the testator, and before he attached his signature under the body of the will,—then such will is not signed at its end, as required by statute and it is invalid for that reason.

3. Where such will and such facts are before the jury, it is not error for the court to charge as follows: "If you find from the evidence that the matter written upon the margin of the page upon which the testator's signature appears was written before the will was signed by him, and that the testator intended such written matter on the margin to be a part of his will, then I say to you such will is not signed at the end as required by statute, and your verdict should be for the plaintiffs, and that the paper writing produced is not the last will and testament of Henry Irwin."

(January 31, 1905.)

ERROR to the Circuit Court for Muskingum County to review a judgment affirming a judgment of the Court of Common Pleas in plaintiffs' favor in a proceeding to contest the will of Henry Irwin, deceased. *Affirmed.*

Statement by Price, J.:

One of the defendants in error, Metta Elma Jacques, commenced an action in the court of common pleas against the plaintiffs in error and others, contesting the will of Henry Irwin, who died on the 14th day of February, 1901. The instrument purporting to be the will bears date November 4, 1898, and it was presented for probate in the probate court of Muskingum county on the 23d day of February, 1901, and it was admitted to probate on the 9th day of March, 1901. Letters testamentary were issued thereon to Dr. Lewis H. Marshall, who thereupon qualified. After stating the relation which each of the parties to the suit sustained to the testator, and the provisions of the will, the petition alleges as

the only ground of contest the following: "Plaintiff further says that the said paper writing or pretended will is not the valid last will and testament of said decedent, because the same is not executed and is not signed at the end thereof as required by the statute of Ohio." Those defendants who are now plaintiffs in error, except the executor, answered the petition, and averred that the said paper writing purporting to be the last will and testament of the said Henry Irwin is his last will and testament, and that is was duly executed and signed at the end thereof as required by the statute of Ohio; and they denied each and every averment in the amended petition that is inconsistent with the statements of the answer.

The issue being made up by these pleadings, the case came to trial by jury, and the defendant introduced and read to the jury the will of Henry Irwin, deceased, and the probate thereof, as shown by the records of the probate court, and then rested. The original will consisted of six pages of foolscap or legal-cap paper, the last page of which exhibits the ground of controversy. The printed record contains a facsimile of the page, except that a red line, which could not be photographed, ran from top to bottom of the page, passing between the word "estate" at the end of the marginal clause, and the word "attest" and parallel with the longer sides of the page.

The following is a facsimile of the will:

*Whereunto I hereby subscribe
my name the fourth day of Nov-
ember Eighteen Hundred and
ninety eight: This 4th of Nov 1898*

*Signed Sealed. Published & declared
by the said Henry Irwin as and
for his last will and Testament
in the presence of us who at his
request and in the presence of each
other have subscribed our names
as witnesses Thereto. This 4th Nov
1898*

*This instrument of writing is written
upon six pages of paper*

Attest Witnesses Names.

*his
Henry + Brown
mark.*

*Witnesses Names
Daniel J. Hurd
Mary Hurd*

*My will is that my child or heir not take with this my last
will and Testament- I have 62 demitchees cut-out and I have not-
have on close of my estate.*

The contestants introduced evidence tending to prove that after Dr. Marshall, the scrivener, had written the various provisions of the will and the attesting clause, he read the same over to the testator, who expressed his satisfaction with what had been written, but refused to sign it as his will until another provision was inserted to the effect that, if any child or heir should be dissatisfied with his will, he should be "cut out," and should have no part of his estate. To express his intention and desire in this respect, the clause on the left-hand margin of the last page was written by the scrivener, and when this was read to him he expressed his satisfaction, and then signed the body of the will under the attesting clause, and his signature was witnessed by two witnesses. Other material facts bearing on the subject appear in the opinion.

At the close of the testimony and arguments the court charged the jury as follows: "This is a proceeding known as a contest of a will. You will have the will with you in your retirement. Your verdict will be either that the paper purporting to be the last will and testament of Henry Irwin, deceased, is or that it is not the valid last will and testament of the said decedent. I give you this simple instruction to govern you in the consideration of this case. If you find from the evidence that the matter written upon the margin of the page upon which the testator's signature appears was written before the will was signed by him, and that the testator intended such written matter on the margin to be a part of his will, then I say to you such will was not signed at the end as required by statute, and your verdict should be for the plaintiff, and that the paper writing produced is not the last will and testament of Henry Irwin." This charge was excepted to by the defendants. The jury returned a verdict for the plaintiff, finding that said paper produced is not the valid last will and testament of Henry Irwin, deceased. The court overruled a motion for new trial, and rendered judgment on the verdict. A bill of exceptions was taken, and error prosecuted in the circuit court, where the judgment was affirmed. Error is prosecuted in this court to reverse both judgments.

Messrs. F. H. Southard and Granger & Granger, for plaintiffs in error:

The will of Henry Irwin was signed at the end thereof.

The policy of the law to sustain wills generates a liberal construction of the statutes stating the formal requirements for a will, and frowns upon a strict and literal construction, which would have the tendency of overthrowing wills.

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A substantial compliance with the formalities prescribed by the statute is sufficient.

29 Am. & Eng. Enc. Law, pp. 161-168. notes; Page, Wills, §§ 183-187; *Chaffee v. Baptist. Missionary Convention*, 10 Paige, 85, 40 Am. Dec. 225; *Gilbert v. Knor*, 52 N. Y. 131; *Sisters of Charity v. Kelly*, 67 N. Y. 409; *Brown v. Clark*, 77 N. Y. 369; *Younger v. Duffie*, 94 N. Y. 535, 46 Am. Rep. 156; *Turner v. Scott*, 51 Pa. 126; *Baker's Appeal*, 107 Pa. 381, 52 Am. Rep. 478; *Barnevall v. Murrell*, 108 Ala. 366, 18 So. 831; *Slater v. Cave*, 3 Ohio St. 80.

In determining whether a will is signed at its end, each case as it arises presents its own controlling circumstances, and will be decided, keeping in mind the intention of the legislators in enacting the requirement: namely, Is it so signed as to adopt the whole instrument after it is finished, as to prevent interpolation, unauthorised addition, improper alteration, fraud? If it is so signed, it is signed at the end, within the legislative intent, although not literally and exactly at the end.

Tonnele v. Hall, 4 N. Y. 140; *McGuire v. Kerr*, 2 Bradf. 244; *Younger v. Duffie*, 94 N. Y. 535, 46 Am. Rep. 156; *Hays v. Harden*, 6 Pa. 413; *Willis v. Lowe*, 5 Notes of Cases, 429; *Glancy v. Glancy*, 17 Ohio St. 134; *Baker v. Baker*, 51 Ohio St. 217, 37 N. E. 125; *Slater v. Cave*, 3 Ohio St. 80.

It does not seem possible to treat the sixth page otherwise than that the marginal clause be considered as belonging in the will immediately after the subscribing clause at the top of the page, and that the mark of the testator is placed at the end of the document.

Baker v. Baker, 51 Ohio St. 222, 37 N. E. 125; *Sisters of Charity v. Kelly*, 67 N. Y. 409.

That the jury is the tribunal to determine and decide whether or not a paper writing in controversy is a will, see—

Rev. Stat. § 5861; *Cooch v. Cooch*, 18 Ohio, 146; *Walker v. Walker*, 14 Ohio St. 157, 82 Am. Dec. 474; *Holt v. Lamb*, 17 Ohio St. 374; *Dew v. Reid*, 52 Ohio St. 519, 40 N. E. 718.

Messrs. F. A. Durban and E. R. Meyer, for defendants in error:

The power to make a will is not an incident of the *jus disponendi*. It is conferred by statute.

Doyle v. Doyle, 50 Ohio St. 345, 34 N. E. 166.

The marginal matter in this case is a dispositive clause, and its operation would affect the disposition of the testator's property.

Bradford v. Bradford, 19 Ohio St. 546, 2 Am. Rep. 419.

The statute requires the will to be signed

at the end. It means that when the paper is taken up and read the whole will will naturally be read before the testator's signature is reached.

Keyl v. Feuchter, 56 Ohio St. 424, 47 N. E. 140; *Marshall v. Mason*, 176 Mass. 216, 79 Am. St. Rep. 305, 57 N. E. 340; *Glancy v. Glancy*, 17 Ohio St. 134; *Wineland's Appeal*, 118 Pa. 37, 4 Am. St. Rep. 571, 12 Atl. 301; *Re Andrews*, 162 N. Y. 1, 48 L. R. A. 662, 76 Am. St. Rep. 294, 56 N. E. 529.

Price, J., delivered the opinion of the court:

We are not required in this case to ascertain the intention of the testator in making the will before us, nor to construe its provisions, but to determine whether it was executed according to law. The undisputed testimony shows, and counsel for the parties agree, that it was the intention of Henry Irwin to make the marginal clause found on the sixth or last page a part of that instrument. As appears from the intended facsimile in our statement of the case, the body of the alleged will was written on the horizontal lines of the pages, but leaving, at least on the sixth or last page, a considerable blank space to the left of the ends of the lines. The signatures of the testator and the witnesses follow below the attestation clause, and are under the body of the instrument, and at its end, as if no marginal clause had been inserted. This marginal clause commences on the left edge of the page, running lengthwise therewith from near the bottom to near the top thereof. The lower end of the clause is 1 inch or more below and to the left of the names of the witnesses, and about 3 inches below and to the left of the signature of the testator. Between the lower end of the clause and the names of the witnesses there is a blank space of about 1 inch, and between it and the attestation clause the blank space is about 1½ inches in width. Between the subscribing and attestation clauses on the horizontal lines there is a blank space of four lines.

We think we have sufficiently described the location and relative situation of this clause, which constitutes the ground of the contest. Its history otherwise is very brief, and may be summed up in a few words. The will, as originally prepared by the scrivener, occupied, and yet occupies, six pages of foolscap or legal cap paper, on the last of which are the signatures of the testator and the witnesses. It was read over to the testator, and he expressed his satisfaction with its provisions so far as they had been written, but refused to sign until another provision should be inserted. He desired to prevent attack on his will and

litigation that might follow at the instance of dissatisfied heirs, legatees, or devisees, and to this end requested that there be inserted a provision that would impose something of a penalty upon any person who would controvert the disposition he was making of the property. The marginal clause referred to was written in the space and in the manner just described, and it reads: "My will is that any child or heir not taken with this my last will and testament shall be disinherited, cut out, and shall have not one doll of my estate." With this in, the will was read to the testator, and he expressed his satisfaction, and signed it at the place before stated. The party or parties contesting the will alleged in the petition and contended at the trial that the will was void, because it was not signed at the end thereof.

On this subject our statute (Rev. Stat. § 5916) provides: "Every last will and testament (except nuncupative wills hereinafter provided for) shall be in writing, and may be hand written or typewritten, and such will shall be signed at the end thereof by the party making the same, or by some other person in his presence and by his express direction, and shall be attested," etc. We have seen that the testator intended the clause written on the margin to be a part of his will, and that he declined to sign until it or its equivalent was inserted somewhere in the instrument, but he did not direct where it should be inserted. If the language so written has no legal significance, and has no effect on the other provisions of the will, it might be treated as mere unimportant surplusage, as in *Baker v. Baker*, 51 Ohio St. 217, 37 N. E. 125. In that case the testator, after having signed the instrument disposing of his property and appointing his sister-in-law as the executrix, which was duly witnessed, wrote under the attestation clause the words, "My sister-in-law is not required to give bond when probated," and signed his name thereto, which was not attested. It was held that these words could not affect the construction of the will, were not dispositive in character, and that the will was signed at the end thereof. But if the clause is of a dispositive character, and may, in certain events, change the course of some or all of his property, its location in the instrument is of essential importance in deciding whether the will is signed at its end. Although the language of the marginal clause is crude, and is the expression of an illiterate man, yet its meaning is not doubtful when coupled with the directions of the testator which led to its insertion. According to the undisputed testimony, he was determined that his estate should be settled in peace,

and according to his will, and that if any "child or heir" should not "take" with his will, he should be cut off without one dollar of his estate. Clearly, the clause has a dispositive character, and this seems to be admitted by counsel for plaintiff in error. In *Bradford v. Bradford*, 19 Ohio St. 546, 2 Am. Rep. 419, it is held that "a condition in a will whereby the testator excludes any one of his heirs who 'goes to law to break his will' from any part or share of his estate is valid and binding; and effect will be given to it as well in respect to bequests of personality as to devises of real estate." However, they urge that, while this is true, the beneficiaries under the will have all united to uphold it, and that this appears by their joint answer in this case, wherein they allege that the paper produced as the last will and testament of Henry Irwin is his valid last will and testament. Therefore, it is argued, the marginal clause can never have any chance for operation, and is no longer of consequence, in the settlement of the estate. But it must be borne in mind that the will was executed without any knowledge of what the "child or heir" might subsequently decide to do, and hence the intense desire to provide for the contingency. The will became operative when admitted to probate. The testator died, leaving the instrument just as he had made it, containing within its scope this dispositive clause, and no pleading could be filed in a case contesting the will that would change its dispositive character. It must be judged as it stood when inserted in the will, and as it was probated with the balance of the instrument.

We therefore recur to the question, Was the will signed at its end, as required by statute? The trial court submitted the question to the jury in a very concise instruction, which covered the whole law of the case. It is this: "If you find from the evidence that the matter written upon the margin of the page upon which the testator's signature appears was written before the will was signed by him, and that the testator intended such written matter on the margin to be a part of his will, then I say to you such will was not signed at the end, as required by statute, and your verdict should be for the plaintiff, and that the paper writing produced is not the last will and testament of Henry Irwin." This brief charge implied that the matter written in the margin is of a dispositive character, which was the decision of a question of law for the consideration of the court. The only questions of fact for the determination of the jury were: (1) Was the matter upon the margin written there before the testator signed the will? (2) Did he intend

such written matter to be part of his will? If "Yes" is answered to both inquiries, then the statute is interposed by the court, and the jury was told that the will was not signed at its end. This charge is severely criticized by counsel as a usurpation of the province of the jury, whereby the court, and not the jury, decided the contest. We cannot concur in this criticism. It is true that, after a will has been admitted to probate, and is contested under the statute in the court of common pleas, the will and the record of its probate make a *prima facie* case for the contestees, and the burden is upon the contestants to overthrow the will, and that the ground of contest, as a general rule, is to be determined by the jury. But the court does not lose its jurisdiction to decide all questions of law that may arise on the trial. The questions of fact were left to the jury, and the court properly charged as to the legal effect of their findings. There could be no mistake as to the findings of fact, for it was clear and beyond dispute that the marginal matter was written before the testator signed the instrument, and that he not only intended, but demanded, that it be written somewhere in his will. The will was with the jury, and hence the charge of the court only applied the law to the facts, and this was the duty of the court. In *Wagner v. Ziegler*, 44 Ohio St. 59, 4 N. E. 705, this court held that, "in the trial of the contest of a will, where the testimony introduced does not tend to prove the issue on the part of the plaintiffs, showing incapacity of the decedent to make a will at the time the will was made, it is not error for the court, at the conclusion of the plaintiffs' testimony, to direct the jury to find a verdict sustaining the will." That holding simply means that the powers, duties, and functions of the court in the trial of will contests are practically the same as in other jury trials of civil cases.

Taking the instrument, the original last page containing the marginal matter as there found, and the undisputed evidence as to its insertion before the signing by the testator and the witnesses, and that the testator intended it to be a part of the will, did the trial court correctly apply the law? We think it did. The statute (§ 5916) prescribes the formalities to be observed in the execution of a will, and we think the intention of the legislature, as thus expressed, is very plain. The history of this and similar legislation evinces a purpose that such dispositions of property, real or personal, should be so executed as to prevent, as far as practicable, unauthorized and fraudulent additions and interlineations before or after the execution of the will. There should be some continuity in the expression of the

testator's wishes, and, if a part of the will is aside from the continuity of the language, such as the marginal matter in this case, there should be some word or character used as a reference to the place it should occupy in relation to the other provisions, so that the end of the will may be ascertained. The authorities sustain this degree of liberality towards the work of incompetent persons who sometimes are called upon to draft wills, but beyond this the rule of strict observance of the statute is seldom, if ever, relaxed. The lawmaking body (our legislature) has the power to set the guards against fraudulent dealings with such solemn instruments, and it has done so, and we are not at liberty to disregard them.

The will before us has no reference by word or character to the marginal clause. There is nothing to show in what connection, if any, it should be read in relation to the other items or provisions. It might be taken as a stray but for the parol testimony adduced at the trial to the effect that it was written before the testator signed the will, and that he intended it to form a part of it. Evidently it was the last provision written, and was so written immediately before the testator and witnesses signed their names. The witnesses so testify, and the jury so found. Is the marginal clause the end of the will? If so, the testator did not sign it at the end thereof. There were blank marginal spaces on each of the six pages constituting the whole instrument. On the last or sixth page a space of four lines was left for testator's signature just preceding the attestation clause. There is no reference by word or character in that space to indicate that the marginal matter belongs there; nor is there any mark or reference in the entire instrument to indicate where it belongs. Hence, beginning at the first page, and reading the items and provisions in their consecutive order, down to the signature, we see nothing else until we have concluded, and then see off to the left on the margin the matter quoted, standing alone and unidentified. Yet the testimony and agreement are that the testator intended this matter to be a part of his will. As said in *Baker's Appeal*, 107 Pa. 381-392, 52 Am. Rep. 478: "Where, however the continuity of a writing otherwise complete it attempted to be broken by the insertion into it of a clause or paragraph written upon the same or a different page or sheet, the clause to be inserted must be plainly referred to, and be susceptible also of certain identification. The reference must, as we have already shown, be complete in the body of the will. The testator's intention cannot otherwise appear." An inspection of the will in contest here and a consideration of

the uncontroverted facts lead us to the conclusion that the charge of the trial court is sound, and that the will was not signed at its end.

Bearing upon the construction of our statute and similar statutes of other states may be cited *Glancy v. Glancy*, 17 Ohio St. 135; *Keyl v. Feuchter*, 56 Ohio St. 424, 47 N. E. 140; *Sisters of Charity v. Kelly*, 67 N. Y. 409; *Re O'Neil*, 91 N. Y. 516; *Re Conway*, 124 N. Y. 455, 11 L. R. A. 796, 26 N. E. 1028; *Wineland's Appeal*, 118 Pa. 37, 4 Am. St. Rep. 571, 12 Atl. 301; *Re Andrews*, 162 N. Y. 1, 48 L. R. A. 662, 76 Am. St. Rep. 294, 56 N. E. 529; *Re Walker*, 110 Cal. 387, 30 L. R. A. 460, 52 Am. St. Rep. 104, 42 Pac. 815. The doctrine of these cases seems to be that, as to the manner of the execution of a will, the courts look to the intention of the legislature, and not the intention of the testator. The intention of the latter is sought in the interpretation of wills, but the purpose of the legislation must be looked to as to the formalities prescribed for their execution. The application of these rules may in some cases work hardship, and thwart an intended disposition of property; but the safeguards cannot be frittered away because of the unfortunate work of an incompetent who has been given the grave responsibility of writing a will. The protection of wills from fraudulent and unauthorized changes, additions, and interlineations seems to be the paramount object of the statute, and its enforcement will no doubt work the greater good.

The judgment of the Circuit Court is affirmed.

Spear, Ch. J., and Davis, Shauck, Crew, and Summers, JJ., concur.

STATE of Ohio *ex rel.* Jean D. McKELL
v.

Huston T. ROBINS, Judge of Probate.
(71 Ohio St. 273.)

*The act of the general assembly entitled
"An Act to Amend § 3641c of the Revised
Statutes of Ohio, Relating to the Giving of

*Headnote by the COURT.

NOTE.—A new phase of the paternal effort of the legislature to interfere with private rights of contract finds condemnation in the above case. The statute, in addition to the ordinary objections to such legislation which are discussed in the *notes* to *People v. Orange County Road Constr. Co.* 65 L. R. A. 33, and *State v. Loomis*, 21 L. R. A. 789, incorporates the more objectionable feature of conferring a special privilege on surety companies. Upon this branch of the case there is not enough material in addition to that cited in the case to make annotation desirable.

Surety Bonds," passed April 20, 1904, (97 Ohio Laws, 182), is unconstitutional and void, being in violation of article 1, §§ 1 and 2, of the Constitution.

(January 3, 1905.)

APPPLICATION for a writ of mandamus to compel defendant to accept an administratrix's bond. *Allowed.*

The facts are stated in the opinion.

Mr. Lawrence T. Neal, for relator:

A necessary requirement of all legislation is that it should not be unequal or partial in its character and effect.

Bill of Rights, Ohio Const. art. 1, § 2; *State ex rel. Schwartz v. Ferris*, 53 Ohio St. 314, 30 L. R. A. 218, 41 N. E. 579; *Hocking Valley Coal Co. v. Rosser*, 53 Ohio St. 12, 29 L. R. A. 386, 53 Am. St. Rep. 622, 41 N. E. 263; *Harmon v. State*, 66 Ohio St. 249, 58 L. R. A. 618, 64 N. E. 117; *State v. Gravett*, 65 Ohio St. 289, 55 L. R. A. 791, 87 Am. St. Rep. 605, 62 N. E. 325; *Williams v. Donough*, 65 Ohio St. 499, 56 L. R. A. 766, 63 N. E. 84; *State v. Gardner*, 58 Ohio St. 599, 41 L. R. A. 689, 65 Am. St. Rep. 785, 51 N. E. 136; *Atchison & N. R. Co. v. Baty*, 6 Neb. 37, 29 Am. Rep. 356; *Wilder v. Chicago & W. M. R. Co.* 70 Mich. 382, 38 N. W. 289; *Grand Rapids Chair Co. v. Runnels*, 77 Mich. 104, 43 N. W. 1006; *Durkee v. Janesville*, 28 Wis. 464, 9 Am. Rep. 500; *Holden v. James*, 11 Mass. 396, 6 Am. Dec. 174; *Missouri v. Lewis (Bowman v. Lewis)* 101 U. S. 22, 25 L. ed. 989; *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; *Com. use of Titusville v. Clark*, 195 Pa. 634, 57 L. R. A. 348, 86 Am. St. Rep. 694, 46 Atl. 286.

The legislature has made a discrimination in favor of surety companies by actually assuming to delegate to these companies the power to determine what kind of a bond or undertaking any party or officer, other than the superintendent of insurance and notaries public, and executors, administrators, guardians, trustees, and other fiduciaries whose bonds do not exceed \$2000 in amount, shall be required to give. It is, in effect, a delegation of legislative power to surety companies; and the Constitution and a wise public policy alike forbid the delegation of any such power to a private corporation.

Harmon v. State, 66 Ohio St. 249, 58 L. R. A. 618, 64 N. E. 117; *People ex rel. Shumway v. Bennett*, 29 Mich. 451, 18 Am. Rep. 107; *Senate of Happy Home Clubs v. Ipena County*, 99 Mich. 117, 23 L. R. A. L. R. A.

144, 57 N. W. 1101; *Fogg v. Union Bank*, 1 Baxt. 435.

Courts of record have the inherent power to determine judicially as to the sufficiency of any security to be required from persons subject to their order. This power is beyond legislative interference.

Re American Bkg. & T. Co. 17 Pa. Co. Ct. 274, 4 Pa. Dist. R. 757.

The right to acquire, possess, and protect property is guaranteed to the people of this state by our Bill of Rights, and is declared by it to be one of the inalienable rights of man.

Ohio Const. Bill of Rights, art. 1, § 1.

This right includes the right to make and enforce contracts.

Palmer v. Tingle, 55 Ohio St. 423, 45 N. E. 313; *Cleveland v. Clements Bros. Constr. Co.* 67 Ohio St. 219, 59 L. R. A. 775, 93 Am. St. Rep. 670, 65 N. E. 885; *Braceville Coal Co. v. People*, 147 Ill. 66, 22 L. R. A. 340, 37 Am. St. Rep. 206, 35 N. E. 62; *Ritchie v. People*, 155 Ill. 98, 29 L. R. A. 79, 46 Am. St. Rep. 315, 40 N. E. 454; *Fiske v. People*, 188 Ill. 200, 52 L. R. A. 291, 58 N. E. 985; *People v. Gillson*, 109 N. Y. 389, 4 Am. St. Rep. 465, 17 N. E. 343.

If an officer pleads the authority of an unconstitutional act for the nonperformance or violation of his duty, it will not prevent the issuing of a writ of mandamus.

Board of Liquidation v. McComb, 92 U. S. 532, 23 L. ed. 625; *Davis v. Gray*, 16 Wall. 220, 21 L. ed. 453; *Osborn v. Bank of United States*, 9 Wheat. 859, 6 L. ed. 233; *Norton v. Shelby County*, 118 U. S. 426, 30 L. ed. 178, 6 Sup. Ct. Rep. 1121.

Courts and judges will be required by mandamus to approve and accept bonds, as well as to perform other duties imposed upon them by law.

State ex rel. Adamson v. Lafayette County, 41 Mo. 225; *Beck v. Jackson*, 43 Mo. 117; *Coats v. State*, 133 Ind. 36, 32 N. E. 737; *Bosely v. Woodruff County Court*, 28 Ark. 306; *State ex rel. Truesdell v. Plambeck*, 36 Neb. 401, 54 N. W. 667; *Cox v. Rich*, 24 Kan. 20; *Church v. United States*, 13 App. D. C. 264.

Messrs. Goulder, Holding, & Masten, for respondent:

The act does not violate the 14th Amendment to the Federal Constitution.

Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; *Missouri P. R. Co. v. Humes*, 115 U. S. 512, 29 L. ed. 463, 6 Sup. Ct. Rep. 110; *Lawton v. Steele*, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499; *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96.

The general assembly may make reason-

able classification of the subjects to which legislation shall apply.

State v. Nelson, 52 Ohio St. 88, 26 L. R. A. 317, 39 N. E. 22; *Lawton v. Steele*, 152 U. S. 133, 38 L. E. 385, 14 Sup. Ct. Rep. 499; *Minot v. Winthrop*, 162 Mass. 113, 26 L. R. A. 259, 38 N. E. 512; *Day v. Lawrence*, 167 Mass. 371, 45 N. E. 751.

The right to receive property is not an absolute one, to be enjoyed without the imposition of any burdens upon the property by the state, such as are reasonably necessary for the general welfare and protection of the public and those interested in the estate.

State ex rel. Schwartz v. Ferris, 53 Ohio St. 325, 30 L. R. A. 218, 41 N. E. 579.

The propriety of regulating the giving of bonds has been recognized in this state during its existence; and, if the evils which have resulted from the giving of personal security in the large amounts have become known to the general assembly, as they have to every citizen of the state, why should it not be permitted, in the exercise of the discretion which it has, to attempt to cure those evils by placing needful safeguards against loss to those whose property the law places in the hands of another, without being charged with attempting to create a favored class?

If the subject-matter of legislation be not prohibited by the Constitution, the provisions of the law must be clearly unreasonable before the courts will declare it invalid.

Sunbury & E. R. Co. v. Cooper, 33 Pa. 283; *Clark's Estate*, 195 Pa. 524, 48 L. R. A. 587, 46 Atl. 127.

It is competent for the legislature to decide as to what security shall be sufficient in such cases.

Johnson v. Johnson, 88 Ky. 279, 11 S. W. 5; *Coleman v. Parrott*, 11 Ky. L. Rep. 947, 13 S. W. 525; *Wallace v. Scoles*, 6 Ohio, 429; *Love v. Sheffelin*, 7 Fla. 40; *Tessier v. Crowley*, 17 Neb. 210, 22 N. W. 422.

The general assembly has power to pass laws for the conduct of the affairs of the offices created and existing, to designate the duties of public officials and the manner in which they shall be performed, and, before any person elected or appointed shall enter upon the performance of the trust, provide for the giving of bonds as security for the faithful performance according to the oath of office and the laws of the state.

State use of Knox County v. Blake, 2 Ohio St. 147; *Ex parte Buckley*, 53 Ala. 42; *Schuff v. Pflanz*, 99 Ky. 97, 35 S. W. 279.

Davis, J., delivered the opinion of the court:

The relator, Jean D. McKell, was appointed administratrix of her late husband's estate,

and she was ordered to give bond in the sum of \$200,000. The relator immediately tendered a bond in the required amount, but the probate judge refused to accept it, solely on the ground that it was signed by personal sureties, and not by a surety company, as required by the act of the general assembly entitled "An Act to Amend § 3641c of the Revised Statutes of Ohio, Relating to the Giving of Surety Bonds," passed April 20, 1904 (97 Ohio Laws, 182). The probate judge was fully satisfied that the bond was sufficient in every other respect. The relator, therefore, prays for writ of mandamus commanding the respondent, the probate judge, to approve and accept the bond so tendered. The respondent answers that he did not accept and approve said bond because the said statute provides that any administrator's bond in excess of \$2,000 must be executed and guaranteed by a surety company or companies authorized by the laws of Ohio to guarantee the fidelity of persons holding places of public or private trust, unless the person required to give such bond shall make affidavit that he has applied to such surety company or companies for such bond and has been refused or rejected; that the bond offered by relator being in excess of \$2,000 and not being executed and guaranteed by such surety company or companies, but by personal sureties, and no affidavit, as provided by law, having been filed, he was prohibited by the aforesaid statute from accepting or approving said bond. To this answer the relator has filed a demurrer. It is insisted on behalf of the relator in support of the demurrer that this statute is unconstitutional.

The provisions of the act are so interdependent and interwoven that the whole act must stand or fall together. It provides that the execution of all bonds for the faithful performance of official or fiduciary duties, or the faithful keeping, applying, or accounting for funds or property, or for one or more of such purposes, with certain exceptions, is thereby required to be by a surety company or companies. We are therefore not able clearly to perceive that the general assembly intended in any event to require bonds to be executed by a surety company or companies in any one of the classes mentioned, to the exclusion of another. This being so, if the statute is void as to administrators or other fiduciaries, it is void as to public officers, and, if void as to public officers, it is void as to fiduciaries, and the contention here made as to the bond of an administratrix involves as well the question as to the validity of the bonds of public officers.

Liberty to contract is one of the inalienable

ble rights of man which is guaranteed to every citizen by the Bill of Rights (Const. art. 1, § 1), subject only to such restrictions as clearly appear to be for the general welfare. The mere fact that the general assembly has enacted a law which narrows the liberty of contract as to the whole people, or as to a class of citizens, is not decisive. If it were so, the constitutional guaranty might be made a dead letter by bills passed through the procurement of interested parties, or in response to the demands of extremists in times of popular excitement. It is the province of the courts to determine whether a given statute infringes the Constitution, which is the supreme law; and therefore it is within the province of the courts to decide whether the common welfare demands a restriction of the right of individuals to contract freely for their own benefit or convenience. It is the undoubted right of the general assembly to require bonds to be given "for the faithful performance of official or fiduciary duties, or the faithful keeping, applying, or accounting for funds or property, or for one or more such purposes," and to make reasonable requirements as to execution, approval, and security to effectuate fully the purposes thereof. But, unless the public welfare should justify and require it, the power of the general assembly is so limited by the Constitution (art. 1, § 1) that it cannot deny or restrict the liberty of the officer or fiduciary to obtain or contract for a bond on terms satisfactory to himself. Before the enactment of this statute an officer was at liberty to present a bond signed by personal sureties or by a surety company or companies, as his own interest or convenience might suggest. The right of choice between the classes of sureties is now denied him. It is now made compulsory upon him to give bond signed by surety companies, and personal security is in effect abolished. It is very plain that the security companies may be greatly benefited by this legislation, but an adequate corresponding benefit or protection to the general public, such as would justify such a radical and drastic limitation upon individual rights, is not apparent. The amount of loss to the state, county, township, or municipality on official bonds, or to the beneficiaries under bonds of executors, administrators, guardians, trustees, or other fiduciaries, comparatively speaking, is trifling. Indeed, it is possible that the loss is no greater than would result when the bonds shall be signed exclusively by incorporated companies, which sometimes become insolvent as individuals do. It is true that the loss, if any default occurs, falls on the sureties, and that there have been spe-

cial acts of the general assembly for the relief of sureties in cases in which it was claimed that the principal was not in fault. Some of these acts are meritorious, many of them improvident, and most of them unconstitutional. It argues nothing in favor of the legislation which is assailed here that sureties sometimes seek to escape from the consequences of their contract of suretyship. The fact remains that those whose interests are protected by personal bond rarely lose. We have not been advised of any necessity for, or general demand for, the abolition of personal security and the substitution thereof of corporate security, and the reasons which we have given persuade us that the public welfare does not require it.

But further, not only is the person who gives a bond deprived of the right to obtain it of whomsoever and however he pleases, subject only to the requirement that it really protects and secures the obligee, but the obligee is compelled to pay a security company for protection. The burden is not put on the officer or fiduciary to give protection, but on the public or estate to obtain protection. The requirement of the statute is that an executor, administrator, guardian, trustee, or other fiduciary shall give a security company as bondsman, and that the estate shall pay for it, which is a taking of private property for private uses without compensation; and that a public officer shall give bond with a surety company as surety, the premium to be paid out of the public funds. The effect of the latter provision is to require the state, county, township, or municipality to pay to the enrichment of security companies each year vastly more than it would lose by defaulting public officials; and it thus becomes evident that it would be more economical for the public to become its own insurer of the good faith of its officials, which would result, perhaps, in no official bond in any case. It does not seem to us, therefore, that any part of this statute was promoted by considerations of public necessity or public welfare, and thence it follows that it is an unconstitutional restriction upon the liberty to contract which is guaranteed by article 1, § 1, of the Constitution of this state.

It is contended on the part of the respondent that no citizen has an inalienable right to act as a legal representative or public officer; that the general assembly has power to provide for the descent and distribution of estates, and for the appointment and qualifications of executors and administrators, including the giving of bonds; that the general assembly has power to prescribe the manner of election to a public

office, and the qualifications therefor; and that it logically follows from these premises that the general assembly has authority to determine the kind and sufficiency of the security to be given. The general soundness of this argument is not to be questioned; but it is pressing the conclusion too far to maintain that the legislature may go beyond the purpose of the security to be given, and may require things to be done which do not increase the protection of the obligee, which abridge individual rights without contributing to the general welfare, and which enrich a designated class of sureties to the exclusion of all others. Such a conclusion would lead not only to violation of article 1, § 1, of our Constitution, as already shown, but of article 1, § 2, also, which declares that "government is instituted for the equal protection and benefit" of the people. This basic principle of the Constitution is also violated when executors, administrators, guardians, trustees, or other fiduciaries whose bonds are fixed at an amount not in excess of \$2,000 are excepted from the operation of the act. No good reason for this discrimination is apparent. If personal bonds are a public evil they should be abolished altogether. If bonds signed by surety companies are the only ones fit for the security of estates, all estates should be permitted to enjoy equally

both the protection and the benefit. If any discrimination were necessary, it would seem to be the better way to allow all estates, large or small, to procure personal bonds or security-company bonds as they might be able or might prefer, instead of compelling the larger estates to pay tribute to the surety companies, while the smaller estates, presumably less desirable risks to the surety companies, are still permitted to give either personal bonds or bonds of security companies,—if the latter do not reject their applications, as the statute provides that they may do.

We do not regard any of the cases cited for the respondent as decisive of the question now before us. The issue raised here is whether the general assembly may make security by security companies exclusive and compulsory. It is not whether corporations may be authorized to secure bonds, nor whether the person giving bond may at his option give a bond signed either by personal securities or by security companies.

Our conclusion is that the statute is unconstitutional, and it is accordingly ordered and adjudged that the demurrer to the answer be sustained and a *peremptory writ of mandamus* allowed.

Spear, Ch. J., and Shauck, Price, and Crew, JJ., concur.

MICHIGAN SUPREME COURT.

TEAGAN TRANSPORTATION COMPANY,
Plff. in Certiorari,

v.

BOARD OF ASSESSORS OF DETROIT.

DULUTH & ATLANTIC TRANSPORTATION COMPANY, *Plff. in Certiorari,*

v.

SAME.

WOLVERINE STEAMSHIP COMPANY.
Plff. in Certiorari,

v.

SAME.

(.....Mich.....)

1. The holding of annual stockholders' and directors' meetings at the

place named in the articles of incorporation as the home of the corporation is not its principal business, so as to make it taxable there, where substantially all the business for which it is organized is transacted and its funds kept at another place, under a statute providing that a corporation shall be taxable where its office is located by its charter, provided its business is actually transacted there, but that, if it shall establish its principal office in another place, then the place where it transacts its principal business shall be deemed its residence for purposes of taxation.

2. A statute making all the property of corporations engaged in maritime commerce or navigation taxable only at the place designated in their charters as their general office for business violates a constitutional provision requiring a uniform rate of taxation.

NOTE.—The situs, for taxing purposes, of tangible personal property of domestic corporations in the United States.

I. Scope of note, 431.

II. Essentials of jurisdiction, 432.

III. Localization of corporations, 433.

IV. Principal office as domicile.

a. In general, 433.

b. Of railroads, 436.

V. Effect of certificate of incorporation on the question of domicile, 437.

VI. Legislative power to fix the situs of property for taxation, 441.

VII. Personal property physically present in the taxing jurisdiction, 442.

VIII. Tangible property outside the state, 443.

IX. Particular classes of property.

a. Railroad rolling stock, 445.

b. Water craft, 447.

X. Conclusion, 450.

I. Scope of note.

This note is confined to the consideration of

3. The legislature has no power partially to exempt from taxation the property of corporations engaged in maritime commerce and navigation where the Constitution requires a uniform rule of taxation.
4. In determining the situs of personal property for taxation, the legislature must regard the constitutional requirement of uniformity.

(January 30, 1905.)

PETITIONS for writs of certiorari to review judgments of the Circuit Court for Wayne County denying writs of mandamus to compel the board of assessors of the city of Detroit to strike an assessment upon plaintiffs' property from the rolls. *Affirmed.* The facts are stated in the opinion.

Messrs. Graves & Hatch and Angell, Boynton, McMillan, & Bodman for plaintiffs in certiorari.

Mr. Timothy E. Tarsney for defendant in certiorari.

Carpenter, J., delivered the opinion of the court:

Writs of certiorari bring before us for review three mandamus proceedings determined in the circuit court for the county of Wayne. Each of the above-named relators is a corporation engaged in transporting goods by water, and each asks for a mandamus (which the lower court refused to grant) compelling respondent to strike from the assessment rolls an assessment on ac-

cases decided in the United States concerning the legal places of taxation of the personal property of corporations in the states of their origin. It does not deal in general with any questions concerning the taxability of foreign corporations on account of personal property which they own and use outside of their own states, except to present some cases illustrative of the main theme, or those where peculiar circumstances have made a particular corporation, for all practical purposes, a domestic one in a state in which it did not originate.

Neither does this note include cases relating to inheritance or succession taxes involving corporate, intangible property interests; and it takes no account of the situs of shares of stock in foreign corporations at the domicile of the stockholder, whether that stockholder be a natural person or a domestic corporation.

The purpose of the note is to present the cases pertinent to the maxim, *Mobilia personam sequuntur*, in its application to taxing a corporation in its home jurisdiction and within the limits of the United States.

None of the ground gone over in previous notes in this series respecting the taxation of American corporations is again occupied. For this reason, the reader is referred to the note to *Sandford v. Poe*, 60 L. R. A. 641, on *Corporate taxation and the commerce clause*, where the subject of the state power to tax the instruments of commerce and the validity of taxes thereon were treated at length; also to the note on *Constitutional equality in the United States in relation to corporate taxation*, to *Bacon v. State Tax Comrs.* 60 L. R. A. 321; also to that part of the note on *Taxation of corporate franchises in the United States*, to *Louisville Tobacco Warehouse Co. v. Kentucky*, 57 L. R. A. 33, div. VII. c. 3, pp. 88 *et seq.*, dealing with the inquiry as to what constitutes doing business or employing capital in a state so as to render a corporation amenable to its tax laws; also to the part of the note on the *Taxation of manufacturing corporations in the United States*, to *Williams v. Warren*, 64 L. R. A. 33, divs. IV. and V. a, pp. 52-54, dealing with the right of a manufacturing corporation to exemption from taxation in the place where it holds its meetings of stockholders and directors and maintains an office; and finally, to the cases relating to the taxation of railroad property, apparently personal but treated as real, or *vice versa*, with a corresponding effect upon the question of 69 L. R. A.

situs, in the note on *Nature of railroad,—whether real estate or personal property*, to *Webster Lumber Co. v. Keystone Lumber & Min. Co.* 66 L. R. A. 33, div. XI, pp. 51 *et seq.*

The questions relating to the taxation of the poles and wires of telegraph, telephone, light, heat, and power companies, street railways, gas and water mains, service pipes, and hydrants are considered to lie outside of the point under annotation, and need not be sought here.

For a case holding the mains, pipes, and hydrants of a water company assessable for taxes as part of the real estate and a note of the pertinent decisions, consult *Oskaloosa Water Co. v. Board of Equalization*, 15 L. R. A. 296. Another case in point in that behalf is *Shelbyville Water Co. v. Illinois*, 16 L. R. A. 505.

For a note upon the residence of corporations for the purposes of jurisdiction in the Federal courts, the reader is referred to *Stephens v. St. Louis & S. F. R. Co.* 14 L. R. A. 184.

II. Essentials of jurisdiction.

It is unnecessary to cite more than a few especially apt cases to the point that either the corporation itself, or the property of it taxed, or both, to warrant a state in levying a tax, must be under the dominion of the assessing government.

The authority of a legislature to impose taxes extends over all persons and property within the sphere of its territorial jurisdiction; but where there is jurisdiction neither as to persons nor property the imposition of a tax will be *ultra vires* and void. *St. Louis v. Wiggins Ferry Co.* 11 Wall. 425, 20 L. ed. 192.

Unless either the property or its owner is within a state, that state has no jurisdiction to tax either the one or the other. *Dallinger v. Rapello*, 14 Fed. 32; *Yost v. Lake Erie Transp. Co.* 50 C. C. 511, 112 Fed. 746.

Whether or not choses in action may, under certain circumstances, be subjected to taxation in a state where their owner has no domicile, as several cases decide, they cannot be so taxed unless they have acquired what may be aptly called a business situs at the place of taxation. *Herron v. Keeran*, 59 Ind. 476, 26 Am. Rep. 87.

We readily concede, said the Tennessee supreme court upon a recent occasion, when considering the situs of a corporation, that under the Codes of all civilized nations jurisdiction ends where neither the person nor property

count of certain steamboats owned by it. Said steamboats during the season are engaged in navigating the Great Lakes, and are seldom in the city of Detroit. In the articles of incorporation of the first two relators the township of Hamtramack, Wayne county, is named as the location of their general offices for business. In the articles of incorporation of the last-named relator, viz., the Wolverine Steamship Company, the village of Utica, Macomb county, is named as the location of its general office for business. At the place named as the location of their offices relators never had any regular business office. All they did there was to use the office or house of another for their annual stockholders' meeting, and in case of the Teagan Transporta-

tion Company also for the first meeting of the directors elected at said stockholders' meeting. Substantially all the other business of said Teagan Transportation Company which was not done on its boats was done in the city of Detroit. The management of the ordinary business of the last two named relators was carried on by their agent at Cleveland. Their funds, however, except those required "to pay the ordinary running expenses of the boats and the officers and crew," were received and disbursed by their treasurer at Detroit; and it may be inferred that this official at Detroit decided any business matters "outside the ordinary course" not necessary—that is, as we infer, which he may decide to be not

of the defendant is within the territorial jurisdiction of the court. *Young v. South Tredegar Iron Co.* 85 Tenn. 189, 2 S. W. 202.

III. Localization of corporations.

The popular sense of the term "inhabitant" is the same as resident, or one who lives in a place. An inhabitant necessarily implies an habitation. It requires no reflection to determine that in this sense a corporation resides nowhere. *Hartford F. Ins. Co. v. Hartford*, 3 Conn. 15.

A corporation as a mere ideal existence subsisting only in contemplation of law, an invisible being, can have no locality, occupy no space, and hence can have no dwelling place, unless the legislature explicitly or impliedly establishes one for it in a particular place. *Wood v. Hartford F. Ins. Co.* 13 Conn. 202, 38 Am. Dec. 395.

The term "inhabitant" includes a corporation occupying an office or building in a town, ward, or village, and there conducting the business for which it was incorporated. Especially is this so with reference to the burdens of taxation for public purposes. *Ontario Bank v. Bunnell*, 10 Wend. 186.

A corporation is an artificial being, and has no dwelling either in its office, its warehouse, its depots, or its ships. Its domicile is in the legal jurisdiction of its origin irrespective of the residence of its officers or the place where its business is transacted. It retains that domicile until it ceases to exist. *Merrick v. Van Santvoord*, 34 N. Y. 208.

A corporation can have no legal existence in any state except by the law of that state. The legal entity or person which exists by force of law when a corporation is created can have no existence beyond the limits of the state which brought it to life and endowed it with its faculties and powers. *Ohio & M. R. Co. v. Wheeler*, 1 Black, 286, 17 L. ed. 130.

In the jurisprudence of the United States a corporation is regarded as a citizen of the state which created it. It has no faculty to emigrate. It can exercise its franchise extraterritorially only so far as may be permitted by the policy or comity of other sovereignties. *St. Louis v. Wiggins Ferry Co.* 11 Wall. 425, 20 L. ed. 192.

For the purposes of jurisdiction of the Federal courts corporations are conclusively presumed to be residents of the states in which they were created, and of every district in the 69 L. R. A.

state of their domicile wherein they own property and exercise their functions, regardless of the location of their principal offices. *East Tennessee V. & G. R. Co. v. Atlanta & F. R. Co.* 15 L. R. A. 109, 49 Fed. 608; *Locomotive Engine Safety Truck Co. v. Erie R. Co.* 10 Blatch. 307, Fed. Cas. No. 8, 453.

When a foreign railroad is authorized to extend and operate its line in another state by a statute thereof, and does so in conformity therewith, it becomes to all intents and purposes, and subject to the same taxation as if, a corporation originating in such state. *Com. v. Cleveland, P. & A. R. Co.* 29 Pa. 370.

When the question is one of taxation it is conceded that railway corporations are persons within the meaning of the provisions of the Constitution of the United States in respect of due process of law and the equal protection of the laws. *Cleveland, C. C. & St. L. R. Co. v. Backus*, 183 Ind. 513, 18 L. R. A. 729, 33 N. E. 421.

And they are also conceded to be persons within the meaning of a state constitutional provision giving every man a remedy by due course of law for injury to person, property, or fame. *Ibid.*

The decisions that corporations are persons, and are deemed to have a local habitation, residence, or domicile for the purposes of taxation, are harmonious. It is unnecessary to cite them upon this point here; they were exhibited in the writer's note on *Constitutional equality in the United States in relation to corporate taxation*, div. VII., p. 330, appended to the case of *Bacon v. State Tax Comrs.* 60 L. R. A. 321.

IV. Principal office as domicile.

a. In general.

In the absence of a statute, the rule is that personality is to be taxed where the owner resides. *Walton County v. Morgan County*, 120 Ga. 548, 48 S. E. 243.

Personal property, *prima facie*, is returnable for taxation where the owner resides. *Morgan County v. Walton County*, 121 Ga. 659, 40 S. E. 776.

It is the rule, subject to some qualifications, that personal property, with respect of its taxability, follows the residence of the owner. *Sangamon & M. R. Co. v. Morgan County*, 14 28

necessary—to submit to the board of directors.

The question of whether relators' property is taxable in the city of Detroit depends upon the constitutional validity and construction of § 3834, Comp. Laws 1897. That section reads: "All corporate property, except where some other provision is made by law, shall be assessed to the corporation as to a natural person, in the name of the corporation. The place where its office is located in its articles of incorporation shall be deemed its residence: Provided, its business is actually transacted at such office; but if it shall establish its principal office in any other place than the place named in its articles of incorporation, then the place where it transacts its prin-

icipal business shall be deemed its residence for all the purposes of this act. If there be no principal office in this state, then at the place in this state where such corporation or agent transacts business: Provided further, that all the personal property of all corporations heretofore or hereafter organized under the laws of this state for the purpose of engaging in maritime commerce or navigation shall be assessed only in the city, village, or township which is stated in their original articles of association or in any amendment thereof heretofore or hereafter made to be the location of their general office for business." This section was § 11 of the general tax law passed in 1893. See act No. 206, p. 358, Acts 1893. As originally enacted, the section contained

Ill. 184, 56 Am. Dec. 497; *Kennedy v. St. Louis, V. & T. H. R. Co.* 62 Ill. 395.

It is the general rule of law that the domicile of the owner is the place where, by a legal fiction, his personal property is regarded as having its situs, and where it is to be taxed. *Herron v. Keeran*, 59 Ind. 472, 28 Am. Rep. 87.

The place where the business of a merchant is carried on is where he keeps for sale the merchandise in which he deals, not where he purchases or temporarily stores it; and that is its situs for taxation under a statute requiring the personal property pertaining to the business of a merchant to be listed for taxation in the town or district where his business is carried on. *Minneapolis & N. Elevator Co. v. Clay County*, 60 Minn. 522, 63 N. W. 101.

A debt has its situs at the residence of the creditor, and constitutes a portion of his estate there; consequently, for the purposes of taxation both the creditor and the debt are within the jurisdiction of the state which contains that residence. *Kirtland v. Hotchkiss*, 100 U. S. 497, 25 L. ed. 562.

The residence of a corporation is for most legal purposes where its chief office or place of business is, and, except where it is by law otherwise provided, its personal taxes should be paid in that jurisdiction. *Frankfort v. Stone*, 22 Ky. L. Rep. 502, 58 S. W. 373.

A corporation is taxable at its principal place of business under a statute requiring the owner of personal property to be assessed in the town he inhabits. *Portland v. Union Mut. L. Ins. Co.* 79 Me. 231, 9 Atl. 613.

The rule is that personal property, except as otherwise required, shall be listed and assessed for taxation in the county, town, or district where the owner resides, which in the case of a domestic corporation is the place where its principal office or place of business is located. *Minneapolis & N. Elevator Co. v. Clay County*, 60 Minn. 522, 63 N. W. 101.

So far as concerns the taxation of personal property incapable of an actual situs separate from the person or domicile of its owner, a corporation must be considered to reside where its principal office and works are located and its business is transacted. *Pacific R. Co. v. Cass County*, 53 Mo. 17.

The proposition is undoubtedly true that where a corporation has its residence there its personal property is liable to assessment and taxation, if the law has prescribed no dif-

ferent rule or regulation upon the subject. *State ex rel. Kansas City, St. J. & C. B. R. Co. v. Severance*, 55 Mo. 378.

As a general rule a private corporation will be held to reside in the town where its principal office is established. *State, Warren Mfg. Co., Prosecutors, v. Warford*, 37 N. J. L. 397.

A corporation must be deemed to have a residence at the place where its place of business is. *Conroe v. National Protection Ins. Co.* 10 How. Pr. 403.

The capital or personal property of a domestic corporation in New York is assessable in the ward where the principal financial business of the company is transacted, or, if there is no such office, then in the town or ward where are carried on the corporate operations. *People ex rel. Oswego Canal Co. v. Oswego, & Thorp. & C.* 678.

A corporation is embraced by a statute requiring local assessors to set down in the assessment roll all taxable personal property of each person in the taxing district above his debts. *People ex rel. Cornell S. B. Co. v. Dederick*, 161 N. Y. 195, 55 N. E. 927.

A domestic corporation is taxable upon its personal property in the city where it has its principal office, under a statute declaring all property in the state and all personal property belonging to the inhabitants thereof liable to taxation. *Tripp v. Merchants' Mut. F. Ins. Co.* 12 R. I. 435.

The personal property belonging to a corporation, and not composing a part of its capital stock which is otherwise provided for, is liable to be taxed where the corporation has its place of business, under a revenue law by which all personal property, except in certain enumerated and noninclusive cases, must be assessed to the owner in the town he inhabits. *Augusta Bank v. Augusta*, 36 Me. 255; *Portland, S. & P. R. Co. v. Saco*, 60 Me. 196.

A corporation is an inhabitant only at its domicile in its own state. A statute directing all personal property in or out of the state to be assessed to the owner in the city or town he inhabits does not warrant the assessment of a foreign insurance company with a local office. *Boston Invest. Co. v. Boston*, 158 Mass. 461, 33 N. E. 580.

Taxes which are by law collectible only from residents of the districts in which they are assessed are void when levied upon a corporation whose principal place of business is out-

no special provision for the taxation of property of corporations engaged in navigation. The proviso relating to the taxation of such property (the last proviso above quoted) was put in the section by amendment in 1895. See act No. 229, p. 520, of the Public Acts of 1895. It is obvious that, if this proviso is constitutional, relators' property was not taxable in Detroit, but was taxable at the place named for the location of its general office for business. The contention of respondent's counsel that this property is taxable in Detroit compels them to affirm these two propositions: (1) That the proviso is unconstitutional; (2) that the statute, with the proviso eliminated, properly construed, makes their property taxable in the city of Detroit.

side of such district. *Green Mountain Stock Ranching Co. v. Savage*, 15 Mont. 189, 38 Pac. 940.

When a statute requires the personal estate of corporations to be assessed in the townships or wards where their principal offices are, a town wherein in the past the principal office of a railroad company was, is indisputably the proper town to assess it for personal taxes, after its secretary's office is set up in another part of such town, and therein are kept the company's safe and books, and there its annual elections are held,—especially when there is no proof that the company has any other office. *State, Warren R. Co. Prosecutor, v. Person*, 32 N. J. L. 134.

When a statute requires all property to be assessed in the township in which the owner, if a natural person, resides, and, if a corporation, has its principal office, an assessment upon a corporation in another township because part of its property is there located is void. *State, Warren Mfg. Co., Prosecutors, v. Warford*, 37 N. J. L. 397; *State, Warren Mfg. Co., Prosecutors, v. Dalrymple*, 56 N. J. L. 449, 28 Atl. 671.

But under a law enacting that taxes on visible personal estate shall be assessed in the township, ward, or taxing district where the property is found, the location of the corporate office is not material. *State, Warren Mfg. Co., Prosecutors, v. Dalrymple*, 56 N. J. L. 449, 28 Atl. 673.

In the state of New York domestic corporations are taxable (except as to real estate) only in the town or ward where their principal office or place of transacting their financial concerns, when they have such an office or place, is located; consequently, when a statute of said state provides for taxing foreign corporations in the same manner as if they were domestic ones upon their investments in business, they can only be taxed in those towns or wards where they have established their principal offices or places for transacting their financial concerns; therefore, a tax upon the chattels, stock, and machinery of a foreign corporation assessed where these are situated in the hands of an agent, when the principal office and place of business of the company is in another and different town or ward, is void. *People ex rel. Ray State Shoe & Leather Co. v. McLean*, 80 N. Y. 254.

A banking association has a situs and is 69 L. R. A.

We will consider each of these questions, but, as we should not determine a statute to be unconstitutional until it is shown that such determination is necessary to a disposition of the case we will consider them in inverse order.

2. If we eliminate the proviso, the constitutionality of which is in question, the statute made the property taxable "where its office is located in its articles of incorporation: . . . Provided, its business is actually transacted at such office; but if it shall establish its principal office "in any other place than the place named in its articles of incorporation, then the place where it transacts its principal business shall be deemed its residence for all the purposes of this act. If there be no principal office in

an inhabitant of the city, town, or ward wherein is located its office of discount and deposit, and there it is taxable regardless of the residences of the associates. *Miner v. Fredonia*, 27 N. Y. 155.

The principal office or place of business of a corporation for the purpose of taxation is where its executive officers actually transact its business, and not the location stated in its articles of incorporation, when the law only requires such articles to contain its name and location, and not its principal office or place of business. And this is so notwithstanding the stockholders and directors held their annual elections at the place named in the articles of incorporation, and such place was therein called its principal office. *Milwaukee S. S. Co. v. Milwaukee*, 83 Wis. 590, 18 L. R. A. 353, 53 N. W. 839.

The situs of intangible property, it must be admitted, is, ordinarily, at the local residence of the corporation within the state where it was incorporated. *Hubbard v. Brush*, 61 Ohio St. 252, 55 N. E. 829, *Scottish Union & N. Ins. Co. v. Bowland*, 196 U. S. 611, 49 L. ed. 619, 25 Sup. Ct. Rep. 345.

The situs of a corporation determines the situs of its share stock. *Young v. South Tredegar Iron Co.* 85 Tenn. 189, 2 S. W. 202.

Intangible corporate property is taxable at the corporate domicile when no statute fixes a different situs, notwithstanding the corporate owner carries on corporate business in several places. *Grundy County v. Tennessee Coal, Iron & R. Co.* 94 Tenn. 295, 29 S. W. 116.

A domestic corporation engaged in mining, refining, and marketing its output in distant states, and having in such states deposits in bank, and debts due it for sales made therein and upon bonds representing investments therein made, is none the less liable to taxation upon its credits, bills and accounts receivable, as a part of its personal estate in the state of its origin, since, for the purpose of taxation, these have their situs at the home office. *People ex rel. United Verde Copper Co. v. Feitner*, 54 App. Div. 217, 66 N. Y. Supp. 769, Affirmed on opinion below in 165 N. Y. 645, 59 N. E. 1120.

The fact that a corporation created by one state to operate a ferry between it and another state maintains in the latter an office in a city thereof, where its president and other principal officers reside, and where its corporate seal and books are kept and the ordinary business meetings of its directors are held, and where

this state, then at the place in this state where such corporation or agent transacts business." The court below, by a majority opinion, denied the mandamus. It must be assumed that the court found as a fact that relators' business was not actually transacted at the office named in their articles of incorporation, and was transacted at the city of Detroit. We cannot review this finding of fact, if there was evidence to support it. We can only inquire whether there was such evidence. It appears that all that was done at the office named in the articles of incorporation was to hold the annual meeting of stockholders, and in the case of the Teagan Transportation Company also the first annual meeting of directors elected by the stockholders. Unless we de-

cide that the holding of annual meetings of stockholders and directors is the principal business of said corporations, we must hold that that principal business was not transacted at the place named in the articles of incorporation. It is true that we held in *Detroit v. Lothrop Estate Co.* 11 Det. L. N. 6, 99 N. W. 9, that the principal business was done at the office where the manager resided, and where the managers and shareholders "meet to do whatever is necessary for them to do." This by no means decides that the annual meeting of stockholders constitutes the principal business of the corporation. To so hold would, in my judgment, clearly frustrate the legislative purpose. It is said that the personal property of the corporation should be tax-

its boats are registered under the Federal navigation laws, is not conclusive as to the domicile of the corporation, and does not necessarily give such boats a situs for the purposes of taxation. *St. Louis v. Wiggins Ferry Co.* 11 Wall. 425, 20 L. ed. 192.

b. Of railroads.

The residence of a domestic railroad company for the purpose of taxing its rolling stock when no statute interferes is where its principal office is located. *Sangamon & M. R. Co. v. Morgan County*, 14 Ill. 164, 56 Am. Dec. 497.

If the legislature has made no rule for the apportionment and distribution of taxes upon railroad rolling stock, its situs for the purpose of taxation is regarded as being at the head office of the company. *Philadelphia, W. & B. R. Co. v. Appeal Tax Court*, 50 Md. 397.

When a railroad line is wholly within the boundaries of a single state, and the legislature thereof has prescribed no rule of distribution and apportionment of track and rolling stock, the only practical place for assessing and taxing it is at its principal business office and station. *Appeal Tax Court v. Western Maryland R. Co.* 50 Md. 274.

The office where the financial and business affairs of a railroad are managed, where its transfer and account books are kept, where its directors hold regular meetings, where its executive officers transact its business, and where its machine and repair shops are located, and its rolling stock kept when not on the road, is, for local taxing purposes, its domicile in the absence of any controlling statute to the contrary. *Orange & A. R. Co. v. Alexandria*, 17 Gratt. 176.

The personal property of a street railroad corporation, when no statute directs otherwise, is assessable for taxes and has its situs for taxation in the city where its head office is situated, even when no part of the line is within the municipal limits. *Detroit v. Wayne Circuit Judge*, 127 Mich. 604, 86 N. W. 1032.

The terminal station of a railroad which extends from one state through another and into a third is not the domicile of the company, when its head office, principal place of business, workshops, and storage depots are in other states. *Philadelphia, W. & B. R. Co. v. Appeal Tax Court*, 50 Md. 397.

For the purpose of distributing for taxation

the unlocated personal property of a railroad corporation among the several counties through which the railway runs, so as to subject that property to county taxation in proper proportions, such corporation, in Georgia, is treated as residing *sub modo* in all the counties along its line of road, and therefore as much in one as in another. *Columbus Southern R. Co. v. Wright*, 89 Ga. 574, 15 S. E. 293; *Sparks v. Macon*, 98 Ga. 301, 25 S. E. 459.

A railroad company, said Davis, J., in *People ex rel. Buffalo & S. Line R. Co. v. Fredericks*, 48 Barb. 173, Affirmed in 48 N. Y. 70, should be considered as a resident of the several towns through which its road extends within the meaning of the New York tax laws. To most corporations a fixed locality is given by their charters as the place of their business operations. This locality they cannot change without the consent of the legislature, and it becomes the legal residence of the corporation. But a different rule prevails with railroads. They are organized for the purpose of constructing a road between specified places, and to conduct their business along such road through its whole extent. They own and occupy the entire road, and in every town thereof through which it passes they have and use all the characteristics of inhabitancy that can attach to a corporation. The locality of the corporation may in such case justly be said to cover the route of which the company has the constant and potential occupancy and use, and to be everywhere co-extensive with the road itself. If it has a principal office or place for transacting the financial concerns of the company, the statute has expressly provided that that shall be the place where its personal property or capital shall be assessed; but without this express enactment the personal property might be assessed in each town where it was owned and used. It is claimed that the locality of the principal office determines for all purposes the legal residence of the corporation. But this does not necessarily follow; because with railroad companies the principal office may be changed at pleasure or convenience to any point along the route. Indeed there is nothing in the law to prevent the company from having its principal office in a railroad car, and running it up and down the track as the exigencies of business may require. The principal office does not, therefore, give locality to the corporation in the sense in which it does to a purely local company.

ble at the place "where its office is located in its articles of incorporation: . . . Provided, its business is actually transacted at such office." By "business" the legislature meant something more than the annual meeting of stockholders and newly chosen directors. If it did not, other and more appropriate language would surely have been used. We come, then, to the question, Had the lower court the right to infer that the relator corporations did such business in the city of Detroit as to make their personal property taxable there? We have shown that substantially all the business of relator the Teagan Transportation Company was done in Detroit; that the treasurer of the other relators resided in Detroit, had (and, it may be inferred, there

exercised) superior powers of business management, and that he there received and disbursed the funds of said corporation except those disbursed for the ordinary running expenses of their boats. If the holding of annual meetings of stockholders and directors did not constitute the principal business of the corporations (and we have stated that in our judgment it did not), it follows that the personal property of the corporation was taxable either at the place where it established an "office for the transaction of its principal business, or, if it had no principal office, then at the place in this state where such corporation transacts business." It is immaterial whether we say that the place where the corporation did its business in Detroit was "its principal

Under a general system for taxing corporate real estate in the towns where it is situated, and in the same manner as the real property of individuals, established by statutes antedating railroads, a railroad right of way in any given town through which the line runs is properly assessed therein as real estate as if the railroad company resided in such town, regardless of the location of its principal office. *People ex rel. Buffalo & S. Line R. Co. v. Barker*, 48 N. Y. 70.

A domestic railroad corporation having its principal office at one of its termini, and whose line runs through several counties, is not taxable solely in the county where that office is located upon its intangible property, for that has its situs for taxation along the whole line of the road. *State v. Austin & N. W. R. Co.* (Tex. Civ. App.) 60 S. W. 886.

This is because this particular, intangible property—franchise, privilege, immunity—is by the laws of Texas not separately taxable apart from the real estate. Writ of Error denied, in 94 Tex. 530, 62 S. W. 1050.

In *State v. Austin & N. W. R. Co.* (Tex. Civ. App.) 60 S. W. 886, Key, J., was unable to agree with his colleagues upon the question of the situs for taxation of the intangible property of domestic railroad corporations, but held it to be at the place where the home office of the company was situated, deeming the decision of the Texas supreme court in *Ferris v. Kimble*, 75 Tex. 476, 12 S. W. 689,—that the intangible personal property of a natural person is taxable only where he resides, taken associated with the constitutional and statutory requirements that all property, unless otherwise required, should be listed and assessed for taxation in the county and municipality where it is situated,—conclusive, as there is a sufficient analogy between the principal office and legal domicile of a corporation and the residence of a natural person to render one the equivalent of the other, and they are generally so regarded.

A writ of error was, however, denied by the Texas supreme court in 94 Tex. 530, 62 S. W. 1050, but this was done by holding the intangible property in question—franchises, privileges, immunities, etc.—under the Texas statutes a part of the realty, and not taxable apart from it.

The situs for taxation of the intangible property of a railroad corporation, unlike that of an individual, is not at the home office where the

directing thought and control of the corporation is, but it is distributed wherever its tangible property is situated and its work is performed. *State v. Austin & N. W. R. Co.* (Tex. Civ. App.) 60 S. W. 886.

Writ of error denied upon the principal ground that the franchises, privileges, and immunities of a railroad are not separately taxable by the laws of Texas apart from the real estate. 94 Tex. 530, 62 S. W. 1050.

V. Effect of certificate of incorporation on the question of domicile.

If the charter of a corporation designates no place of general business of the company, the place where that business is done, and where the personal property used in it is situated, is the situs of such property for taxation. *Atlantic & P. R. Co. v. Lesueur*, 2 Ariz. 428, 1 L. R. A. 244, 2 Inters. Com. Rep. 189, 10 Pac. 157.

And if the corporate charter does not fix the corporate domicile, and the officers and directors hold their meetings in several places, the domicile for taxing purposes will be held to be where the by-laws require the stockholders to hold their meetings. *Grundy County v. Tennessee Coal, Iron & R. Co.* 94 Tenn. 295, 29 S. W. 116.

Where the statute under which it is organized does not require a corporation to name its place of business or the location of its principal office in its articles of association, its residence or domicile for taxing purposes is where its principal place of business is situated. *Austen v. Hudson River Teleph. Co.* 73 Hun, 96, 25 N. Y. Supp. 916.

And when such statute does not require such a naming of the words of the statute, or their obvious equivalents, in respect of the corporate domicile, must be used in the articles of incorporation to have the effect of determining by their own force, against the real facts, the place where a corporation is to be assessed upon its property. *Milwaukee S. S. Co. v. Milwaukee*, 83 Wis. 590, 18 L. R. A. 353, 53 N. W. 839.

A business corporation which is not required to report to the state auditor is to be assessed for taxes, in Kentucky, in the same manner as a natural person, and, natural persons being assessable upon personal property only in the counties where they reside, is to be assessed and taxed upon its personal property only at its

office for the transaction of business," or whether we say that it had no principal office in that city. The fact that it transacted business of the character already stated—business which was obviously more than clerical—made that the place where its personal property was taxable under the hypothesis that the proviso of 1895 was unconstitutional. We come to the consideration of the question.

1. Is the provision that "the personal property of all corporations heretofore or hereafter organized under the laws of this state for the purpose of engaging in maritime commerce or navigation shall be assessed only in the city, village, or township which is stated in their original articles of association or in any amendment

thereof heretofore or hereafter made," constitutional? It will be noticed that this provision is not confined to "vessel property," so called, but extends to all the personal property of corporations "engaged in maritime commerce or navigation." While the personal property of individuals is taxable at their place of residence, and while the property of other corporations is taxable at the place of their principal business office, corporations engaging in maritime commerce or navigation may have their property taxed at whatever place they may choose to designate in their articles of incorporation. As the rate of taxation varies much in different localities, it gives to the latter corporations the right to select that place in which the rate of taxation is low-

legal domicile, which is the place named in its articles of incorporation as its principal place of business. A tax assessed elsewhere is illegal and void. *Langdon Creasey Co. v. Owenton Common School District*, 25 Ky. L. Rep. 823, 76 S. W. 381.

There is a conflict upon this question.

In the state of New York it is the general rule that the principal office of a domestic corporation is, for the purposes of taxation, conclusively fixed by its certificate of incorporation, and that only in the place therein designated can it lawfully be subjected to a personal property tax. *Western Transp. Co. v. Scheu*, 19 N. Y. 408; *Oswego Starch Factory v. Dolloway*, 21 N. Y. 449; *Union S. B. Co. v. Buffalo*, 82 N. Y. 351; *Conroe v. National Protection Ins. Co.* 10 How. Pr. 403; *Hubbard v. National Protection Ins. Co.* 11 How. Pr. 149; *Chesebrough Mfg. Co. v. Coleman*, 44 Hun, 545; *People ex rel. Knickerbocker Press v. Barker*, 87 Hun, 341; 34 N. Y. Supp. 289; *People ex rel. Edison Electric Light Co. v. Barker*, 91 Hun, 594, 30 N. Y. Supp. 844; *People ex rel. India Rubber & G. P. Insulating Co. v. Barker*, 16 Misc. 252, 39 N. Y. Supp. 88.

And in Ohio, where corporations are required by statute (56 Ohio Laws, 113) to designate in their certificates of incorporation "the name of the county or place where the principal office" of the company is situated, such office is the domicile or residence of the corporation. *Pelton v. Northern Transp. Co.* 37 Ohio St. 450.

It is otherwise in Wisconsin and Michigan.

In Wisconsin a statutory requirement that a corporation shall state its "name and location" in its articles of incorporation does not enable a corporation conclusively to fix its principal office or place of business for the purposes of taxation under the tax laws. *Milwaukee S. S. Co. v. Milwaukee*, 83 Wis. 590, 18 L. R. A. 353, 53 N. W. 839.

And in Michigan the act requiring the articles of association of a corporation to state the city, or town and county, in the state where its general office for business is located, will not let it escape taxation upon its personal estate in another place where its actual business is transacted. *Detroit Transp. Co. v. Board of Assessors*, 91 Mich. 382, 51 N. W. 978.

It will be noticed that, inasmuch as the Wisconsin corporation law goes no further than to require corporations organized under it to

state in their certificates of incorporation their names and locations, the decision cited is not irreconcilable with the New York and Ohio cases, but may reasonably be distinguished from them. It is possible, also, but more difficult, to distinguish in the same way the Michigan decision just cited; but the Michigan statute is very much more explicit in its language than that of Wisconsin, and the reasoning upon which the judgment rests discloses radical differences in principle.

The boats and vessels belonging to an Ohio corporation navigating the Great Lakes are taxable as personal property only at the place designated in its certificate of incorporation as that where its principal office is situated, and this notwithstanding the bulk of its business is transacted at a neighboring city in the same county and state, and that the office first occupied by it was removed to another part of the same town because the limits of such city were extended to take in the original office, and it was intended to avoid taxation in such city. *Pelton v. Northern Transp. Co.* 37 Ohio St. 450.

The principal office of a corporation, which constitutes its residence or domicile, said the Ohio supreme court, is not to be determined by the amount of business transacted there or elsewhere, but by the place designated in the certificate of incorporation. And when the corporation has established an office at the place named in such certificate no further inquiry as to the identity of the principal office is admissible. *Ibid.*

On the other hand, the Michigan supreme court, while admitting that a corporation has the same right that an individual has to select its residence, and that it may do so with a view to taxation, argues in this wise: The corporation must have a local habitation, just as the individual must have a residence. This must be an actual, not merely a nominal, one to affect taxation. The individual cannot have a nominal residence in the country and an actual residence in the city, and escape taxation in the city. Neither can the corporation fix its nominal domicile in the country, while its actual domicile for business is in the city, without becoming taxable at the latter place. If it does no business, and in the nature of things can do no business, at the place it selects as its office, except hold annual meetings of stockholders and directors, and actually carries on

est. It thus gives to them the privilege of paying less taxes than must be paid by other corporations or by individuals engaged in precisely the same business. Neither can it be said that individuals have the same right to select the place in which their property will be taxed because it will be taxed at the place in which they may choose to reside. It is true that individuals may determine where they will reside, and corporations in general may determine where they will do business, but, in order to make their property taxable at that place, the individuals must actually reside there (see *Beecher v. Detroit*, 114 Mich. 228, 72 N. W. 206), and the corporations must actually do business there (see *Detroit Transp. Co. v. Board of Assessors*, 91 Mich. 382, 51

N. W. 978). Neither such corporations nor individuals have the same right to determine the situs for the taxation of their personality as this statute undertakes to give to corporations engaged in maritime commerce and navigation.

The question arises whether such a law does not violate the provision contained in § 11, art. 14, of our Constitution, requiring a uniform rule of taxation. In *Western Transp. Co. v. Scheu*, 19 N. Y. 408, and *Oswego Starch Factory v. Dolloway*, 21 N. Y. 449 (cases relied on by relators), laws like that under consideration were enforced; but those cases throw no light on the constitutional question before us. There no constitutional question was raised,—perhaps none could be raised,—and no such

all the business it was incorporated to do at another place, it will be taxable in the latter. *Detroit Transp. Co. v. Board of Assessors*, 91 Mich. 382, 51 N. W. 978.

The facts in the Ohio case of *Pelton v. Northern Transp. Co.* 37 Ohio St. 450, and in the Michigan case of *Detroit Transp. Co. v. Board of Assessors*, 91 Mich. 382, 51 N. W. 978, are indistinguishable, and the wording of the incorporation statutes of both states closely similar, yet the two decisions are diametrically opposed.

The certificate of incorporation of a New York corporation is not the less conclusive as to the corporate domicile for the purposes of the taxation of its personal property and the principal office or place for transacting the financial concerns of the company because it is deliberately chosen to avoid taxation in the place where the actual operations are intended to be conducted. If this is an evil it is for the legislature, not the courts, to apply the remedy. *Union S. B. Co. v. Buffalo*, 82 N. Y. 351.

The certificate is not the less conclusive because the actual principal place of business may be in fact elsewhere. *People ex rel. India Rubber & G. P. Insulating Co. v. Barker*, 16 Misc. 252, 39 N. Y. Supp. 88.

Nor can the conclusive effect of naming in the certificate of incorporation the principal office as respects the situs of the corporate personal property for taxable purposes be avoided by adding in the certificate itself the alternative words, "or at such other place as the stockholders may determine." *People ex rel. Edison Electric Light Co. v. Barker*, 91 Hun, 594, 86 N. Y. Supp. 844.

Independently of some statute authorizing it so to do, a New York corporation cannot establish its principal office elsewhere than in the place named in its certificate of incorporation, so as to affect the situs of its personal property for the purposes of taxation. *Oswego Starch Factory v. Dolloway*, 21 N. Y. 449; *People ex rel. Knickerbocker Press v. Barker*, 87 Hun, 341, 34 N. Y. Supp. 269.

In Ohio, however, a domestic corporation may change its office from one to another part of the town named in its organization certificate as the place of its principal office, without express legislative sanction, and not affect thereby the situs of its personal property for taxation. This is because the statute requiring the corporation to designate in its certificate

of incorporation the name of the county or place where the principal office of such corporation is situated, is sufficiently complied with by naming the town without specifying a building by street and number; hence, the corporation, by stockholders' vote at an annual meeting, may remove from the building where such principal office was established originally to another building in the same town, and the latter building will thereafter be to all intents and purposes, including taxation of the personal property of the corporation, its principal office. *Pelton v. Northern Transp. Co.* 37 Ohio St. 450.

In New York, too, when a corporation is created by a special act of the legislature, and its by-laws designate its principal place of business in a named city, and its manufacturing business is there carried on, although they also provide for a branch office in another city, and stockholders' meetings are always held where the manufacturing is done, while the general executive and financial business of the corporation is transacted, and all of the principal officers reside, without the state, the place of taxation of the personal property of the corporation is in the city where its manufacturing is done, and which its by-laws designate as its principal place of business, and it is not taxable in the city where it has a branch office. *People ex rel. General Electric Co. v. Barker*, 91 Hun, 590, 36 N. Y. Supp. 842.

The case of *Oswego Starch Factory v. Dolloway*, 21 N. Y. 449, was critically examined and explained by Finch, J., in the opinion of the court in *People ex rel. Union Trust Co. v. Coleman*, 126 N. Y. 433, 12 L. R. A. 762, 27 N. E. 818, and, although he carefully limited it and expressed his disagreement with the reasoning of Denio, J., he was at pains to pronounce the decision itself "entirely correct and sound."

Even in New York, however, a corporation whose certificate of organization has stated in due form the name and location of its principal office and place for transacting its financial concerns and carrying on its operations, in one county, may, nevertheless, under some circumstances, be subjected to taxation upon its personal estate in another and different county; as where, after being assessed in the latter county, where it does in fact transact business, its officers appear before the tax commissioners and apply for a reduction, filing a sworn statement that the corporate place of business and place of conducting the corpo-

question was considered by the court. In *Cooley on Taxation*, after demonstrating the proposition that perfect uniformity and perfect equality in taxation are unattainable, it is said: "But when, for any reason, it becomes discriminative between individuals of the class taxed, and selects some for an exceptional burden, the tax is deprived of the necessary element of legal equality, and becomes inadmissible. It is immaterial on what ground the selection is made,—whether it be because of residence in a particular portion of the taxing district, or because the persons selected have been remiss in meeting a former tax for the same purpose, . . . for, if the principle of selection be once admitted, limits cannot be set to it, and it may be made use of for

the purposes of oppression, or even of punishment." 1 *Cooley, Taxn.* 3d ed. p. 260. In the note to this text is the following quotation from the opinion of the court in *Atchison, T. & S. F. R. Co. v. Clark*, 60 Kan. 826, 47 L. R. A. 77, 58 Pac. 477: "Absolute equality in taxation is, of course, unattainable; but a law the manifest purpose and legitimate result of which is discrimination and inequality cannot be sustained." In *Standard Life & Acci. Ins. Co. v. Board of Assessors*, 95 Mich. 466, 55 N. W. 112, this court held that a law which subjected banks and insurance companies to a higher rate of taxation than that of other individuals and corporations was unconstitutional. In *Pingree v. Auditor General*, 120 Mich. 95, 44 L. R. A. 679, 78 N. W. 1025, and *Detroit*

rate financial concerns that year was in their county, and by means thereof securing a reduction. *Re McLean*, 138 N. Y. 158, 20 L. R. A. 339, 33 N. E. 821.

In this case of the personal tax on the Wyandance Brick & Terra Cotta Company, which had filed its certificate of incorporation in Suffolk county, and designated a town therein as the place where its operations were to be carried on, the New York court of appeals sustained the validity of a personal tax assessed in the city of New York, but in doing so neither overruled nor criticized the earlier cases holding the statement in the certificate of incorporation conclusive as to the place for the taxation of personal property. The court grounded its decision, not upon the proposition that the corporation had acquired a legal residence for taxation in New York city,—it deemed consideration of that point unnecessary,—but upon the theory that, by appearing before the assessors and applying for a reduction of the tax, filing for that purpose a sworn statement that its principal office was then in the city of New York, and securing favorable action, the corporation had waived its right to object that its residence was in Suffolk county, and the New York officials consequently without jurisdiction to tax it, and had voluntarily submitted to the jurisdiction of such officials. *Ibid.*

But with great respect to the learned tribunal thus deciding, the reasoning leading to its conclusion is quite unconvincing. The difficulty is that New York city had no jurisdiction to tax the corporation at all,—the reduced amount no more than the original assessment. The liability to Suffolk county was unaffected by the proceedings in New York city. The latter municipality yielded nothing by lowering a tax it had no power to impose at all. No principle of estoppel can possibly come into play. It was open to the court to confess error in its early decisions and overrule them, or to hold that the corporation might acquire a taxable situs in another place than that named in its certificate of incorporation; but this it declined to do. The position of the Michigan supreme court upon this question is more commendable and logical.

A much more tenable ground was taken by the New York supreme court when it sustained a personal tax laid in New York city upon the Couper Milling Company, a domestic corporation whose certificate of organization located

its principal office in Tarrytown in the adjoining county of Westchester. The corporation was assessed in New York city a tax upon its capital stock, and apparently was established there. It made its return to the city tax commissioners, and in it stated upon the oath of one of its executive officers that its principal office or place for transacting its financial business was in the city of New York at a named street address. And when afterwards the receiver of taxes began proceedings to enforce collection of the tax the affidavit in resistance was made by the same corporate officer, and attested the fact that the certificate of incorporation located the principal office in Tarrytown and outside the jurisdiction of the New York tax commissioners. And the court deemed the affidavit neutralized by the prior sworn return, and refused to credit its statements. *McLean v. Couper Milling Co.* 38 N. Y. S. R. 893, 14 N. Y. Supp. 609.

Although a New York corporation has designated, as required by law in its certificate of organization, the place within the state where its principal office is to be and its operations are to be carried on, still, if it actually removes its office to another state, and subsequently makes no sales, manufactures nothing, occupies no premises, pays no rent, employs no workmen, and does no business, in the home state, it will no longer be taxable therein under laws taxing corporate franchises according to the amount of capital stock employed within the state. *People ex rel. Davis-Colby Ore Roaster Co. v. Campbell*, 66 Hun, 146, 21 N. Y. Supp. 7. This case is only an apparent exception to the New York rule that a corporation cannot, without legislative permission, change its domicile. The tax in the case was laid only upon corporations which employed capital and did business in the state. The corporation did neither, and so escaped the tax in spite of having its legal domicile within the state.

In Michigan, notwithstanding the decision in *Detroit Transp. Co. v. Board of Assessors*, 91 Mich. 382, 51 N. W. 978,—that naming in the articles of association of a domestic corporation the town, city, and county in which its general office for business is located does not conclusively fix the place where its principal office in the state is situated, which the tax laws make the residence of the corporation for the purposes of taxation; but that the actual place where the corporation carries on the busi-

Citizens' Street R. Co. v. Detroit, 125 Mich., at page 694, 84 Am. St. Rep. 589, 85 N. W. 96, 86 N. W. 809, similar decisions were made. It follows from these decisions that, if the legislature had attempted to impose an onerous burden of taxation upon the property of corporations engaged in maritime commerce and navigation, such legislation would be void. But the act in question, instead of imposing an onerous burden upon such corporations, confers upon them a special privilege.

The question arises—and this is a question not argued by counsel, but which must necessarily be determined before we adjudge the law unconstitutional—whether the act can be sustained as a partial exemption from taxation. It cannot be supposed that

the legislature enacted this law upon the ground that the property of corporations engaged in maritime commerce and navigation should be exempt. So far as that property consists of vessels engaged in commerce, it in no respect differs from vessels belonging to individuals engaged in commerce. So far as it consists of other tangible or intangible personal property, it in no manner differs from such property belonging to other individuals and corporations. This law cannot be sustained as a law partially exempting property from taxation unless the legislature has power to single out individuals or corporations from the class to which they belong, and capriciously exempt them from taxation. We are forced to say that the legislature has not that power. In 1

ness it was authorized to transact, and not the place named in the certificate, is decisive,—the contents of the certificate do influence the determination of the corporate domicile for the purposes of taxation,—probably sufficiently so to decide a doubtful case.

The character of the business and the purposes of a corporation are important elements in determining its situs for the purposes of taxation. If it can, and actually does, in good faith carry on a considerable part of its business at the office named in its articles of incorporation, it will be taxed there, and not elsewhere, upon its personal property, although it may have other offices in other places. *Detroit v. Lothrop Estate Co.* (Mich.) 99 N. W. 9, 11 Det. L. N. 6.

For a corporation to earn the exemption given by the laws of New Jersey to its domestic manufacturing corporations that carry on business in the state, it is not sufficient for it to make some sales, hold business meetings, maintain a business office, buy materials, and transport goods in that state; it must go further and not stop short of carrying on therein its principal business. *American Glucose Co. v. State*, 43 N. J. Eq. 280, 5 Atl. 803; *Standard Underground Cable Co. v. Atty. Gen.* 40 N. J. Eq. 270, 19 Am. St. Rep. 394, 19 Atl. 733; *State v. Under Ground Cable Co.* (N. J. Eq.) 18 Atl. 581.

VI. Legislative power to fix the situs of property for taxation.

While it is true that in general, and in the absence of an express provision of law to the contrary, personal property follows and has its situs for the purposes of taxation at its owner's domicile; and that the power of a state to tax is limited to persons and property within its jurisdiction,—nevertheless personal property may, by law, be severed for taxation from its owner, and lawfully taxed at the place where it is situated. *Tappan v. Merchants' Nat. Bank*, 19 Wall. 490, 22 L. ed. 189.

A railroad corporation has not a constitutional right to have its intangible personal property taxed only at its place of domicile. It is entirely competent for the legislature to fix its situs for taxation anywhere along the line. *Columbus Southern R. Co. v. Wright*, 151 U. S. 470, 38 L. ed. 238, 14 Sup. Ct. Rep. 396.

It is within the legislative power, by suitable enactment, to establish a situs for personal

property elsewhere than at the place where it is found, and this fact interprets several decisions of the United States Supreme Court. The place in which a vessel is registered is, by law, its home port. That is considered its situs. *Pullman's Palace Car Co. v. Twombly*, 29 Fed. 658.

Personal property may be separated from the domicile of its owner, and have a situs elsewhere for the purposes of taxation. *Mobile v. Baldwin*, 57 Ala. 61, 29 Am. Rep. 712.

Under general laws, the legislature may fix the situs for taxation of personal property, tangible or intangible, provided its classification is not arbitrary. *Walton County v. Morgan County*, 120 Ga. 548, 48 S. E. 243.

Unless restrained by some constitutional provision, the legislature may fix the situs for taxation of all personal property at a place different from the owner's residence. *Morgan County v. Walton County*, 121 Ga. 659, 49 S. E. 776.

It is well settled that it is competent for the legislature to adopt different methods for ascertaining the value of personal property, and to fix the situs of such property for taxation. *Layman v. Iowa Teleph. Co.* 123 Iowa, 591, 99 N. W. 205.

The legislature has unquestionable authority to fix the situs of property for the purpose of taxation. *Langdon-Creasey Co. v. Owenton Common School District*, 25 Ky. L. Rep. 823, 76 S. W. 381.

The personal property of a corporation may be taxed where it is located if the legislature so enacts, although such may not be the domicile of the owner. *Blackstone Mfg. Co. v. Blackstone*, 13 Gray, 488.

It is competent for the legislature to treat railroad rolling stock for the purposes of taxation as real estate, and to make it taxable as such. *Louisville & N. A. R. Co. v. State*, 25 Ind. 177, 87 Am. Dec. 358.

That the situs for the purposes of taxation of personal property follows the domicile of its owner is a convenient legal fiction, but not an unbending and uncontrollable principle of law which the legislature, if it chooses, cannot modify or change. *Columbus Southern R. Co. v. Wright*, 151 U. S. 470, 38 L. ed. 238, 14 Sup. Ct. Rep. 396; *State ex rel. Kansas City, St. J. & C. B. R. Co. v. Severance*, 55 Mo. 378.

The provisions of the general tax law of Georgia (Acts 1900, § 8, p. 29) in requiring

Cooley on Taxation, 3d ed. pp. 381, 382, it is stated: "It is difficult to conceive of a justifiable exemption law which should select single individuals or corporations, or single articles of property, and, taking them out of the class to which they belong, make them the subject of capricious legislative favor. Such favoritism could make no pretense to equality. It would lack the semblance of legitimate tax legislation." See *Hamilton v. Wilson*, 61 Kan. 511, 48 L. R. A. 238, 59 Pac. 1069; *Lexington v. McQuilian*, 9 Dana, 513, 35 Am. Dec. 159. We are bound, therefore, to declare that the constitutional provision requiring uniformity of taxation prevents the legislature enacting a law which it must be presumed was intended to and does tax property at a rate

different from that imposed on all property of precisely the same class. Tested by this principle, the law (the proviso) under consideration is unconstitutional, for, as we have already shown, it clearly taxes (and we must assume that the legislature intended that it should tax) the property of corporations engaged in maritime commerce and navigation at a rate different from all other property of the same class. But it is said that this result is brought about in an unusual manner, viz., by selecting the situs for taxation. And it is earnestly contended that the constitutional requirement of uniformity does not affect the legislative power to determine that situs. If this argument is sound, it leads us to some peculiar consequences. In the case before us

manufacturing corporations whose factory properties are in more than one county to make their returns for taxation to the county in which is the greater value of their real estate and machinery, make final and conclusive the determination of corporate officers as to which county the tax return should be made in, and render void the assessment and levy of taxes in the other county or counties containing part of the manufacturing plant. *Penick v. High Shoals Mfg. Co.* 116 Ga. 819, 43 S. E. 254.

This statute is no longer in force. An act of 1902 required the return to be made to the county containing the main building of the corporation, and provided, in case of a dispute as to the fact, for a bill in the nature of an interpleader to which the corporation and the counties were parties. *Walton County v. Morgan County*, 120 Ga. 548, 48 S. E. 243.

The legislature may, if it so chooses, by statute make a foreign a domestic corporation also, and give to its stock and property a legal situs for all purposes within the state. *Young v. South Tredegar Iron Co.* 85 Tenn. 189, 2 S. W. 202.

While it is true that personal property having a situs within a state, if the legislature so provides, may be taxed in that state, and that the same rule applies between different counties in the same state, yet it is always a question of legislative provision and intent, and, unless some statute so provides, personal property is not taxable save at its owner's domicile. *Com. v. Chesapeake & O. R. Co.* 25 Ky. L. Rep. 1126, 77 S. W. 186.

VII. *Personal property physically present in the taxing jurisdiction.*

A state has undoubted power to tax private property having an actual situs within its territorial limits, and may require the person having possession of it to pay the taxes laid upon it. *Carstairs v. Cochran*, 193 U. S. 10, 48 L. ed. 596, 24 Sup. Ct. Rep. 318.

The general rule is that tangible personal property is taxable by the state in which it is, no matter where may be the domicile of the owner. *Old Dominion S. S. Co. v. Virginia*, 198 U. S. 299, 49 L. ed. 1059, 25 Sup. Ct. Rep. 686.

In the eye of the law personal property for most purposes has no locality. *Mobilia sequuntur personam; immobilia situm. Mobilia non habent sequelam.* In a qualified sense it ac-

companies the owner wherever he goes, and he may deal with it and dispose of it according to the law of his domicile. But this doctrine is not allowed to stand in the way of the taxing power in the locality where the property has its actual situs and the requisite legislative jurisdiction exists. Such property is undoubtedly liable to taxation as if the proprietor were a resident of the same locality. *St. Louis v. Wiggins Ferry Co.* 11 Wall. 425, 20 L. ed. 192.

The situs of a railroad corporation, and, upon general principles, the situs of all its personal property, is in the state which gave it life; but for the purposes of taxation that situs may be fixed in whatever locality the property may be brought and used by its owner by the law of the place where it is found. *Marye v. Baltimore & O. R. Co.* 127 U. S. 117, 32 L. ed. 94, 8 Sup. Ct. Rep. 1037.

Personal property may be separated from its owner, and he may be taxed on its account at the place where it is located, although that is not the owner's domicile, and even if he is neither a citizen nor a resident of the state which imposes the tax. *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 35 L. ed. 613, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876.

Tangible movable property, when made taxable by statute, may be assessed and taxed where it is permanently situated, without regard to its owner's domicile. *Liverpool & L. & G. Ins. Co. v. Board of Assessors*, 44 La. Ann. 760, 16 L. R. A. 56, 11 So. 91.

The general rule that the domicile of the owner is the place of taxation of his personal property is in most states departed from as to chattels having a permanent situs else where. These are taxable where found. *Herron v. Keeran*, 59 Ind. 472, 26 Am. Rep. 87.

For many purposes the situs of personal property is the domicile of the owner, but for the purposes of taxation tangible property has a situs wherever it is found. *Pullman's Palace Car Co. v. Twombly*, 29 Fed. 658.

Thus, railroad rolling stock continuously used in a state acquires a situs there for the purposes of taxation, and may, at the option of such state, be subjected to an equal property tax. *Ibid.*

For many purposes tangible personal property is deemed to have no situs apart from its owner; but this fiction is always made to yield where the purposes of justice require that the

it permits a particular class of corporations to have their property assessed for taxation at that place in the state where taxation is lowest. If relators' argument is sound, it would be competent for the legislature to declare that such property should be taxed at that municipality in the state whose rate of taxation was highest. If such a law were passed, would it not be clear that relators could successfully maintain that their property was taxed at a rate higher than that imposed on other property of the same class? In support of their argument that the requirement for uniformity does not affect the power of the legislature to determine the situs for taxation, relators cite *State, Vanatta, Prosecutor, v. Runyon*, 41 N. J. L. 98; *Crawford v. Linn County*, 11

Or. 482, 5 Pac. 738; *Winston v. Salem*, 131 N. C. 404, 42 S. E. 889. What is decided in *State, Vanatta, Prosecutor, v. Runyon*, 41 N. J. L. 98, is sufficiently shown by the following quotation from that opinion: "The framers of the constitutional amendments did not aim at the impossible. They contented themselves with the accomplishment of so much of good as was attainable under the single requirement that 'property shall be assessed for taxes under general laws, and by uniform rules, according to its true value.' In other respects the legislative power over taxation was left unimpaired. If property be such in its nature as, upon ordinary principles of taxation, to be capable of having a twofold situs for taxation, the legislature may select either

actual status of the movable be regarded, as where dominion is asserted by the government of the place of actual situation of such property. *Yost v. Lake Erie Transp. Co.* 50 C. C. A. 511, 12 Fed. 746.

The power and right of a state to tax property of nonresidents, whether natural or artificial persons, having its situs within the state for the business, convenience, or pleasure of its owners or others, is too well settled to be seriously questioned. It rests upon the just ground that property having the protection, advantage, and benefit of the laws of a state ought to contribute its fair share to the support of the government. *Bain v. Richmond & D. R. Co.* 105 N. C. 363, 8 L. R. A. 299, 3 Inters. Com. Rep. 149, 18 Am. St. Rep. 912, 11 S. E. 311.

The technical principle that the situs of personal property for the purposes of taxation is at the domicile of the owner is the rule as to intangible property, such as bonds, mortgages, and other evidences of debt; but the better opinion seems to be that, in respect of visible, tangible personal property, permanently located in another jurisdiction, this principle does not hold, because such property, goods, chattels, horses, cattle, and other movables are taxable where kept, irrespective of the owner's residence, for legal protection and liability to taxation are reciprocal. But if such property be kept in motion, so that it is impracticable to tax it anywhere except at the owner's domicile, it will have situs for taxation at that place. *Com. v. American Dredging Co.* 122 Pa. 386, 1 L. R. A. 237, 2 Inters. Com. Rep. 221, 9 Am. St. Rep. 116, 15 Atl. 443.

The ancient rule indicated by the maxim, *Mobilia sequuntur personam*, that personal property is to be regarded as subject to the *lex domicilii*, has never been of universal application in this country. The origin of that doctrine dates from an ancient time when jewels and gold principally constituted the movable property, and that could be taken by the owner from one place to another: but such has not been the case in recent times, since in the continued progress of the world the accumulated wealth consists in large proportions of personal property, including, not only jewels and gold, but also a great variety of other personal property, much of which is intangible, and none of which is immediately connected with the person of the owner, yet over all of which it is incumbent upon government to ex-

tend its protection. The constantly increasing variety of such property, perceptible and imperceptible, tangible and intangible, has caused the ancient rule expressed in the maxim to yield more and more to the *lex situs*, and, while it is true that for many purposes personal property is subject to the law of the place of the owner's domicile, still the law is well settled that, for the purposes of taxation, such property has its actual situs where it has been brought and used by its owner, and is subject to the law of that place. Such property may be separated from its owner, and he may be taxed because of it at the place where it is found, although that is not the place of his domicile. *Union Refrigerator Transit Co. v. Lynch*, 18 Utah, 378, 48 L. R. A. 790, 55 Pac. 639.

VIII. *Tangible property outside the state.*

As to intangible personal property it is doubtless the rule that the maxim, *Mobilia personam sequuntur*, applies whenever the taxing power has dominion over the person of the owner.

The state, in taxing one of its own corporations upon its capital stock as representing all its property and assets including its franchises, is entitled to include purchase-money mortgages upon land without the state, which the company has conveyed, since such mortgages have their situs for taxation at the domicile of the corporation. *Com. v. Pennsylvania Coal Co.* 197 Pa. 551, 47 Atl. 740.

It was an open question in the United States Supreme Court, at least as late as 1871, whether the tangible personal property of a domestic corporation, when actually and permanently located in another state, was taxable to it at home. Whether the personal property of a resident of one state situate in another, said that tribunal at that time, can be taxed in the former, is a question which, in this case, we are not called upon to decide. *St. Louis v. Wiggins Ferry Co.* 11 Wall. 425, 20 L. ed. 192.

And in *Walton County v. Morgan County*, 120 Ga. 548, 48 S. E. 243, Lamar, J., as recently as last year (1904) declared that, "while the situs of choses in action for taxation has been several times considered, no case involving the situs of tangible personal property has ever been before this court."

The right of a state to tax its own citizens and domestic corporations on account of their

as the place where the tax shall be laid." Conclusive proof is furnished that the court did not intend by this statement to assert the proposition contended for by relators by other language in the opinion, which I quote: "The object of this constitutional provision was the equalization of taxation in its relation to the several parts of the state, and the prevention of unjust discriminations in the apportionment of the public burdens among its citizens liable to taxation." In *Crawford v. Linn County*, 11 Or. 482, 5 Pac. 738, it was held that the constitutional provision requiring uniformity was not violated by a law which taxed mortgages covering land in two or more counties at the place where the mortgagee resides, and which taxed other mortgages

where the mortgaged land was situated. This decision proceeded upon the ground that the court could not say that this determination of situs was favorable or burdensome to either of these two classes of mortgagees. And it was said: "If the court could know judicially that the one or the other were hurt, it would be sufficient." It is true that it is said in this opinion: "A limitation on the power of the legislature to fix rates of assessment and taxation has nothing to do with the power of the legislature to fix the situs of personal property for purposes of taxation." If by this the court intended to assert the proposition contended for by relators, it has no more than stated a *dictum*. In *Winston v. Salem*, 131 N. C. 404, 42 S. E. 889, it was decided that

tangible personal property situated abroad has in the past often been asserted. If such property is not actually subjected to taxation *in situ*, its owner may be taxed on its account at his home.

Inasmuch as it is a settled rule, whether regarded as one of necessity or convenience, that property must be taxed somewhere, coal mined by a domestic corporation in its own state is taxable therein, although it has been transported to places in other states where it is held for sale,—at least this is so when there is no proof of its taxation at the places where it is actually resting. *Com. v. Pennsylvania Coal Co.* 3 Dauphin Co. Rep. 142.

The situs of tangible personal property for taxing purposes is at the domicile of the owner if temporarily, and not permanently, located, and not taxed locally where it is found. *Com. v. American Dredging Co.* 122 Pa. 386, 1 L. R. A. 237, 2 Inters. Com. Rep. 221, 9 Am. St. Rep. 110, 15 All. 443.

The taxing at the owners' domicils of ships and vessels which, because of their employment in trade and commerce, acquire no situs in foreign ports, as hereafter noted, afford examples of the exercise of power to tax absent property because of jurisdiction to tax those to whom it belongs.

But if tangible personal property not only be absent from its owner's domicile in another state, but actually subjected there to lawful taxation, then the modern view is, the owner is not to be taxed for it at his home.

This is the necessary corollary to the asserted right to tax tangible property where it is located regardless of the owner's domicile.

Taxing the tangible property of a domestic corporation after it has lost its situs in the state by being shipped away never to return, although in the guise of a tax upon the capital stock of the corporation, is depriving such corporation of its property without due process of law, in contravention of the 14th Amendment to the Constitution of the United States. *Delaware, L. & W. R. Co. v. Pennsylvania*, 198 U. S. 341, 49 L. ed. 1077, 25 Sup. Ct. Rep. 669.

When a tax is laid upon the capital stock of a domestic corporation as a property tax upon the aggregate of all its property and assets, tangible and intangible, and a part of that property consists of coal which the corporation owns, has shipped to market in another state, where it rests awaiting sale, and is act-

ually taxed at its resting place, the refusal to deduct the value of such coal from the aggregate capital stock when assessing such tax in the home state is taxing property beyond the jurisdiction of the state, and amounts to depriving the corporation of its property without due process of law in violation of its rights under the Federal Constitution. *Ibid*.

As a state cannot tax tangible property permanently outside its boundaries, even though it belongs to a domestic corporation, so it cannot attain the same end by taxing the enhanced value of the capital stock of such corporation which is beyond the jurisdiction of the state. *Ibid*.

The tangible personal property of a New York corporation which is actually permanently located and taxed in another state is not subject to taxation at the domicile of the company. *People ex rel. Orinoka Mills v. Barker*, 84 App. Div. 469, 83 N. Y. Supp. 33; *Hatch and Patterson, J.J.*, dissenting.

The majority of the court relied upon and followed as controlling, the early decision in *People ex rel. Hoyt v. Tax & A. Comrs.* 23 N. Y. 224, decided when the tax law (1 Rev. Stat. 387, § 1) read, "All lands and personal estate within this state, whether owned by individuals or by corporations, shall be liable to taxation," although the present tax law (Laws 1896, chap. 908, § 3) now reads, "All personal property situated or owned within this state is taxable," and provides (§ 11) for the assessment of all the personal estate of every incorporated company in the tax district where its principal office or place for transacting its financial concerns is situated. The majority thought it difficult to see the object of adding the words "or owned" in reference to the property subject to taxation, and deemed it probably applicable to intangible property, such as credits that have no actual situs. A chattel with a defined situs actually located in a foreign state is not "owned" in New York. It is taxable where it is located. The intent which controlled in the Hoyt Case is not less obvious in the latter statute, and personal property that has an actual situs in another state, and is there subject to taxation, is not taxable in New York notwithstanding its owner actually resides there. The dissenting judges, starting with the assumption that the legislature has power to tax personal property owned by one of its citizens and residents and act-

a law which made personal property generally taxable at one's place of residence and the personal property of partnerships and corporations taxable at their places of business was constitutional. It may be said in this case, as was said in the case of *Crawford v. Linn County*, that the court could not judicially know that this method of taxation discriminated in favor of or against either of these classes of taxpayers. In saying in its opinion that the constitutional provision requiring uniformity left the legislature "free, as always heretofore, to prescribe regulations as to the situs of personal property," the court went far beyond the requirements of the case, and, like the Oregon case, has merely stated a *dictum*.

We are bound to say from this examina-

tion of authorities that there is nothing but *dicta* to sustain relators' contention. We are therefore free to determine on principle whether the constitutional requirement of uniformity affects the legislative authority to determine the situs for the taxation of personal property. This is not a difficult inquiry, especially if the proposition be stated in different, but in equivalent, language, viz., Can the legislature, in determining the situs for the taxation of personal property, disregard the constitutional provision requiring uniformity? The legislature derives its authority to determine the situs for the taxation of personal property,—and it certainly has that authority (see *Detroit v. Board of Assessors* [*Detroit v. Rentz*] 91 Mich. 78, 16 L. R. A. 59, 51 N.

usually having situs outside of the state, because personal property follows the owner's domicile, held that the change of verbiage meant a change of meaning, and was intended to change the rule established by the Hoyt decision.

At the time of writing, this case has not been reported as having been decided by the court of appeals if it was taken there for review.

In the early case of *People ex rel. Hoyt v. Tax & A. Comrs.* 23 N. Y. 224, it was held that the statute of New York (1 Rev. Stat. 387, § 1) making all lands and all personal estate within the state, whether owned by individuals or by corporations, liable to taxation subject to specified exemptions, did not authorize the assessment and taxation of either personal or real property actually located and taxed outside of the state belonging to one of its resident citizens. This holding was supported as follows: We have a system, apparently symmetrical and complete, said the court, according to which all personal estate having an actual situs in this state is brought within the sphere of taxation without regard to the domicile of the owner, with only special exceptions dictated by policy and justice. And if this be the rule of taxation where the situs of the thing to be taxed and the domicile of the owner are different, it is conceded that the opposite rule cannot and does not prevail. Proceeding on this rule, Louisiana and New Jersey very justly imposed a share of their public burdens on the property of the relator situated in those states. The state of New York will do the same thing in respect of citizens of those states having property here, but it is not so unjust to its own citizens as to load them with double burdens by proceeding also upon the opposite principle.

This case is said to have been uniformly followed in that state. *People ex rel. Orlinoka Mills v. Barker*, 84 App. Div. 469, 83 N. Y. Supp. 33.

The doctrine of the cases of *Delaware, L. & W. R. Co. v. Pennsylvania*, 198 U. S. 341, 40 L. ed. 1077, 25 Sup. Ct. Rep. 609, and *People ex rel. Hoyt v. Tax & A. Comrs.* 23 N. Y. 224, has just been reaffirmed, and these cases followed in *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194, 50 L. ed.—26 Sup. Ct. Rep. 36.

IX. Particular classes of property.

a. Railroad rolling stock.

For taxing purposes, railroad rolling stock is personal property, and taxable only at the 69 L. R. A.

head office of the company when there is no statute fixing its situs elsewhere. *Sangamon & M. R. Co. v. Morgan County*, 14 Ill. 163, 56 Am. Dec. 497.

The rolling stock of a domestic railroad corporation, no statute prescribing otherwise, has its situs for taxation at the home office of the company. *Appeal Tax Court v. Northern C. R. Co.* 50 Md. 417.

The rolling stock of a domestic railroad corporation whose line is wholly within the state, whether considered to be personal property or movable fixtures partaking of the nature of real estate, is properly assessed for taxation at the principal office of the company, when the legislature has failed to prescribe some positive rule of distribution and apportionment. *Appeal Tax Court v. Western Maryland R. Co.* 50 Md. 274.

When the workshops and storage depots of a consolidated railroad corporation are without one of the states which its rolling stock regularly enters and leaves in the operation of its road, and the statutes of that state subject to taxation only property permanently located at the places where taxes are imposed, and there is no law for the apportionment and distribution for the purposes of taxation of railroad rolling stock, no valid tax can be laid thereon in such state, because its situs is at the head office of the corporation. *Philadelphia, W. & B. R. Co. v. Appeal Tax Court*, 50 Md. 397.

By the terms of the Maryland assessment act of 1876, railroad rolling stock is assessable for taxes only at the home office or principal place of business of the corporation which owns it, whether that be a domestic or a foreign one, and irrespective of the consideration whether, independent of such statute, railroad rolling stock is real or personal property. *Appeal Tax Court v. Pullman Palace Car Co.* 50 Md. 452.

The rolling stock of a railroad company, although continuously employed by it in operating leased lines in a state other than that which created it, is not taxable in the state where it is used, in the absence of any statute thereof fixing the situs of personal property for taxation elsewhere than at its owner's domicile, for such rolling stock has its situs at the principal office in the home state of the corporation to which it belongs. *Baltimore & O. R. Co. v. Allen*, 22 Fed. 376.

The rolling stock, tools, etc., of a street railroad are no part of the track, but are personal property to be assessed for taxation at the place

W. 787),—not from any express constitutional grant, but from the grant of general authority to legislate. The provision requiring uniformity of taxation is a constitutional limitation on that authority. To contend that in determining such situs the legislature may ignore the constitutional requirement of uniformity is to contend that in exercising its general authority the legislature may ignore the constitutional limitation on that authority. This argument nullifies all constitutional limitations on legislative authority, and is therefore unsound. We are therefore forced to conclude that the legislature, in determining the situs for the taxation of personal property, must regard the constitutional requirement of uniformity, and the disregard of that re-

quirement makes the law under consideration unconstitutional and void. We do not, by our decision, negative relators' claim that it is unjust that their property (which, like much other property similarly located, receives no benefit from the expenditures of municipal tax in Detroit) should contribute toward their payment. Neither do we declare that it is beyond the power of the legislature to enact a law which will remedy this injustice. What we do say is that any such law—unlike that before us—must regard the constitutional requirement of uniformity.

It follows that *the lower court was right in refusing a mandamus, and their decision is affirmed, with costs.*

where the company's principal office is located. *Detroit v. Wayne* Circuit Judge, 127 Mich. 604, 86 N. W. 1032.

While railroad movable property has its situs for taxation in general at the principal office of its owner, yet it is competent for the legislature to change this, and to provide for the appraisal and assessment of all railroad property by a state commission, and for the apportionment of the taxable value thereof among the localities through which the line runs, according to the mileage in each. *Richmond & D. R. Co. v. Alamance*, 84 N. C. 504.

It is perfectly competent for the legislature to say that the rolling stock and machinery of a railroad corporation, which is constantly passing between the termini, shall become part of the road for taxable purposes, and be equally distributed along the line to the counties, cities, and towns according to the length of the road in the respective localities. *State ex rel. Kansas City, St. J. & C. B. R. Co. v. Severance*, 55 Mo. 378.

Notwithstanding a constitutional provision that the personal property of residents of the state shall be subject to taxation in the counties and cities where they reside for the greater part of the fiscal tax year, and not elsewhere, except goods and chattels permanently located in other places, the legislature may make taxable the rolling stock of domestic railroad corporations elsewhere than at the home or principal office of the railroad company, for the constitutional provision refers only to natural persons having power to change their residences at will, which corporations cannot do. *Baltimore, C. & A. R. Co. v. Wicomico County*, 93 Md. 113, 48 Atl. 853.

The legislation upon the subject of taxing railroad rolling stock in the state of Illinois has made such property an exception to the general rule that personal property is taxable only at the place where its owner resides, and has required taxes upon it to be paid *pro rata* in the several counties, towns, and cities through which the road may run. *Kennedy v. St. Louis, V. & T. H. R. Co.* 62 Ill. 395.

The difficulty of assessing railroad property in separate parcels located in distinct cities and townships is almost insuperable. A railroad cannot be regarded as mere land, like farms or building lots; its value depends upon the whole line as a unit used as a thoroughfare and means of transportation. A separate mile or

two of its length is almost valueless by itself. And its rolling stock has no particular location, except a constructive one where the principal office of the railroad is situated, and it would manifestly be unequal to give that place the benefit of taxing the whole of it. *Union P. R. Co. v. Cheyenne* (Union P. R. Co. v. Ryan) 113 U. S. 516, 28 L. ed. 1098, 5 Sup. Ct. Rep. 601.

The situs, for the purposes of taxation, of railroad rolling stock, is where it is habitually used, and if its elements, though constantly shifting, be substantially maintained in equal number and value, the average amount used may be made the basis of the tax. *Atlantic & P. R. Co. v. Lesueur*, 2 Ariz. 428, 1 L. R. A. 244, 2 Inters. Com. Rep. 189, 19 Pac. 157.

Vehicles of transportation used constantly and continuously upon a single run acquire a situs for purposes of taxation, independent and irrespective of the domicile of the owner. *Pullman's Palace Car Co. v. Twombly*, 29 Fed. 658.

The Iowa supreme court decided in *Davenport v. Mississippi & M. R. Co.* 16 Iowa, 349, that railroad rolling stock was not subject to local taxation in the city where the railroad company had its principal office, but its members did not agree upon the reasons for this conclusion. Lowe, J., thought it a part of the road, and not separately taxable; Wright and Dillon, JJ., that it had no situs in the city; and Cole, J., that the legislature had given no authority to the municipality to tax railroad rolling stock.

Afterwards, in *Dubuque v. Illinois C. R. Co.* 39 Iowa, 56, Beck and Day, JJ., held railroad rolling stock to be personal property with a situs for taxation where the company had its principal office; but Miller, Ch. J., opined that it had no situs at any particular point along the line; while Cole, J., the other member of the court, dissented *in toto* from his colleagues.

When a state revenue law in one section provides that the personal property of every street railroad shall be listed and assessed in the political subdivision of the state in which is located its principal place of business, and that its track shall be deemed personal property and listed and assessed as such in the place where it is laid; and in other sections that the like property of railroads shall only be assessed by a state board of equalization,—elevated passenger railways organized under the general railroad act, built partly over streets and in part over private lands leased, purchased, or condemned,

NEBRASKA SUPREME COURT.

STATE of Nebraska *ex rel.* George T. MORTON *et al.*

v.

Peter M. BACK *et al.*

(.....Neb.....)

*1. In the assessment of railway property for municipal purposes situated in cities of the metropolitan class, such as is required to be listed with and assessed by the State Board of Equalization for general revenue purposes under the provisions of §§ 39 and 40 of chap. 77, art. 1, Comp. Stat.

*Headnotes by HOLCOMB, Ch. J.

are assessable as railroads by the state board, and not as street railways by the local assessors. *Knopf v. Lake Street Elev. R. Co.* 197 Ill. 212, 64 N. E. 340. *Magruder, Ch. J.*, dissented because the road was wholly within a single county.

b. *Water craft.*

The general rule is that seagoing vessels and boats navigating interstate waters are only taxable at the domicile of their owners when registered under the Federal navigation laws at the port in the district where that domicile is located, and when they visit other jurisdictions only in the course of trade or for temporary purposes.

A state has no jurisdiction over seagoing vessels for the purposes of taxation, where they are not abiding in the limits so as to become incorporated with other personal property in the state, but are there but temporarily in the course of trade, and where they have no situs at any of its ports by registration and the domicile of their owner. *Hays v. Pacific Mail S. S. Co.* 17 How. 596, 15 L. ed. 254.

It has no jurisdiction to tax as personal property a vessel which regularly visits its port while carrying on an interstate coasting trade, where it is registered in and owned by a resident of another state, since its situs for the purpose of taxation is in the latter state. *Morgan v. Parham*, 16 Wall. 471, 21 L. ed. 303.

When ferryboats passing between different states belong to a corporation chartered by one of them, and are registered at a port in that state, the other state cannot tax them. Their situs for taxation is at the domicile of their corporate owner, and the port where they are enrolled in the home state. *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 29 L. ed. 158, 3 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826.

For the purposes of taxation, vessels navigating the high seas have their situs at their home ports, where their owners are domiciled, and where they are registered under the laws of the United States, and never at the ports, or within the states, where incidentally and temporarily they touch to land or take aboard passengers and cargoes. *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 35 L. ed. 613, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876.

Such vessels are not taxable by states at whose ports they incidentally call to discharge and receive passengers and freight, because they are not in any proper sense abiding within 69 L. R. A.

1901, as existing prior to the revenue act of 1903 (Cobbe's Anno. Stat. 1903, chap. 49), it is made the duty of the tax commissioner or assessor of such city to accept the values of the fractional part of such railroad property situated in the municipality as the same is valued and assessed by the State Board of Equalization, and apportioned to such city in accordance with the provisions of said act.

2. The proportional share of railway property as valued and assessed by the State Board of Equalization belonging to and situated in such city and subject to taxation for municipal purposes may be equalized by the proper authorities of such city by lowering or raising the value of the same, as thus ascertained, so as to bring

the limits of such states, and have no continuous presence or actual situs within their jurisdiction; and not at all because they are engaged in foreign or interstate commerce. *Ibid.*

The decisions of the United States Supreme Court distinctly recognize the right of a state to tax a ship owned by one of its citizens, and having a situs within such state. *Wiggins Ferry Co. v. East St. Louis*, 107 U. S. 365, 27 L. ed. 410, 2 Sup. Ct. Rep. 257.

Seagoing vessels are not subject to taxation in a state whose ports they regularly visit in the course of trade, when they are not permanently and continuously, but only temporarily and incidentally, employed in the waters of such state, if they are owned by persons domiciled elsewhere, and are registered at the ports where their owners are domiciled. Registration in a foreign port and nonresident ownership, together, render seagoing vessels primarily and presumptively taxable only at their home port. *Johnson v. De Bary-Baya Merchants' Line*, 37 Fla. 490, 37 L. R. A. 518, 19 So. 640.

Water craft owned by a Michigan corporation whose principal office has been located in that state pursuant to its incorporation laws, and thus made its domicile, which are registered conformably to the United States navigation laws at the port of Michigan where such domicile is situated, and are engaged in interstate commerce, and not permanently employed anywhere else, are not taxable as personal property in another state whose ports they visit in the course of trade. *Yost v. Lake Erie Transp. Co.* 50 C. C. A. 511, 112 Fed. 746.

A tugboat enrolled and licensed under the Federal navigation laws, belonging to a non-resident, and upon which he has been taxed at his domicile, is not liable to taxation in a state where it comes for the purposes of trade, *Roberts v. Charlevoix, Twp.* 60 Mich. 197, 26 N. W. 878. It does not appear from the report of this case where the port was at which the boat was registered,—it could hardly have been in Dakota, the state of the owner's residence; nor does it appear what was the nature and duration of the boat's business in Michigan waters.

A domestic corporation owning ocean-going ships registered at the port in the state of its origin, where it has its principal place of business, and consequently its legal domicile, is,

about uniformity of valuation in respect of all property subject to taxation within the municipality.

3. It is competent for the legislature to provide for the valuation and assessment of the property of railway companies such as is required to be listed and scheduled with the auditor of public accounts by §§ 39, 40, chap. 77, art. 1, Comp. Stat. 1901, as heretofore existing, by one assessing body, and for ascertaining the value of the whole of such property of any one railway corporation subject to taxation in this state as a unit or as an entirety, and to distribute the value as thus found over the main line or track of such railway company and to the different taxing districts, municipalities, etc., on a mileage basis.
4. Such a scheme or plan of assessment and taxation of the property of railway companies as therein provided

for state, county, and municipal purposes does not violate the provisions of the fundamental law commanding uniformity in the valuation and assessment of property for the purpose of raising needful revenues by the levying of a tax upon all property subject thereto according to its value.

5. The valuation and assessment of the property of a railway company, as therein provided, as an entirety, and the distribution of the value thus ascertained upon a mileage basis over the entire line of such railway, do not operate as a changing of the situs of the property assessed. Its effect is only to distribute the value of an organic whole to the fractional parts situated in the different subordinate taxing districts through which the line extends and in which the property is actually situated, which is a legitimate exercise of legislative power.

when taxed in its home state upon its capital stock at its actual value, subject to assessment upon the value of such ships, notwithstanding they are physically absent and constantly employed in foreign seas. In such a case the subject of taxation is at all times where the corporation is in law and in fact domiciled, and the legal situs for taxation of such ships is in the home port. *People ex rel. Pacific Mail S. S. Co. v. Tax Comrs.* 1 Hun, 143, Affirmed in 58 N. Y. 243.

The corporation is entitled to no deduction from its assessment of the value of such ships. *People ex rel. Pacific Mail S. S. Co. v. Tax Comrs.* 5 Hun, 200, Affirmed in 64 N. Y. 541.

A corporation organized to build, own, charter, and navigate ships, whose paid-in capital has been invested, one half in a steamboat, and the other half in transporting it to its permanent location in South America, is properly taxable in the city where it has its principal office, upon the value of its capital stock, without allowance for the permanently absent steamboat beyond the United States. *People ex rel. Zulia Steam Nav. Co. v. Tax. & A. Comrs.* 51 Hun, 312, 3 N. Y. Supp. 885.

The situs of steamboats navigating waters within and bordering upon different states is that of the home port, which is ascertained by the residence of the owners, and is the port of enrolment and registration. *Pelton v. Northern Transp. Co.* 37 Ohio St. 450.

Water craft not registered or enrolled, and only temporarily employed at places other than the domicile of their owner, have their situs for taxation as personal property at such domicile, even though never there, when they are not actually shown to be subjected to taxation at places where they are used. *Com. v. American Dredging Co.* 122 Pa. 380, 1 L. R. A. 237, 2 Inters. Com. Rep. 221, 9 Am. St. Rep. 116, 15 Atl. 443.

The statute of the United States (Rev. Stat. § 4141, U. S. Comp. Stat. 1901, p. 2808) requiring every vessel to be registered by the collector of the port to which she belongs at the time of her registry, and the one nearest the residence of her owner or husband, creates the home port of the enrolled vessel, and gives it an artificial situs which controls the place of taxation, but only when she has no actual situs elsewhere. *Old Dominion S. S. Co. v. Virginia*, 198 U. S. 299, 40 L. ed. 1059, 25 Sup. Ct. Rep. 686.

69 L. R. A.

The most potent factor in determining the situs of ships and vessels is the owner's domicile rather than the port of registration, when the two are in different taxing districts.

Ferryboats plying between two states, owned by a corporation of one of them, moored in the home state when not in use, have no situs for taxation in the other state, even when registered at one of its ports because that happens to be the same collection district as the corporate owner's domicile and the nearest port thereto. *St. Louis v. Wiggins Ferry Co.* 11 Wall. 425, 20 L. ed. 192.

A ferry plying daily between a city and another place where its owner is domiciled, and whence it starts every morning and where it is moored every night, has no situs in such city so as to entitle the city to tax it, and this notwithstanding it is registered at such city as its home port because the owner's domicile is in the same collection district. *Mobile v. Baldwin*, 57 Ala. 61, 29 Am. Rep. 712.

When the local statute makes personal property having its situs in the county where its owner resides taxable only in the township or town of the owner's domicile, steamboats which ordinarily would be taxable at their home port are, when that port is in another tax district from their owner's domicile, but in the same county, taxable in the district where the domicile is, not that in which the home port is. *Pelton v. Northern Transp. Co.* 37 Ohio St. 450.

If, however, personal property by the local laws is made subject to taxation in the district of its actual situs, steamboats will be taxable in the districts containing their home ports. *Ibid.*

In holding boats and vessels belonging to a domestic corporation taxable at the place of the principal office or domicile of the company, in *Pelton v. Northern Transp. Co.* 37 Ohio St. 450, the Ohio supreme court felt the influence of the actual situs of such boats in Cleveland, but that city was in the same county, although in a different taxing district. The court leans to the opinion that the actual situs of tangible personal property is the controlling factor, as against the domicile of the owner, in determining the place of taxation, unless a statute directs otherwise. It said: In deciding this case we have been guided solely by the statute, without calling to our aid the familiar doctrine of the common law that the situs of personal property follows the domicile of the owner; for we

6. In the assessment of railway property for taxation as therein provided, it is competent for the legislature to classify such property, and provide for the assessment of the same as personalty, and to fix the situs of the property assessed by providing for the valuation of the property as an entirety and the distribution of the total value to each taxing district, according to the number of miles of main track located therein.

7. Said §§ 39 and 40, as existing prior to their repeal by the revenue act of 1903 (Cobbey's Anno.^o Stat. 1903, chap. 49), are not invalid as taking property by taxation without due process of law.

(October 5, 1904.)

APPPLICATION for a writ of mandamus to compel the equalization of the as-

sessment of taxes upon certain property within the city of Omaha. *Denied.*

The facts are stated in the opinion.

Mr. T. J. Mahoney, for relators:

The constitutional limitations do not relate merely to state taxation, or to the rate of levy within taxing districts, but they require uniformity of both levy and assessment in each taxing district.

High School Dist. No. 137 v. Lancaster County, 60 Neb. 147, 49 L. R. A. 343, 83 Am. St. Rep. 525, 82 N. W. 380; *State ex rel. Cornell v. Poynter*, 59 Neb. 417, 81 N. W. 431; *State ex rel. Shriver v. Karr*, 64 Neb. 514, 90 N. W. 298; *State ex rel. Young v. Osborn*, 60 Neb. 415, 83 N. W. 357.

When the legislature assumes to make the apportionment according to the num-

admit that, if the owner had not resided in Cuyahoga county, the result would have been different. And, on the other hand, if the situs of the property had been in another county, subject to be listed and taxed there under the statute, the residence of the owner in Cuyahoga county would not have given the latter county any right whatever to tax it.

Tugs and barges enrolled in a port of a foreign state in the name of the secretary of a domestic corporation, which is the owner of them and has its domicile in the state which created it, are subject to taxation in the home state of the corporation and in the county of their port of lading, where the corporate owner may be said to reside, and not at their port of enrolment,—especially when not assessed for taxes at the latter place or elsewhere outside of the home state. *Norfolk & W. R. Co. v. Board of Public Works*, 97 Va. 23, 32 S. E. 779.

But since the amendments of 1884 to the statutes of the United States, respecting the registration of vessels, shipowners have the option of selecting any one of three places as the home port of their boats, to wit, the port of registry, the port in the same district where the vessel was built, or the port where one or more of the owners reside; and when the home port has been selected and the statutes otherwise complied with, the vessel acquires a situs for the purpose of taxation at that port regardless of the owners' domicile. *Com. v. Ayer & L. Tie Co.* 25 Ky. L. Rep. 1068, 77 S. W. 686.

Water craft, however, like other tangible personal property, is capable, under some circumstances, of acquiring a situs for taxation in jurisdictions where neither their ports of registration nor their owners' domicils are located. If ships and vessels are so permanently and constantly used within the limits of a single state as to be fairly regarded as incorporated with the general property in that state, they may lawfully be taxed like other tangible property having a physical presence there, regardless of a foreign ownership and registration.

The physical presence within a state of a vessel engaged in coasting trade does not of itself entitle such state to tax it as personal property; neither does its character as a vehicle of commerce exempt it from taxation; but its taxability depends upon its situs, and this is decided by its port of registry and its owner's

residence. *Morgan v. Parham*, 16 Wall. 471, 21 L. ed. 303.

But boats which have a physical situs at a given port, especially when that port is where they are registered under the Federal statutes, are taxable there irrespective of their owner's domicile. *St. Louis v. Consolidated Coal Co.* 113 Mo. 83, 20 S. W. 699.

And, although vessels belong to a foreign corporation, and are enrolled and registered under the United States statutes in a foreign state, and are also engaged in interstate commerce, yet, if they are permanently and continuously navigating the waters and between the ports of a single state, so that they actually have a situs in such state, they are subject to taxation in such state. *Old Dominion S. S. Co. v. Virginia*, 198 U. S. 299, 49 L. ed. 1059, 25 Sup. Ct. Rep. 686.

In *Johnson v. De Bary-Baya Merchants' Line*, 37 Fla. 499, 37 L. R. A. 518, 19 So. 640, Liddon, J., dissented, taking the ground that the actual situs of seagoing vessels was the controlling factor in determining their taxability, and would prevail over the port registry and domicile of the owner, and that the facts in the case at bar established an actual situs in Florida waters.

In the examination of the question as to whether movable property has acquired a situs at a place not the domicile of the owner, a very obvious distinction must be recognized between vessels engaged in navigating interstate waters and other tangible property having a permanent situs. Apart from the rule that personal property follows its owner, Congress has given vessel property a situs or home port by statutory provisions respecting registration and enrolment, painting the name of the port legibly on the stern, and requiring such port to be at or nearest the owner's domicile. And it is now settled in the Federal courts, and by the weight of opinion in the state courts, that such home port is the only place where registered water craft actually engaged in interstate or foreign commerce is taxable. *Yost v. Lake Erie Transp. Co.* 50 C. C. A. 511, 112 Fed. 746.

There is said to be an obvious and striking distinction between ships belonging to citizens of one state or to foreigners domiciled at home and which are registered at ports where their owners reside, and which, navigating the high seas or other common waters, only come at the ends of their voyages to the ports of another

ber of miles of main line, it necessarily ignores value altogether.

The mandate of the Constitution is, that in every taxing district every owner shall pay a tax in proportion to the value, not the extent, of his property.

The complaints show that the assessments aggregate \$119,210, whereas, if the railroads were assessed upon the same basis as other property within the city of Omaha, they would aggregate \$25,195,410. In other words, while the other property in the city is assessed at its full value, this railroad property is assessed at less than $\frac{1}{4}$ of 1 per cent of its fair value. Such a discrepancy amounts to a release of the railroad companies from the payment of their municipal taxes altogether.

Cooley, Taxn. 3d ed. 259.

The legislature cannot transform a railroad company's real estate into personalty, and shift its location for purposes of taxation.

state to discharge or receive cargoes, in respect of taxation in the latter state; and cars or other vehicles of transportation by land which actually enter and go about in such state and have no registered place of ownership, although both ships and cars are alike engaged in interstate or foreign commerce. Their situs as property is different. *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 35 L. ed. 613, 3 Inters. Com. Rep. 596, 11 Sup. Ct. Rep. 876. But three of the members of the court, Bradley, Field, and Harlan, JJ., were wholly unable to perceive this obvious and striking distinction, and dissented from the judgment of the court sustaining the right of the state of Pennsylvania to tax the palace cars of a foreign corporation running upon the railroads of that state. To contend, said Bradley, J., that there is any difference is to lose sight of the essential qualities of things.

The court, with the same judges dissenting, reached the same conclusion in *Pullman's Palace Car Co. v. Hayward*, 141 U. S. 36, 35 L. ed. 621, 11 Sup. Ct. Rep. 883.

X. Conclusion.

It is reasonably safe to conclude:

1. That a domestic corporation may be taxed in its home state upon its tangible personal property notwithstanding the physical absence of that property in another state, if the property itself has acquired no actual situs, and is not subject to taxation in the place where it is situated.

2. That a state may tax any and all tangible personal property which has an actual situs within its limits and is a part of the general permanent body of property within its jurisdiction, and not merely in transit through it or temporarily staying therein. And this rule is as applicable to vehicles of commerce, whether ships or railroad cars, as it is to any other species of personal property.

3. That, when a state has the right to tax tangible personal property, or the owner thereof, it may designate the place for the tax to be assessed, whether such be the owner's domicile or the resting place of the taxed property, or not. 69 L. R. A.

Chattanooga v. Nashville, C. & St. L. R. Co. 7 Lea, 561; *Nashville, C. & St. L. R. Co. v. Franklin County*, 12 Lea, 521; *Davenport v. Mississippi & M. R. Co.* 16 Iowa, 348; *Dunlieth & D. Bridge Co. v. Dubuque*, 32 Iowa, 427; *Davenport v. Chicago, R. I. & P. R. Co.* 38 Iowa, 633.

Uniformity in taxing implies equality in the burden of taxation, and this equality of burden cannot exist without uniformity in the mode of assessment as well as in the rate of taxation.

Railroad Tax Cases, 13 Fed. 735; *State ex rel. White House School Dist. No. 7 v. Readington Twp.* 36 N. J. L. 70; *Gilman v. Sheboygan*, 2 Black, 510, 17 L. ed. 305; *Chattanooga v. Nashville, C. & St. L. R. Co.* 7 Lea, 561; *Bureau County v. Chicago, B. & Q. R. Co.* 44 Ill. 229; *Franklin County v. Nashville, C. & St. L. R. Co.* 12 Lea, 550.

The constitutional validity of the law is to be tested by the fairness of the assessment made under it.

4. That, if no statute fixes the situs of personal property at a particular place for the purpose of taxing it, the domicile of the owner, and that alone, will be the place where it is taxable; and the domicile of a corporation is where its principal office is located.

5. That the place named in the certificate of incorporation as the principal office of the corporation, if the incorporation act under which the company is organized requires such certificate to name the principal office, is always a powerful, and sometimes a determining, factor in fixing the domicile of the corporation for the purposes of taxation. Its potentiality in this respect largely depends upon the wording of the incorporation and taxing statutes, and the identity or synonymy of their language concerning the principal offices of corporations.

6. That, notwithstanding the legal domicile of a corporation is technically in one place, and by the laws of the state it can be lawfully taxed only in that place, a corporation may so conduct itself and its business as to render itself liable to taxation in another place. At least this is the rule in New York.

7. That in the case of steamship and navigation companies the Federal statutes and conformity thereto preponderate in deciding where the corporate domicile and taxable situs of water craft are.

8. That in other cases domicile and situs are determined like any other question of fact. And finally, accepting the latest reported utterances of the United States Supreme Court in the cases of *Delaware, L. & W. R. Co. v. Pennsylvania*, 198 U. S. 341, 49 L. ed. 1077, 25 Sup. Ct. Rep. 689, and *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194, 50 L. ed.—, 26 Sup. Ct. Rep. 36, as conclusive authority, that a state has no more power to tax tangible personal property wholly and permanently beyond its boundaries than it has to tax real estate in a foreign state, notwithstanding such personal property belongs to one of its own corporations domiciled within its jurisdiction, provided always such property is subject to taxation locally where it lies.

J. B. G.

Franklin County v. Nashville, C. & St. L. R. Co. 12 Lea, 551; *Stuart v. Palmer*, 74 N. Y. 186, 30 Am. Rep. 289.

The uniformity spoken of in the books has reference to the tax district.

Pleuler v. State, 11 Neb. 547, 10 N. W. 481; *Gilson v. Rush County*, 128 Ind. 65, 11 L. R. A. 835, 27 N. E. 235; *Norris v. Waco*, 57 Tex. 635; *State v. Hannibal & St. J. R. Co.* 75 Mo. 212; *Pine Grove Twp. v. Talcott*, 19 Wall. 675, 22 L. ed. 232.

A person owning a building in a city, worth \$5,000, has to pay much more than 100 per cent more taxes to the city for the protection of that building than the railroad company would have to pay for the protection of its depot if valued at the same amount. This is fundamentally wrong.

Cooley, Taxn. pp. 1, 2; 2 Burlamaqui, Natural & Politic Law, pt. 3, chap. 5, § 14; 2 Rutherford, Institutes of Natural Law, chap. 3, p. 272; Vattel, Law of Nations, bk. 1, chap. 20, § 240, p. 111; 5 Smith, Wealth of Nations, pt. 2, chap. 2, p. 651; *Chicago & N. W. R. Co. v. Boone County*, 44 Ill. 242.

The city board of equalization is not bound to accept the returns from the State Board of Equalization.

State ex rel. Breckenridge v. Fleming (Neb.) 97 N. W. 1063.

Messrs. C. C. Wright, Charles J. Green, and John N. Baldwin for respondents.

Holcomb, Ch. J., delivered the opinion of the court:

This action is begun in this court in the exercise of its original jurisdiction. The relators pray for a peremptory writ of mandamus to compel the respondents, the city council of Omaha, acting as a board of equalization, to reassemble and hear their complaint relative to the alleged low assessment of certain railroad properties situated within the corporate limits, and to equalize the assessment of such properties by raising the assessed value thereof to conform to the standard of value pertaining to all other property assessed for municipal purposes. The substance of the complaint is that the properties of the railroad companies mentioned in the alternative writ, situated within the city limits, are assessed at but a fraction of their true value, while all other property subject to municipal taxation is assessed at its commercial value. The return of the respondents to the alternative writ discloses that in the assessment for municipal taxation of the railroad properties complained of the assessing officer of the city accepted the valuations placed thereon by the State Board of Equalization and the distributive share

thereof apportioned to the city of Omaha as the assessable value of such properties, and that in the equalization thereof the respondents, acting as a board of equalization, raised the assessments five times the value as fixed by the State Board of Equalization and returned by the city tax commissioner, which act of equalization, in the judgment of the board, brought the value of the railroad properties thus assessed to a uniform standard of value with other property assessed for municipal purposes, and exhausted their powers in the premises. Reduced to its narrowest limits, the question presented for consideration by the pleadings and in briefs of counsel is in respect of the method of procedure by the tax commissioner and the city council in the assessment of railroad properties situated in part in such municipality and subject to municipal taxes, and also whether the statute providing for the assessment of railroad property as a unit, and distributing the aggregate value to the different counties, townships, cities, and towns through which the lines run on a mileage basis, is in harmony with the fundamental law. The validity of such legislation is especially called in question when applied to the taxation of railway property in the city of Omaha for municipal purposes.

The legal questions presented, says counsel for relators, are, first, Have the respondents correctly interpreted the statutes and, second, Are the statutes in question valid? The answer to the first question must, we think, be in the affirmative. The old revenue act under which the assessment in question was made, provided for the assessment of railroad property of the character under consideration by one assessing body, viz., the State Board of Equalization, for all purposes of taxation,—state, county, township, school-district, and municipal. This assessing body, the statute declares, shall value and assess the property of railroad corporations at its actual value for each mile of said road or line, the value of each mile to be determined by dividing the sum of the whole valuation by the number of miles of such road or line. It is further provided that after the valuation and assessment is made as aforesaid the state auditor shall certify to the county clerks of the several counties in which the properties of such corporations are situated, or any part thereof, the assessment per mile so made on the property of such corporations, specifying the number of miles and the amount in each of said counties. Comp. Stat. 1901, chap. 77, art. 1, § 40. By § 98, chap. 12a, Comp. Stat. 1901 (Cobbey's Anno. Stat. § 7547), the same being the charter act of cities of the metropolitan class, to which the city of Omaha belongs, it is provided that "the tax com-

missioner shall take the valuation and assessment of railroad property within the city limits from the returns made by the State Board of Equalization to the county clerk." Assuming, as we do for present purposes, that the legislature may rightfully provide for the assessment of the property of a railway company by one assessing body, and as one property or as a unit, and apportion the value thereof on a mileage basis, then, as we view the subject, it is not only manifest that the legislature intended, but that it is quite appropriate, that the distributive share belonging to any one taxing district should be taken and accepted as the assessable value of that part of the whole property which is situated in such district, and which shall be subject to taxes as all other property therein. There appears to be no fundamental objection to such an assessment. The assessment thus made and returned would, doubtless, be subject to the authority and power of a board of equalization to raise or lower the value so as to comply with the rule of uniformity and conform to values generally obtaining in such taxing district. In all schemes of taxation there are generally recognized elements of inequality and the probability of erroneous valuations in the assessment of property by whatever mode the assessment may be made. The evil is usually remedied by the exercise of the authority of a board created for that purpose, whereby the assessment of different properties is brought to a common standard of value. Different precincts have different assessing officers, and these different officers, we know by common experience, widely differ in their valuation of property of approximately the same value. This difference of opinion and judgment necessitates the establishment of a tribunal having authority and jurisdiction to equalize values and bring all property to a common standard of valuation, to the end that each item and class may bear its just and equitable share of the burdens of taxation. A question somewhat akin to the one under consideration was raised in *State ex rel. Prout v. Aitken*, 62 Neb. 428, 87 N. W. 153, and the propriety of assessments of railroad properties by the State Board of Equalization and the acceptance of the valuation thus ascertained for purposes of municipal taxation was recognized and sanctioned. In upholding a law providing for such method of assessing railroad property situated in a municipality for municipal purposes, the court, among other things, in the opinion says: "The legislature, in its wisdom, has decided that the value of railroad property can be more accurately and justly estimated by the State Board of Equalization than by local assessors, and 60 L. R. A.

has exercised its constitutional prerogative by providing that railroad property shall be assessed in that manner. Whether or not it is reasonable to suppose that the State Board of Equalization would have more knowledge and a better opportunity to make a just valuation of such property than local assessors is quite unnecessary to be determined in deciding upon respondent's right to act as tax commissioner. Why may not several valuers constitutionally act upon different kinds of property, or upon the same property, for the purpose of different taxes? The real objection to this act on the ground of uniformity is, evidently, the idea that value is not such a fixed quantity that it is possible for two independent appraisers to agree. If values are fixed for purposes of municipal taxation by one body of assessors, and for county and state by another, it is practically certain that the two will disagree. Enough is said above to indicate an opinion that the only uniformity required as to any tax is that it should be uniform throughout the jurisdiction; i. e., that state taxes shall be uniform throughout the state, county taxes throughout the county, and city taxes throughout the city." The result produced by this method of assessment is only that there are different assessing authorities for different kinds of property, each exercising an independent judgment in arriving at the value of the property assessed, and making due return thereof to the proper authorities. The inequalities in values thus returned, if any there be, is a proper subject for consideration by a body or tribunal authorized to discharge the functions of a board of equalization. If it be proper to assess railroad property as a unit, and distribute the total value thereof on a mileage basis, it is obvious that the distributive share going to any one taxing district may be required to be taken as the assessable value and as the basis of valuation for equalization and taxing purposes. The value of such distributive share of the whole property may, it would seem, be raised or lowered by an equalizing board in order that it may be brought to a common standard and conform to the values placed on all other property. This, as we understand the record, is what was done by the respondents in the case at bar, and, if so, is, we think, in harmony with legislative intentment. It is the business of such boards, says this court in *State ex rel. Breckenridge v. Fleming* (Neb.) 97 N. W. 1063, "to fairly and impartially equalize the valuation of all personal property assessed in their respective jurisdictions, and to raise or lower the same as the justice and equity of the case may require. Whatever directions the law may

give to the assessor in valuing the property in the first instance, and whatever result these directions may produce in the assessment of franchises or other property of the taxpayer, the work of the board of equalization is to equalize the valuations made so that everyone, as nearly as that may be attained, shall stand upon an equal footing, and pay an equal proportion of the tax laid according to the real value of his property.

. . . In this way equity is attained, and every interest protected." It is manifest that the legislative plan for the assessment of railroad property situated in a municipality, for municipal purposes, has been followed by the city authorities in the case at bar, and that the interpretation given to these several provisions of the statute by the respondents as to their authority and power is in harmony with the expressed will of the legislature.

The very able and helpful arguments and briefs of counsel on both sides of the controversy are devoted almost exclusively to the second question presented,—that is, the alleged invalidity of the statutes providing for the assessment of the property of a railroad company as a unit, and the distribution of the value of the whole on a mileage basis by one assessing body for all purposes of taxation,—and it is to this phase of the case that we have given the fullest consideration and most thorough research at our command. It is the contention of counsel for relators that the provisions of the fundamental law governing taxation are violated in the assessment of railroad property for municipal purposes by the plan adopted and prescribed by the legislature. It is argued that railroad properties of great value located within the corporate limits of the city of Omaha pay taxes on but an insignificant part of the true value; that these properties escape a large share of municipal taxes for which they should be justly burdened and made to contribute to the revenues of the city in return for the protection received in the administration of the affairs of the municipality in which they are situated. Counsel says that here are located costly depots and terminal facilities, including real estate of vast value occupied for such purposes, which ought to respond to municipal taxation according to such values, to be ascertained with reference to the actual location of such properties as if separate and independent properties, and without regard to their relation to and connection with the entire lines of railway of which they form a part. The right and power of the legislature to provide a scheme of taxation for municipal purposes by an assessment of railway property as an entirety and the distribution of

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the aggregate value on a mileage basis is boldly challenged, and we are asked to so construe the constitutional provisions relating to the subject as inhibiting such a plan and method of taxation of such properties for municipal purposes. "Our complaint," says counsel, "is not that the legislature has provided a different method of assessing railroad property from that provided for assessing other property, but rather that, under the statutes relied upon by respondents, a result is obtained which violates the constitutional requirement of uniformity." If, it is said, the legislature had provided for assessing the property of railroads extending into more than one county by determining the value of the railroad as a whole, and then apportioning such value to the several tax districts in proportion to the real values in the several districts, rather than in proportion to the number of miles of main line, such a method would at least be theoretically correct; but that, when the apportionment of the total value is according to the number of miles of main line in any one taxing district, there is an ignoring of the question of value altogether. The mandate of the Constitution, it is insisted, is imperative that in every taxing district every owner shall pay a tax in proportion to the value of the property in the district, and not the extent of it. The constitutional provisions principally relied on by relators in support of their contention are found in § 1 of article 9, which declares that revenues are to be raised by levying a tax by valuation so that every taxpayer shall pay in the proportion to the value of his, her, or its property subject to taxation, the value to be ascertained in such manner as the legislature shall direct. The necessity for uniformity and equality in taxation is emphatically expressed in *State ex rel. Young v. Osborn*, 60 Neb. 415, 83 N. W. 357, wherein it is said: "And this rule of uniformity applies not only to the rate of taxation, but as well to the valuation of property for the purposes of raising revenue. . . . The Constitution forbids any discrimination whatever among taxpayers. . . . Thus, if the property of one citizen is valued for taxation at one fourth its value, others within the taxing district have the right to demand that their property be assessed on the same basis. The rule of uniformity is satisfied if observed by each jurisdiction imposing the tax." To the same effect is *High School Dist. No. 137 v. Lancaster County*, 60 Neb. 147, 49 L. R. A. 343, 83 Am. St. Rep. 525, 82 N. W. 380. See also *State ex rel. Cornell v. Poynter*, 59 Neb. 417, 81 N. W. 431, and *State ex rel. Shriver v. Karr*, 64 Neb. 514, 90 N. W. 298.

By § 6 of article 9 of the Constitution it is provided that for corporate purposes all municipal corporations may be vested with authority to assess and collect taxes, but such taxes shall be uniform with respect to persons and property within the jurisdiction of the body imposing the same. The requirements of uniformity in the assessment of property for municipal purposes generally is doubtless the same, and as obligatory under the provisions of § 6 of article 9 as that required by the provisions of § 1 of the same article; and it is so held in *State ex rel. Bee Bldg. Co. v. Savage*, 65 Neb. 714, 91 N. W. 716. The construction given to the 1st section in the several decisions of this court which we have cited apply with equal pertinency and force to those of § 6. Uniformity with respect to person and property requires that the tax rate must be the same as to all persons affected, and the valuation of the property must be upon the same basis throughout the entire taxing jurisdiction. A departure either as to rate of levy or as to the standard of valuation of the different properties subject to taxation would violate the rule of uniformity demanded by the Constitution, and render ineffectual legislation authorizing such a method of procedure in the levying and collection of municipal taxes. It is equally clear that, if property within a municipality having a fixed legal situs therein was, by a scheme or plan of assessment, to escape in whole or in part municipal taxes upon a valuation in substantial conformity with all other property within the taxing district, this would be a violation of the provisions of said § 6. May the legislature, without infringing on these provisions of the fundamental law, provide for the assessment of the property of railway companies such as is required to be included in the schedules to be returned to the state assessing board upon the unit plan or system, and distribute the value of the whole property along the line of the road thus assessed, and to the different tax districts, on a mileage basis? It is earnestly contended by the relators that the several railroad companies having lines in the city of Omaha have valuable terminal facilities, depots, and other properties on their right of way and side tracks which have a fixed and actual physical situs, and as such are subject to local taxation upon such values, and that the distribution of the total value of any one road over the entire line on a mileage basis is to withdraw from taxation for municipal purposes property situated within the municipality, thereby resulting in a violation of the provision of the Constitution that all property shall bear its just share of tax burdens of 69 L. R. A.

the taxing jurisdiction in which it is situated. In a sense it is no doubt true that the properties of the large railway corporations doing business in this state with extensive terminal facilities, switching yards, depot grounds, and costly structures in the large cities and towns are much more valuable, mile for mile, than a corresponding length of the roadbed and right of way situated outside of such municipalities, consisting usually of but a single track and roadbed and the right of way of from 100 to 200 feet in width. In a legal sense, however, must it be said that the property thus situated is so localized that its situs for the purpose of taxation must be the same as where physically situated, and that any attempt to throw it with the whole mass of property with which it is connected, and of which it forms a part, and assess it as an entirety, and distribute the value on a mileage basis, contravenes the fundamental law?

We may assume that all the lines of railway in this state have been by the State Board of Equalization assessed at a valuation uniform with the values placed on all other property assessed for revenue purposes, and that the total value of each of such lines of railway has been distributed to the different counties, townships, school and road districts, cities, and towns through which such lines extend according to the length of the line in each division for whose benefit taxes are levied. If those portions of the road lying in the city of Omaha are to be valued at a larger sum per mile than other portions of the same line, then it follows that there must be a corresponding reduction of the amount apportioned to the remainder of the line, or else an overvaluation and double taxation would be the result, and this would violate the rule of uniformity the same as does undervaluation. The legislative plan contemplates a full valuation of all property of a railway line subject to taxation in this state, and the distribution of that value equally over each mile of the line, and with equal benefit to every taxing district through which it extends. The relators contend for a method of taxation that recognizes differences of value of different parts of the same line, a localization of such property for taxation, and an apportionment of values accordingly as necessary to meet the demands of the constitutional requirement of uniformity. It is not for us to say that the method adopted by the legislature is the most approved, and comes nearest reaching an ideal state in the levying and collection of the public revenues. Yet it is quite true that this plan has been warmly commended by courts of last

resort of many of the states and of the United States as best calculated to more nearly approach perfect uniformity than any other plan that has heretofore been devised. It may be, and possibly is, true that legislative provisions might be enacted in the interest of more just and equitable taxation that would allow some latitude on the part of an assessing body clothed with the power to value and assess railway property to vary the value of different parts of a railway line in the distribution of the value of the whole to conform to the improvements made and character of the property assessed in the different localities through which the right of way and roadbed extends. It is, however, for us to determine only as best we may whether the plan of valuing and assessing railway property as adopted by the legislature is in conflict with fundamental law. The courts have generally recognized that upon legal principles and as a practical question the properties of a railroad company, because of their peculiar character, can best be assessed by one assessing body, and cannot with any degree of satisfaction be left with local assessing officers. The wisdom and necessity for a taxing body having authority and jurisdiction over the territory covered by all the property of a railroad company, and with power to assess the whole of such property, and to fix values which would be uniform over the different lines of railroads to be assessed, seems so apparent that argument can scarcely add anything. At least, the wisdom and experience of those having to do with the subject of taxation have in very many of the states of the Union brought about plans for the assessment of properties of this character by one assessing body, and this method is now quite generally resorted to as the best solution of a difficult problem of railroad taxation. As to those properties which have no fixed situs, such as the rolling stock, franchises, and other intangible property, it is difficult to conceive of any more just or equitable scheme or plan than to find the value of the whole and distribute the same throughout the different taxing jurisdictions according to the distance of the line of road situated in each district for whose benefit taxes are levied. In a measure, this same principle, it is manifest, obtains in respect of the line of a railroad, including all properties necessary and used in its operation in the accomplishment of the objects of its incorporation. Carried to its logical conclusion, the contention of the relators would require the assessment of every fractional part of a railroad within any taxing district as separate and independent property, the aggregate of these several val-

ues representing the value of the entire property within the state. No two miles of a railway system, if regard be had solely to the real estate composing the roadbed and right of way, the cost of construction, and the value of the superstructures and buildings thereon necessary for the operation of the road, would be exactly the same. Each taxing district would have located therein property of a value peculiar to itself and to no other, and, if the rule of uniformity be observed, an assessment must be made of such property according to its value as thus localized. Must all railway property be thus localized for the purposes of taxation? The assessment of the property, which is the subject of the present controversy, and the validity of which is challenged, was made by the State Board of Equalization under the old revenue act (Comp. Stat. 1901, chap. 77, art. 1). The provisions assailed are found in §§ 39 and 40 of the act. The provisions of the new revenue act (Cobbe's Anno. Stat. 1903, §§ 10,484, 10,485, and 10,486) in regard to the questions herein being considered are believed to be in all material respects the same as the provisions of the old law. By § 39, art. 1, chap. 77, Comp. Stat. 1901, it is made the duty of certain officers of every railroad company doing business in this state and having property therein subject to taxation to file schedules under oath of the property of such company with the state auditor at a time as therein stated. The schedule is required to disclose the number of miles of such railroad in each organized county, and the total number of miles in the state, including the roadbed, right of way, superstructures thereon main and side tracks, depot buildings and depot grounds, section and tool houses, rolling stock, and personal property necessary for the construction, repairs, or successful operation of such railroad lines; "provided, however," says the statute, "that all machine and repair shops, general office buildings, store houses, and also all real and personal property, outside of said right of way and depot grounds as aforesaid, of and belonging to any such railroad and telegraph companies, shall be listed for purposes of taxation by the principal officers or agents of such companies, with the precinct assessors of any precinct of the county where such real or personal property may be situated, in the manner provided by law for the listing and valuation of real and personal property." By the succeeding section authority is given to the State Board of Equalization to value and assess all property required to be listed and returned to the auditor of public accounts at its actual value for each

mile of said road or line, the value of each mile to be determined by dividing the sum of the whole valuation by the number of miles of such road or line. It is also made the duty of the auditor to certify to the county clerks of the several counties in which the property of the corporation or any part thereof may be situated the assessment per mile so made on the property of such corporation, specifying the number of miles and amount in each of such counties. The value of the whole, when ascertained, is by this method apportioned to the several counties, townships, cities, and villages and other subdivisions through which such railway line extends according to the number of miles of railroad situated in such subdivision. It is further declared that all such property shall, for the purpose of taxation, be deemed "personal property," and placed on the tax lists as thereafter provided. It will be observed that in the assessment of railroad property under this statute no property located off the right of way is assessed by the state board, and that there are certain exceptions as to property, which is specified, which is situated on the right of way. It is only the lines of railways, including superstructures, appurtenances, and property on the right of way necessary to the successful operation of the road, and the rolling stock and franchises, that are required to be assessed by the state board as a unit.

In *Adams County v. Kansas City & O. R. Co.* (Neb.) 99 N. W. 245, this court had occasion to construe the language of the proviso found in § 39, and it is there held that the phrase "outside of said right of way," etc., qualifies only the word "property" immediately preceding it, and not the specific terms used in the enumeration of other property therein. Accepting this as a correct construction, as we do, and keeping in view the entire act relating to the subject, it becomes obvious that the legislative intentment was to enlarge the situs of the property of a railway company necessary for and used in the construction of its lines and the prosecution of its business so as to cover the entire line of its roadbed and right of way. All of this property is so intimately related to each of the different parts, and so connected together, that it is, it seems, appropriate and legal to so treat and regard it when fixing its value for assessment purposes and apportioning the value to the different tax districts through which the road extends. A clear understanding of the character of the property of a railway company, which the statute requires to be valued and assessed as a unit and the value distributed on a mileage basis, is necessary to an intelligent under-

standing and application of the principles underlying the taxation of this species of property and of the decisions of the courts of other states relating to the subject. The supreme court of Tennessee, in the cases of *Chattanooga v. Nashville, C. & St. L. R. Co.* 7 Lea, 561, and *Nashville, C. & St. L. R. Co. v. Franklin County*, 12 Lea, 521, by its opinions therein comes nearest supporting the contention of counsel for relators, and yet these cases are, we think, clearly distinguishable, and are not authority of a decisive character in the determination of the questions as presented in the case at bar. In the first case cited all the property of whatever description, and wherever situated, was, for the purpose of taxation under the statute, being considered to be thrown together as a unit or as one property, valued as a whole, and the value distributed on a mileage basis. In the latter decision of that court judicial sanction is given to the validity of an assessing statute very similar to the one under consideration, except that it was held that depots have a local situs, and should be assessed accordingly. But the reasoning by which this conclusion is reached, as counsel well says, is somewhat bewildering. In a discussion of the character of railroad property required to be assessed by the State Board of Equalization and the reasons for legislation providing for the assessment of such property as a unit, the total value thereof to be distributed on a mileage basis, this court has expressed itself in *Chicago, B. & Q. R. Co. v. Richardson County*, 61 Neb. 519, 85 N. W. 532, as follows: "The common-sense view of the subject would seem to be that such purpose was to enable the proper authorities to distribute the avails of such taxation equitably among all the municipal subdivisions through which a road may pass in the ratio which the number of miles within each subdivision bears to the total number of miles of road within the state, treating each mile as equal in value to every other mile, and regardless of whence came the power under which any particular portion of the road is constructed. A railroad might have vast terminals at one point, worth as much as the remainder of the line, though it extended through a dozen counties. The subdivision in which these terminals are located is not, under this law, permitted to reap an advantage over other localities, by reason of the mere accident of location, but must share its advantages with these others *pro rata*. That evidently is the reason behind and under this legislation. How a franchise has been acquired, or whether a particular portion of a line is more expensive to construct than others,

is unimportant in determining whether the property should be taxed locally or otherwise. As a matter of fact, this inequality of value was the principal motive for the legislation, which sought to obviate the evils attendant upon such a state of facts. Without such inequality, no legislation would have been necessary, the general laws being in that event adequate for the purpose." While the constitutionality of the statute was not directly involved, the discussion of the subject is valuable as showing the reasons for treating and assessing railroad property as a unit, and the difficulty of separating it into fractional parts, each piece, for the purpose of assessment, to be localized, and treated as a specific item of property having a value independent of the other portions of the whole. In *Cooley on Taxation*, 3d ed. vol. 1, p. 693, it is observed by the eminent author: "The property of railroad and canal companies constitutes a legitimate class of property for the purposes of taxation; a class which, in order to treat it fairly in the matter of taxation, must be treated separately. Indeed, the difficulties of assessing, in the same way that property in general is assessed, lines of railroad extending through many municipalities, are so great and so obvious that in many states it is not attempted, and a franchise tax is imposed as a substitute for all other taxation. But in other states a railroad is listed, assessed, and valued as an entirety, and the value is then apportioned for taxation among the several municipalities by some standard prescribed by law, which generally is the length of line within the municipalities respectively. There is no constitutional objection to that method of taxing this species of property, and it is perhaps more just than any other."

The supreme court of Colorado, in the case of *Ames v. People*, 26 Colo. 83, 56 Pac. 656, in passing upon a controversy identical in principle with one in the case at bar, upholds the validity of statutory enactments providing for one body to value and assess all the property of a railway company as a unit, and to distribute the value upon a mileage basis. The constitutional provisions as to uniformity in that state, while not the same, are substantially so in principle, and the necessity for equality of taxation is recognized in the decision rendered. In the opinion it is said: "In the method of laying a tax, either as to the assessment or the apportionment, the general assembly is not restricted by the Constitution; and, unless the legislation is palpably unjust, oppressive, or inadequate, courts will not substitute their judgment for that of the legislature. Many tribunals

of final resort, including the Supreme Court of the United States and our own court, as will be seen from the cases already cited, have held that the method of ascertaining and distributing values of railroad property like that prescribed in the statute under consideration, if not the only rational one, is at least the best and fairest thus far invented." And further on in the same opinion the court treats the subject in the following manner: "It follows that, in order to secure a just valuation for taxation of this class of property, all of it that is used for the convenient and proper operation of the railway may be assessed as a unit, and the valuation thus ascertained may be apportioned to the various taxing districts upon a mileage basis. Indeed, construing, as we should, §§ 3 and 10 together, such of the property of a railroad company, real and personal, as is used for the convenient and proper operation of its railway, can properly only be assessed and apportioned for taxation as a unit; and the apportionment upon a mileage basis, as this act prescribes, will come as near to doing exact justice as it is possible to do. . . . This method of apportionment, in our judgment, gives to each local taxing district its just proportion of tax; that is to say, each taxing district gets for purposes of taxation the just valuation of the property physically situate within its territorial limits, for the value of property situate therein cannot be made to depend upon its so-called natural situs, entirely disassociated from the use made of it. But that value in great measure depends upon its connection with every other part of the corporation property so used, and situate in every other taxing district in which any part of its railroad lies, considered always in connection with the character of the use made of it. Thus the command of the Constitution is obeyed, and in fact to each taxing district is given a fair valuation of the railroad property within its territorial limits; and that is all the section requires." Says the supreme court of Michigan: "The propriety of treating aggregations of property as a unit is as natural and proper for the purposes of assessment as for sale, and this is especially so, where the various articles are so essential to the purpose for which they are combined that the withdrawal of one or any class would destroy, or substantially impair, the use of all for the purposes to which in their new form they are adapted." *Detroit Citizens' Street R. Co. v. Detroit*, 125 Mich. 673, 84 Am. St. Rep. 589, 85 N. W. 96, 86 N. W. 809. In *People ex rel. Chicago v. State Board*, 205 Ill. 296, 68 N. E. 943, it is said: "The right of way of a railroad company cannot be cut up,

for the purposes of assessment, into parts, either by dividing it into sections by the lines of the different taxing bodies which it crosses, or by severing from its main track the portions that lie outside of some arbitrary line drawn through the center of the right of way. A railroad is a unit, and for the purposes of assessment its right of way must be treated as a whole. The switch or side track at which it receives coal, grain, stock, or freight in a country village is as essential to the successful operation of the road as is the switch or side track in the city at which the articles which it handles as a common carrier are discharged; and the land upon which its side or second track and turnouts, and its station, machine shops, roundhouses, etc., stand, is as necessary to the successful operation of the road and as much a part of its right of way as the land upon which its main track is laid; and the value of each piece of its right of way must be determined by taking into consideration the value of the entire right of way, rather than the value of each piece for commercial purposes wholly disconnected from the use to which it has been applied, as compared with contiguous property used for purposes other than right of way." Many other authorities could be cited, but the foregoing give a very accurate idea of the trend of judicial opinions regarding the propriety and legality of this method of assessing the property of railway companies. The principles justifying the assessment of railroad properties as a unit, and distributing the value on a mileage basis to the different tax districts through which the railway line or track extends, seem to be that in fact and in legal contemplation for the purpose of assessment, use, and sale such property may rightfully be regarded as a physical whole or one entire property extending over the whole line of the railway, the value of which depends not on any separate or fractional part, but upon the whole of the property as an entirety.

The fundamental idea underlying the relators' contention as to the proper method of local taxation of these properties is that the fractional parts of the different railway companies located in the city of Omaha consisting of the depot grounds, main track, and side tracks, and the structures thereon, have a fixed and natural situs, and that they are of themselves of special value greatly in excess of other portions of equal length of the lines of which they are parts, and that such values are separable from the remainder; and therefore, to meet the requirements of the Constitution as to uniformity, and to the end that all property shall bear its just proportion of the burdens

of taxation in the district where it is situated, these properties should be localized in the taxing district in which they are physically situated, and assessed upon their separate values for municipal purposes. Of course, if we assume that such properties have a legal situs and an ascertainable value of themselves within the limits of the municipality, separate and apart from the remainder of the line, and are possessed of a greatly enhanced value over other portions of the main track of equal extent, the contention of relators is conceded, and there is left no room for discussion or argument.

The principle underlying the legislation complained of undoubtedly is that every portion of the property of a railway company going to make up the whole is interdependent, and that the situs must be determined with respect to the entire property, and not any fractional portion of it. The legislature has fixed, or undertaken to fix, the legal situs of a railroad where the organic structure is, in all the counties and subordinate districts through which the road is constructed, and has provided for the apportionment of a share of the total value to each taxing district in proportion to the length of the main track in such district, upon which taxes are to be levied for all purposes. It is the fractional proportion of the whole distributed to any one taxing district that represents the taxable property of such railway line in such district, rather than the physical property found therein. This method does not effectuate a moving about of property having a fixed place of location,—a change of situs,—but amounts only to the valuing of the whole as a unit, and the distribution of the total value along the line and throughout the extent of the physical property on what is regarded as a fair, just, and equitable basis. The nature and characteristics of the property are such as to render it incapable of division into fragmentary parts and the valuing of each of such parts for assessment purposes as though it were a separate and distinct item of property having a location in a particular taxing jurisdiction. These properties have no market value when considered in fractional parts. Railroad properties are bought and sold as an entirety. The real estate on which the right of way is located cannot be valued in a commercial sense as so many acres, or as lots and blocks, since its value in such cases is determined in a large measure by reason of the use to which it is put, and the improvements thereon, and then only in connection with the other property of which it forms a part. The legislature has declared that the property

of railroad companies required to be valued and assessed by the State Board of Equalization should, for the purposes of levying and collecting taxes, be regarded as personal property. If this legislative declaration is to be given force, then the right to enact and the validity of the enactment providing for a distributive valuation on a mileage basis would necessarily follow. There will, we apprehend, be no serious contention against the power of the legislature to, by rule of law, fix the situs of all such property (if it may be regarded as personality) for purposes of taxation. In *Missouri, K. & T. R. Co. v. Labette County*, 9 Kan. App. 545, 59 Pac. 383, the Kansas court of appeals says: "Under § 6873, Gen. Stat. 1889, . . . all property used or held by a railway company for the purpose of operating its railroad, including its roadbed, right of way, etc., is to be appraised and assessed as personal property. The statute declaring such property personal property for the purposes of assessing a tax against it, it follows that such tax must be collected as a tax upon personal property. . . . The legislature had the power to enact the statute declaring the right of way, roadbed, and other property held or used in the operation of the railroad to be personal property for the purposes of taxation." In *Ames v. People*, 26 Colo. 83, 56 Pac. 656, the court says: "The whole argument, however, is based upon the proposition that the property is assessed not where it is physically situated, but all along the main track, each municipal corporation being given for taxation a value dependent, not upon the actual value of the property therein physically located, but only such value of the entire property of the corporation as the length of the main track in the municipality bears to the total length of the line. This method of distribution is said to be contrary to the rule that property must be taxed at its actual situs. But it is settled by a long line of decisions that this rule is merely the law of the state that recognizes it; hence, being a matter of legislation, it is entirely competent for the legislature, unless restrained by the Constitution, to fix, for the purposes of taxation, the situs of both real and personal property." The Arkansas supreme court, regarding a similar question, states the principle as follows: "The nature of the property justifies classification and separation from the body of the real estate upon the grounds that justify the separate classification of realty and personality. The requirement of an annual assessment of railways affords, therefore, no greater cause for complaint than does the like requirement for personal property, 49 L. R. A.

and the complaint of discrimination is groundless." *St. Louis, I. M. & S. R. Co. v. Worthen*, 52 Ark. 529, 7 L. R. A. 374, 13 S. W. 254. The Supreme Court of the United States, in *Columbus Southern R. Co. v. Wright*, 151 U. S. 470, 38 L. ed. 238, 14 Sup. Ct. Rep. 396, has said: "The roadway itself of a railroad depends for its value upon the traffic of the company, and not merely upon the narrow strip of land appropriated for the use of the road and the bars and cross-ties thereon. The value of the roadway at any given time is not the original cost, nor, *a fortiori*, its ultimate cost after years of expenditure in repairs and improvements. On the other hand, its value cannot be determined by ascertaining the value of the land included in the roadway assessed at the market price of adjacent lands and adding the value of the cross-ties, rails, and spikes. The value of land depends largely upon the use to which it can be put and the character of the improvements upon it. The assessable value, for taxation, of a railroad track, can only be determined by looking at the elements on which the financial condition of the company depends, its traffic, as evidenced by the rolling stock and gross earnings, in connection with its capital stock. No local estimate of the fraction in one county of a railroad track running through several counties can be based upon sufficient data to make it at all reliable, unless, indeed, the local assessors are furnished with the means of estimating the whole road." Again, it is said by the supreme court of Wisconsin in *State ex rel. Milwaukee Street R. Co. v. Anderson*, 90 Wis. 550, 63 N. W. 746: "The utter impracticability, not to say impossibility, of treating it as real estate for the purposes of taxation, is illustrated not only from the results that might follow tax sales, but in attempting to assess it as such under the provision that 'all real property not expressly exempt from taxation shall be entered upon the assessment roll in the assessment district where it lies,' . . . and is well illustrated by the present case, where the property claimed to be real estate has a physical location in twenty-one assessment districts. How could it be entered on the rolls by lots and blocks, or by reference to plat or deed, or how, otherwise, under §§1045 and 1046 [Rev. Stat. 1878]? It is part on and part in the soil and part in the air. How are the twenty-one assessors to assess and value the tracks, ties, poles, trolley wires, etc., with certainty, and in an intelligible manner, in so many parcels? And are the twenty-one assessments to be followed by as many separate taxes and tax sales in case of nonpayment? It seems to us entire-

ly clear that this property cannot be regarded as real estate for the purposes of taxation, and that it is not the 'land' and 'real property' described in these sections for assessment and taxation; and, as already stated, it seems perfectly plain from the statute . . . that this property is required by law to be assessed and taxed. . . . In view of the use made of the specific lots upon which the power houses are situated, and upon a fair construction of the statute, and with a view to carry out its evident meaning, we hold that such real estate, thus devoted to such uses, is not the real property required by § 1039 [Rev. Stat. 1878] to be 'entered upon the assessment roll in the assessment district where it lies;' it having acquired a peculiar character in the law by reason of having become a part of the entirety of a property, subject only to assessment and taxation as an entirety in the assessment district where the corporation owning it has its principal office and place of business." We are satisfied upon principle and authorities cited that the legislature has not exceeded its powers in providing, as it has done, for the assessment of the property of a railway company as a unit, and the distribution of the value thus ascertained over the entire line of the railway assessed, and to the different tax districts and municipalities in to which the roadbed or right of way extends on a mileage basis; that when the

values are thus ascertained and apportioned, and the distributive share assigned to any one district or municipality, such proportionate share legally represents the value of the fractional part of the entire property situated in such district or municipality for the purposes of municipal taxation, and that the fundamental law as to uniformity is not violated by such a scheme of assessment and distribution of values of the entire property.

It is also contended that the sections of the statute providing for an assessment of railway property by the State Board of Equalization is void because of the alleged deprivation of property by taxation without due process of law, in that no sufficient notice is given of the meeting of the State Board of Equalization when assessing such property. This question has been under consideration for some time, and is disposed of in an opinion in the case of *Chicago, B. & Q. R. Co. v. Richardson County* (Neb.) 100 N. W. 950. On the authority of that decision these sections in respect of the objection urged against them, of which we have just made mention, must be held valid. The constitutionality of these sections is also upheld in that opinion as to other objections herein discussed.

The application for a peremptory writ of mandamus should be denied, which is accordingly done.

OKLAHOMA SUPREME COURT.

Alice DAVIS, Plff. in Err.,

v.

R. D. FRY.

(.....Okla.....)

***When surface waters by natural drainage collect in a natural basin or depression upon the premises of a dominant tenement, and escape therefrom only by percolation or evaporation, forming thereby a lake or pond, permanent in its character, the waters so collected and coming to rest lose the character of surface water, and may not by artificial means, other than that incident to the cultivation of the soil, be drained to the damage of a servient tenement, without liability in damages for such act.**

(September 2, 1904.)

*Headnote by GILLETTE, J.

NOTE.—As to what are surface waters, see also in this series *Calro, V. & C. R. Co. v. Brevoort*, 25 L. R. A. 527 and *note*; *Fordham v. Northern P. R. Co.* 60 L. R. A. 556, and *Uhl v. Ohio River R. Co.* 68 L. R. A. 138.

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ERROR to the District Court for Blaine County to review a judgment in favor of plaintiff in an action brought to recover damages for the alleged unlawful casting of surface water upon plaintiff's property. *Affirmed.*

Statement by Gillette, J.:

This action was originally commenced in the probate court of Blaine county, and, after trial and judgment therein, appealed to the district court. It appears from the pleadings in the case that at the time of commencing the action the plaintiff was the lessee of the northwest quarter of the northwest quarter of section 17, township 16, range 11, Blaine county, Okl. T., and at the time of the injury complained of had growing thereon a crop of corn. The defendant, Alice Davis, was the owner of the southwest quarter of section 8, township 16, range 11, upon which there was a depression which at various times in the year contained more or less water as the result of drainage of sur-

rounding lands, making a lake or pond of some 10 or 15 acres, which was retained there by the natural conformation of the land until absorbed or evaporated; that the defendant caused a ditch to be excavated of such depth and extent as to drain said depression and cause the water accumulating there to immediately flow off through such drain, which it did at the time complained of, and over and onto the premises of plaintiff, destroying his crop there growing, and for which he asked judgment in damages. The case was tried to the court without a jury, at the conclusion of which trial the defendant requested special findings of fact by the court, which were accordingly made as follows:

"In the District Court of Blaine County, Oklahoma Territory, November Term, 1902. R. D. Fry, Plaintiff, v. Alice Davis, Defendant. Findings of the Court.

"Now on this 4th day of December, 1902, the court, after hearing the evidence, argument of counsel, and being fully advised in the premises, and after a personal inspection of the premises by the judge, as per request of parties, finds the following facts:

"(1) That the plaintiff, R. D. Fry, as the renter, was in possession of the northwest quarter of the northwest quarter of section 17, township 16, range 11, Blaine county, Oklahoma Territory, and in the lawful and peaceable possession thereof.

"(2) That in the spring of 1901 plaintiff plowed, prepared, and planted said land to corn.

"(3) That until and on the 12th day of May, 1901, said crop was in a good and prosperous condition.

"(4) That plaintiff, under his lease, was to pay as rent for said land one third of said crop, and that plaintiff had a two-thirds interest in said crop.

"(5) That on the 12th day of May, 1901, prior thereto, and ever since, the defendant, Alice Davis, was and is the owner of the southwest quarter of section 8, township 16, range 11, in said county.

"(6) That in the spring of 1901, and while the defendant was the owner and in possession of said southwest quarter of section 8, township 16, range 11, the defendant caused to be dug a ditch from a large pond located on her land, across and over her said lands, and into the public highway between the land of defendant and the land of plaintiff, upon which plaintiff's crop was growing.

"(7) That said pond on defendant's land had and has no natural outlet, and at various times of the year is filled with water from a large area of surrounding country, leaving a large body of water in said lake, from one to two and a half feet deep, and covering about fifteen acres.

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"(8) That said ditch was cut by the defendant for the purpose of draining the water from said pond.

"(9) That the defendant, by the cutting of said ditch, turned all the water in said pond into and through said ditch, over and across the highway, and upon the land leased by plaintiff, and upon which his crop of corn was cultivated and growing, caused the same to be inundated and covered with water to the depth of several inches, and thereby destroyed a portion of plaintiff's crop of corn, to the amount of about fifteen acres.

"(10) That the water remained on said land, and continued to run through said ditch from said pond, until stopped by the order of injunction of this court.

"(11) That said ditch is about fifty rods long, commencing upon defendant's land from said pond, over and across defendant's line, and across the south line thereof, and to within forty-eight feet of plaintiff's corn ground.

"(12) That said ditch was cut through a hill from two and a half to three feet higher than the bottom of said pond.

"(13) That said ditch was not cut over a natural outlet from said pond.

"(14) That said pond is filled from the drainage of the surface water from the surrounding lands, and the water stands and remains until the same evaporates and sinks away in the ground.

"(15) That there was no considerable body of water in said pond when said defendant caused the ditch to be dug.

"(16) That said ditch did not fill with water until May 12, 1901, and that the same filled at that time as the result of a heavy rain and hail storm.

"(17) There were no ditches or other artificial means used to control or collect the water that was gathered in the pond thereon by defendant.

"(18) That said pond was not fed or supplied by any spring, streams, swamps, or lakes, but only by rain, hail, and snow falling on the surrounding lands, which was conducted into the said pond by the natural surface of the country surrounding it.

"(19) The grass growing in said pond is what is commonly known as 'pond grass,' of no value for pasturage, and the land covered thereby is what is commonly known as 'gumbo' or 'hardpan,' and of no value for cultivation of crops or tillage.

"(20) The said ditch was from two and a half to three feet wide at the top, and from eighteen inches to two feet at the bottom, and was filled with water flowing from said pond from the evening of May 12th until stopped by the order of injunction of this court.

"(21) That plaintiff, while said ditch was

being constructed, warned the defendant of the danger of damage to him, and on the 17th day of May, 1901, secured an order of injunction from this court, preventing defendant from maintaining said ditch, causing the same to be closed.

"(22) That said ditch has not been open since.

"(23) That the hail and rains of May 17, 1901, and subsequent thereto, fell upon plaintiff's corn crop to about the same degree as that which fell upon defendant's land, and that said rain and hail was damaging to vegetation, and that at said time plaintiff's corn, being very young, and where not drowned by the water flowing from said ditch, soon recovered, and yielded about 26 bushels of corn per acre.

"(24) That the tract of land upon which plaintiff's corn was growing is smooth, slightly sloping to the east, and not subject to overflow from natural causes, and the crops thereon had not been damaged in years previous and subsequent to that of 1901, except, possibly, in a small buffalo wallow thereon.

"(25) That water that collected on plaintiff's corn had only partially run off and sunk down by Sunday, May 19, 1901, and after the ditch was dammed on May 17, 1901.

"(26) The rains of Sunday evening and Monday, May 19 and 20, 1901, by reason of the water then standing in plaintiff's corn land, again caused plaintiff's corn to be covered and flooded with water.

"(27) The damage to plaintiff's corn was caused by the flow of water from said ditch, and as a result thereof, and not from any other water thereon from other directions, as a natural result of downfall of rain and hail, had not said ditch been constructed.

"(28) Plaintiff had a two-thirds interest in said corn crop, as tenant.

"(29) That the land upon which plaintiff's crop was growing is now occupied by Sisto Seschetti, who now has a crop of wheat growing thereon.

"(30) There was evidence of the value of plaintiff's corn crop during the month of May, 1901, adduced to show the value at that time by comparison with the remainder of the crop produced.

"(31) This action was originally brought against Frank Krahn, Will Davis, and Alice Davis as defendants. Frank Krahn and Will Davis were wholly discharged by this court at the April term, 1902.

"(32) The plaintiff could have replanted his corn after May 25, 1901, but it would not have been ordinarily prudent, or with the expectation of realizing for his efforts.

"(33) The court finds that the plaintiff, by reason of the construction of said ditch by defendant and the drainage of water from

said pond, has sustained damage in the sum of \$100.

"Conclusion: The court therefore concludes that the issues are with the plaintiff herein against the defendant herein, Alice Davis, and that plaintiff is entitled to judgment against the defendant, Alice Davis, for the sum of \$100 as damages sustained, and costs of suit."

Upon the facts so found the court rendered judgment in favor of plaintiff in the sum of \$100 for damages sustained, and costs. Defendant brings the cause to this court, alleging error of law.

Messrs. Payne & Bennett, for plaintiff in error:

The injury complained of does not constitute a legal injury under the law.

Gray v. McWilliams, 98 Cal. 157, 21 L. R. A. 593, 35 Am. St. Rep. 163, 32 Pac. 976; *Ogburn v. Connor*, 46 Cal. 546, 13 Am. Rep. 213, 22 Pac. 216; *McDaniel v. Cummings*, 83 Cal. 515, 8 L. R. A. 575, 23 Pac. 795; *Lamb v. Reclamation Dist. No. 103*, 73 Cal. 125, 2 Am. St. Rep. 775, 14 Pac. 625; *Peck v. Goodberlett*, 109 N. Y. 180, 16 N. E. 350; *West Cumberland Iron & Steel Co. v. Kenyon*, L. R. 6 Ch. Div. 773; *Sheehan v. Flynn*, 59 Minn. 436, 26 L. R. A. 632, 61 N. W. 462; *Gilfillan v. Schmidt*, 64 Minn. 29, 31 L. R. A. 547, 58 Am. St. Rep. 515, 66 N. W. 126; *Burnett v. Great Northern R. Co.* 76 Minn. 461, 79 N. W. 523; *Jungblum v. Minneapolis, N. U. & S. W. R. Co.* 70 Minn. 153, 72 N. W. 971; *Connell v. Stark*, 108 Wis. 92, 83 N. W. 1092; *Brown v. Winona & S. W. R. Co.* 53 Minn. 259, 39 Am. St. Rep. 603, 55 N. W. 123; *Gannon v. Hargadon*, 10 Allen, 109, 87 Am. Dec. 625; *Chadeayne v. Robinson*, 55 Conn. 350, 3 Am. St. Rep. 55, 11 Atl. 593; *Cairo & V. R. Co. v. Stevens*, 73 Ind. 281, 38 Am. Rep. 139; *Morrison v. Bucksport & B. R. Co.* 67 Me. 355; *Morrissey v. Chicago, B. & Q. R. Co.* 38 Neb. 406, 56 N. W. 946, 57 N. W. 522; *Bowlsby v. Spicer*, 31 N. J. L. 351, 86 Am. Dec. 216; *Benson v. Chicago & A. R. Co.* 78 Mo. 504; *Angell, Watercourses*, §§ 94-135; *Taylor v. Fickas*, 64 Ind. 173, 31 Am. Rep. 114.

Surface water has been called a common enemy, which each owner may get rid of as best he may.

O'Brien v. St. Paul, 25 Minn. 335, 33 Am. Rep. 470; *Brown v. Winona & S. W. R. Co.* 53 Minn. 259, 39 Am. St. Rep. 603, 55 N. W. 123; *Gannon v. Hargadon*, 10 Allen, 106, 87 Am. Dec. 625; *Morrison v. Bucksport & B. R. Co.* 67 Me. 355.

The owner of land may improve it either by erection of buildings or other structures thereon, so as to cause surface water accumulating there by rains and snows falling on the surface to stand in unusual quantities

on other adjacent lands, or to pass onto or over the same in greater quantities or in other directions than they were accustomed to flow, or may elevate or depress his land, thus changing the flow of the surface water.

Taylor v. Fickas, 64 Ind. 173, 31 Am. Rep. 114; *Weis v. Madison*, 75 Ind. 241, 39 Am. Rep. 135; *Templeton v. Voshloe*, 72 Ind. 134, 37 Am. Rep. 150; *Cairo & V. R. Co. v. Stevens*, 73 Ind. 278, 38 Am. Rep. 139; *Evansville v. Decker*, 84 Ind. 325, 43 Am. Rep. 86; *Chambers v. Kyle*, 87 Ind. 83; *Crawfordsville v. Bond*, 96 Ind. 236; *Rice v. Evansville*, 108 Ind. 7, 58 Am. Rep. 22, 9 N. E. 139.

Plaintiff in error had a right to drain her land as she did, and the defendant in error has received no legal injury.

Morrissey v. Chicago, B. & Q. R. Co. 38 Neb. 406, 56 N. W. 946, 57 N. W. 522.

There was no evidence before the court upon which the court could predicate or assess damages in any sum against the plaintiff in error.

Burnett v. Great Northern R. Co. 76 Minn. 461, 79 N. W. 524; *Byrne v. Minneapolis & St. L. R. Co.* 38 Minn. 212, 8 Am. St. Rep. 668, 36 N. W. 339; *Ward v. Chicago, M. & St. P. R. Co.* 61 Minn. 449, 63 N. W. 1104; *Chicago, B. & Q. R. Co. v. Emmert*, 53 Neb. 237, 68 Am. St. Rep. 602, 73 N. W. 542; *Drake v. Chicago, R. I. & P. R. Co.* 63 Iowa, 302, 50 Am. Rep. 746, 19 N. W. 219; *Lommeland v. St. Paul, M. & M. R. Co.* 35 Minn. 412, 29 N. W. 119; *Gulf, C. & S. F. R. Co. v. Hedrick* (Tex.) 7 S. W. 353; *Gulf, C. & S. F. R. Co. v. Pool*, 70 Tex. 713, 8 S. W. 535; *Sabine & E. T. R. Co. v. Smith*, 73 Tex. 1, 11 S. W. 123; *International & G. N. R. Co. v. Pape*, 73 Tex. 501, 11 S. W. 526; *Green v. Taylor, B. & H. R. Co.* 79 Tex. 604, 15 S. W. 685.

Messrs. Hotchkiss & Emery, for defendant in error:

Plaintiff in error cannot lawfully dig a ditch and run the water from a natural reservoir onto the lands of the defendant in error to his injury.

Davis v. Longgreen, 8 Neb. 43; *Butler v. Peck*, 16 Ohio St. 334, 88 Am. Dec. 452; *Vernum v. Wheeler*, 35 Hun, 53; 24 Am. & Eng. Enc. Law, p. 904; *Anderson v. Henderson*, 124 Ill. 164, 16 N. E. 232; *Pettigrew v. Evansville*, 25 Wis. 223, 3 Am. Rep. 50; *Ludeling v. Stubbs*, 34 La. Ann. 935; *Belows v. Sackett*, 15 Barb. 96; *Schaefer v. Marthaler*, 34 Minn. 487, 57 Am. Rep. 73, 26 N. W. 726.

When surface waters reach and become a part of a permanent body of water contained in a natural basin forming a lake or pond, but having no outlet, they lose their character as surface waters and are governed by the same rules as are watercourses.

24 Am. & Eng. Enc. Law, p. 904; *Schaefer* 69 L. R. A.

v. Marthaler, 34 Minn. 487, 57 Am. Rep. 73, 26 N. W. 726; *Alcorn v. Sadler*, 66 Miss. 221, 5 So. 694; *Earl v. De Hart*, 12 N. J. Eq. 280, 72 Am. Dec. 395; *Jones v. Hannovan*, 55 Mo. 462; *Sweet v. Cutts*, 50 N. H. 439, 9 Am. Rep. 276; *Gibbs v. Williams*, 25 Kan. 214, 37 Am. Rep. 241; *Palmer v. Waddell*, 22 Kan. 352; *Wait, Act. & Def.* p. 711; *Drew v. Hicks* (Cal.) 35 Pac. 563; *Cushing v. Pires*, 124 Cal. 663, 57 Pac. 573; *Union P. R. Co. v. Dyche*, 31 Kan. 120, 1 Pac. 243; *Cooley, Torts*, p. 688; *Livingston v. McDonald*, 21 Iowa, 160, 89 Am. Dec. 563; *Smith v. Chicago, C. & D. R. Co.* 38 Iowa, 518; *Shotwell v. Dodge*, 8 Wash. 337, 36 Pac. 254; *Economy Light & P. Co. v. Cutting*, 49 Ill. App. 422.

Gillette, J., delivered the opinion of the court:

This case comes to this court upon a question of law applicable to the facts found and determined by the court below.

It is contended by the plaintiff in error that the injury complained of does not constitute a legal injury under the law. The statutes of this territory contain no provision which assists in the analysis of the proposition here submitted. *Wilson's Rev. & Anno. Stat.* 1903, §§ 4052-4062, defining easements and servitudes, their creation and abolishment, contain no provisions which throw any light upon the subject here under investigation. The whole subject-matter is therefore left to be determined by the rules of the common law.

While the defendant in error is shown to have no estate in the land upon which his crop was growing, other than that of a lessee, he, nevertheless, to the extent of his lease, had the right to the use and occupation thereof, with no greater servitude from the dominant or upper landowner than the owner of the fee would be compelled to recognize; and we think it will be conceded that, if the lessee should suffer damage by the act of the lessor in granting to the dominant tenement a right of servitude with reference to surface water which did not exist at the time of the creation of the lease, the lessor would be liable to the lessee for the damages sustained by reason of the creation of such servitude; and we think, therefore, that he may have such right of action, against one who creates such servitude wrongfully, for any damages he has sustained in the enjoyment of his leasehold estate. Counsel for both plaintiff and defendant in error have been commendably diligent in briefing the authorities governing injuries by flowing water. Many cases have been cited, however, which have little, if any, application to the issues framed in this case. The plaintiff in error is the owner of the domi-

nant tenement, upon which is a natural depression which receives and holds during a rainy season surface water which collects there from the natural drainage of quite a large scope of adjacent territory, and from which there is no natural outlet, and beyond which there is no ravine or surface indication of a natural water course, when such depression is full to overflowing. The depression contains 15 to 20 acres of ground flooded in times of heavy rainfall. The plaintiff in error caused a ditch to be dug so as to drain this depression and discharge the water therefrom over and onto defendant's crop on the adjoining premises, destroying the same. The right of such drainage by the plaintiff in error is the point in issue.

The cases are numerous which hold that the dominant or upper owner of land has a natural easement or servitude upon the lower or servient one, to discharge all waters flowing or accumulating on his land, which is higher, upon or over the land of the servient owner as in a state of nature, and such natural flow or passage water cannot be interrupted or prevented by the servient owner to the detriment or injury of the dominant owner. In each case, however, where such proposition is laid down, the case itself presents peculiar features easily distinguished from this case. We will notice some of them.

The case of *McDaniel v. Cummings*, 83 Cal. 515, 8 L. R. A. 575, 23 Pac. 795, was an action concerning land in the Sacramento River Valley. The land next to the river is highest, and when, in a rainy season, that river overflows, the valley beyond is inundated, to prevent which a landowner proceeded to erect an embankment to prevent such overflow, which caused such overflow water to set back upon the plaintiff's lands, causing it to cover a larger area thereof for a longer period than it otherwise would. The court, in determining that case, held that the landowner had a right to protect himself against water overflowing from the river, following the English case of *King v. Sewer Comrs.* 8 Barn. & C. 355, with respect to waters of the sea, viz., that they are a "common enemy" against which every man has a right to defend himself, regardless of the fact that the barriers he erects may cause the flood to rise higher or flow with greater force upon his neighbor. The court, in the course of its opinion, says: "If the owner of the land next to the river will not, either by himself or in combination with those behind him, erect a levee on the bank, he ought not to be allowed to prevent them from protecting themselves merely because by so doing they prevent his higher land from being drained of the flood waters as rapidly as it otherwise would be." 69 L. R. A.

The court in that case distinguish such conditions from inundations by rainfall, which in *Ogburn v. Connor*, 46 Cal. 340, 13 Am. Rep. 213, was defined as follows: "When two parcels of land belonging to different owners are adjacent to each other, and one is lower than the other, and the surface water from the higher tract has been accustomed by natural flow to pass off over the lower tract, the owner of the lower tract cannot obstruct this flow. The owner of the upper tract has an easement to have the water flow over the land below, and the land below is charged with a corresponding servitude." And this, the court says, is intended as a statement of the common-law rule, but it is probably a better statement of the civil law.

Neither the cases of *Ogburn v. Connor*, 46 Cal. 346, 13 Am. Rep. 213, nor *McDaniel v. Cummings*, 83 Cal. 515, 8 L. R. A. 575, 23 Pac. 795, relied upon by the plaintiff in error, are authorities in point in this case. In *Ogburn v. Connor* the language of the court, in stating the rule, bases it upon surface water from the higher tract, which has been accustomed by a natural flow to pass off over the lower tract. The words "natural flow," here used, clearly distinguish that case from the one under consideration. And the facts in *McDaniel v. Cummings* are clearly distinguishable from the case under consideration, because in this we have only to consider surface water descending from the clouds. These questions were again brought before the supreme court of California in *Gray v. McWilliams*, 98 Cal. 157, 21 L. R. A. 593, 35 Am. St. Rep. 163, 32 Pac. 976, in which the rule in each of the cases of *Ogburn v. Connor* and *McDaniel v. Cummings* is by that court reaffirmed. In the opinion of the court, however, speaking by Searls, J., they say: "In the case of surface waters having no defined channel of escape, and the owner of the land upon which they are found being impotent to rid himself of their presence, the law wisely provides that the laws of nature shall be left untrammelled in their disposition." The last statement of the California court brings us very close to the case under consideration, for here we have a case in which the accumulating surface water has no defined channel of escape, and, if one is made, it must be in addition to what nature has provided.

Counsel for plaintiff in error has called this court's special attention to the case of *Sheehan v. Flynn*, 59 Minn. 436, 26 L. R. A. 632, 61 N. W. 462, as being a case closely in point, and say that the court held in that case that the drainage of surface water to and upon the premises of another does not constitute a tort or an actionable wrong. We are unable to get such meaning from the

language used in that case. The facts were that the dominant owner had a depression in his land which filled with surface water, and in 1871, some 20 years before the case was tried, he dug a ditch 96 rods long upon his own land, to the head of a ravine, which conveyed the water across an adjoining 40-acre tract, and thence across the land of defendant into a lake. This ditch was permitted to fill up in the course of four or five years. The overseers of highways caused condemnation proceedings to be instituted in 1893 for the purpose of opening this ditch, which resulted in an order directing the same to be opened, which act was enjoined. A trial followed, in which the court found that the opening of the ditch would raise the waters of the lake in the spring of the year higher than it otherwise would be, to the extent of submerging $1\frac{1}{2}$ or 2 acres of land, to his damage in the sum of about \$50. Judgment was entered for this sum, which judgment was reversed upon appeal. The court in its opinion modified and criticised several prior decisions of that court, and finally concluded: "We hold that one has a right to drain his land for any legitimate use, whether for a railroad track, a wheat field, or a pasture, and whether the improvement is directly and wholly for the purpose of drainage, or whether it is for some other purpose and such drainage is a mere incidental result. But, if he collect and convey the surface water off his own land, he shall do what is reasonable, under all the circumstances, to turn it into some natural drain, or into some course in which it will do the least injury to his neighbor; and, if he would prevent it from coming upon his land, he must not do so by obstructing some natural drain, and thereby hold back the water and flood the land of his neighbor, at least if such natural drain is an important one. Applying these principles to the present case, we are of the opinion that these limitations on the common-law right of the owner to improve his land so as to rid it of surface water do not prohibit this defendant from draining this depression in the manner proposed. As before stated, it fairly appears that this is the only . . . natural drain reasonably accessible, and the consequent injury to others is not so great, as compared to the benefit to be derived from the improvement as to make it unreasonable on that account. The judgment appealed from is reversed, and judgment ordered for defendant." This is the strongest case presented by the plaintiff in error in support of his contention, and is distinguishable from the case under consideration in this: That there the water was discharged through a ravine into the lake below, while here the water by means of the ditch was discharged upon and

permitted to spread out over the land of defendant in error. In 10 Am. & Eng. Enc. Law, 2d ed. p. 236, the author says: "The upper proprietor cannot collect the waters from his estate and discharge them by artificial channels in a new direction, or in increased volume, upon the lands of the lower proprietor to his injury."

In the case of *Butler v. Peck*, 16 Ohio St. 336, 88 Am. Dec. 452, we have a case closely analogous to the one under consideration. In that case the defendant, Peck, is shown to have been the owner of a tract of land having thereon a low, wet, and swampy marsh or basin covering some five or six acres of land, upon which at certain seasons water stood to a great depth, and at other times to a depth of from one to six inches, until it passed off through a natural outlet, or by evaporation, or passed off by percolation through the soil. The natural outlet would not take all the water off. From one to six inches would remain and pass off by evaporation and percolation. The defendant dug a ditch within 25 rods of defendant's north line, where it terminated, where the water was discharged upon the surface of defendant's land, and from thence onto the land of an adjoining owner, and thence to the land of the plaintiff. In the trial of the case the court instructed the jury as follows: "If you find that, after natural outlets had ceased to carry off the water, there still remained a basin covering several acres, on which water stood to the depth of one, two, or three inches or more, which would not have passed upon the land of the plaintiff but for this improved channel, the plaintiff is entitled to recover." This charge of the trial court was excepted to, and the question brought to the supreme court of that state, and, in passing upon the question thus presented, the court said: "The sole question made by that part of the charge to the jury which is complained of is this: Whether an owner of land having upon it a marshy sink or basin of water, which basin, as to a considerable portion of the water which collects within it, has no natural outlet, may lawfully throw such water by artificial drains upon the lands of an adjacent proprietor? We are clear that no such right exists. It would sanction the creation by artificial means of a servitude which nature has denied. The natural easement arises out of the relative altitudes of adjacent surfaces as nature made them, and these altitudes may not be artificially changed to the damage of an adjacent proprietor. And it makes no difference that, in the hypothetical case on which the charge of the court below complained of is based, in times of high water a portion of the waters of the basin would overflow . . . along a natural

swale to and upon the lands of the plaintiff below; for as to those waters which naturally could not surmount nor penetrate the rim of the basin, but were compelled to pass off by evaporation or remain where they were, the case is the same as if the basin had no outlet."

In *Livingston v. McDonald*, 21 Iowa, 160, 89 Am. Dec. 564 (second syllabus), the court says: "Where the owner of higher lands constructed a ditch to drain the surface water therefrom, which increased the flow of water upon a lower proprietor, or which threw the water upon his land in a manner different from that in which it would have naturally flowed, to the latter's injury, the former is liable for the injury thus occasioned, even though the ditch was constructed by him in the course of the ordinary use and improvement of his farm." And again: "Injuries by flowing surface water, done to a neighbor as the result of ordinary farming operations, such as plow furrows, are not actionable; but where ditches which caused an increased flow of water on the lands of an adjoining owner were dug to reclaim or improve the land, the higher owner is liable." In the course of the opinion in this case, the court cites approvingly the language of Lewis, Ch. J., in *Wheatley v. Baugh*, 25 Pa. 528, 64 Am. Dec. 721: "Accordingly, the law has never gone so far as to recognize in one man a right to convert another's farm to his own use for the purposes of a filter."

In the course of his opinion in *Livingston v. McDonald*, Mr. Justice Dillon, in commenting upon the trial in the court below, said: "The court, in substance, laid down the law to the jury to be that, if the ditch in question increased the quantity of water upon the plaintiff's land to his injury, or, without increasing the quantity, threw it upon the plaintiff's lands in a different manner from what the same would naturally have flowed upon it, to his injury, the defendant was liable for the damage thus occasioned, even though the ditch was constructed by the defendant in the course of the ordinary use and improvement of his farm. . . . We recognize the fact (to use Lord Tenterden's expression) that sur-

face water or slough water is a common enemy which each landowner may reasonably get rid of in the best manner possible, but in relieving himself he must respect the rights of his neighbor, and cannot be justified by an act having the direct tendency and effect to make that enemy less dangerous to himself and more dangerous to his neighbor."

This language of the court in that case is directly applicable to the case under consideration, and would seem to lay down a reasonable and correct rule governing causes arising under circumstances of like import. In this case it is shown that the surface water collecting in large quantities in the depression or basin upon plaintiff in error's land had no natural outlet, and seldom, if ever, overflowed the banks or rim of the depression, and disappeared only by evaporation and percolation. If its presence there was a detriment to that tract of land, such detriment could not, by the act of the plaintiff in error, be inflicted upon the servient tenement. The land of plaintiff in error might rightfully be cultivated to the very brink of the depression, in fact to the water's edge, and whatever of drainage was incident to a proper cultivation of the land, the servient tenement was bound to receive; but a matter of drainage of the depression in question, constructed for the purpose of drainage and consequent increased valuation, followed by a corresponding detriment to an adjoining owner, is in violation of the general rule as now established by American authorities, and we hold that where surface waters reach and become a settled body of water, retained in a natural body or receptacle, forming a lake or pond which is emptied only by evaporation or percolation, they lose their character as surface waters, and may not be drained by artificial means, to the damage of a lower or servient tenement, without the person so artificially draining becoming liable for damages thus inflicted.

It follows that *the judgment of the District Court must be affirmed, with costs.*

All the Justices concur except **Beauchamp, J.**, who presided in the court below, not sitting.

OREGON SUPREME COURT.

STATE of Oregon, *Respt.*,
v.

Frank GUGLIELMO, *Appt.*

(.....Or.....)

1. Indictment by a grand jury is not

necessary to due process of law, so as to preclude the institution of a criminal prosecution by information.

2. Under a constitutional provision for the constitution of a grand jury, which empowers the legislature to modify

NOTE.—As to sufficiency of prosecution upon information, instead of upon indictment of a grand jury, see also, in this series, *Re Wright*, 69 L. R. A.

13 L. R. A. 748; *State v. Tucker*, 51 L. R. A. 246; and *State v. Kyle*, 56 L. R. A. 115.

or abolish it, provision may be made for the institution of criminal proceedings by information without the entire abolition of the grand jury.

3. The official oath of the officer filing an information charging one with crime is sufficient to comply with a constitutional provision that no warrant shall issue but upon probable cause supported by oath, without the necessity of verifying each particular information filed.
4. The regularity of the appointment of the deputy district attorney who signed an information cannot be challenged by merely alleging that the information was not found, indorsed, or presented as required by law.
5. Proof of the appointment of a deputy district attorney who signed an information is not necessary to render it valid, since the court is presumed to be cognizant of such appointment and of the powers of the appointee.
6. In the absence of evidence to the contrary, a deputy district attorney who signs the name of the district attorney to the information will be presumed to have possessed plenary power in the premises, and to have been authorized to examine witnesses to enable him intelligently to charge persons with the commission of crimes, to prepare informations, sign the name of the district attorney thereto, and file them in court.
7. A district attorney who insists that one accused of crime shall plead to the information thereby ratifies the subscription of his name to the information by his deputy.

On Rehearing.

8. Leave of court is not necessary to the filing of an information by the district attorney charging the commission of crime.
9. The fact that the record shows that a warrant was ordered to be issued upon an information filed by the deputy district attorney in the absence of his chief does not show that it was in fact issued without the support of the oath required by the Constitution, where it further appears that the district attorney was present in court when accused first appeared, and ratified the information, so that his oath of office supported the warrant if it was not actually issued until after he had appeared and assumed control of the proceedings.

(February 20, 1905.)

APPEAL by defendant from a judgment of the Circuit Court for Multnomah County convicting him of murder. *Affirmed.* The facts are stated in the opinion.

Messrs. Dan R. Murphy, John F. Logan, and Ralph E. Moody, for appellant:

The motion to quash the information should have been granted and sustained, and the court erred in overruling the same.

Or. Const. art. 7, § 18, art. 1, § 9, Bill of Rights; U. S. Const. 14th Amend. § 1; *Re Lourie*, 8 Colo. 508, 54 Am. St. Rep. 558, 9 Pac. 489; *Zabriskie v. Hackensack & N.* 69 L. R. A.

Y. R. Co. 18 N. J. Eq. 178, 90 Am. Dec. 617; *Lustig v. People*, 18 Colo. 217, 32 Pac. 275; *United States v. Tureaud*, 20 Fed. 621; *United States v. Maxwell*, 3 Dill. 275, Fed. Cas. No. 15,750; *United States v. Smith*, 40 Fed. 755; *Myers v. People*, 67 Ill. 503; *State v. Montgomery*, 8 Kan. 351; *State v. Nulf*, 15 Kan. 404; *State v. Gleason*, 32 Kan. 245, 4 Pac. 363; *State v. J. H.*, 1 Tyler (Vt.) 448; *Walker v. Cruikshank*, 2 Hill, 296; *Conner v. Com.* 3 Binn. 42.

One cannot be prosecuted for a crime until he has been subjected to a preliminary examination by a justice or other lawful officer, or has had an opportunity to be so examined.

O'Hara v. People, 41 Mich. 623, 3 N. W. 161; *Hurtado v. California*, 110 U. S. 516, 28 L. ed. 232, 4 Sup. Ct. Rep. 111, 292; *State v. Cain*, 8 N. C. (1 Hawks) 352; *Stewart v. State*, 24 Ind. 142; *State v. Leicham*, 41 Wis. 565.

The district attorney is the officer to prosecute, and, so far as official acts in prosecutions are required by law to be done in a particular way, he is the only one authorized to discharge such duty.

Byrd v. State, 1 How. (Miss.) 247; *Durr v. State*, 53 Miss. 425; *Welch v. State*, 68 Miss. 341, 8 So. 673; *Wilson v. State*, 70 Miss. 595, 35 Am. St. Rep. 664, 13 So. 225; *Carlisle v. State*, 73 Miss. 387, 19 So. 207.

The indictment (information) must be signed by the district attorney.

Bellinger & C. Codes & Statutes, § 1304.

The duties of the district attorney are quasi judicial, and cannot be delegated.

State ex rel. Blanchard v. Smith, 1 Or. 250.

On petition for rehearing.

The attorney general, under the common law, did not possess the power or authority to file a criminal information *ex officio*, or otherwise, in a case of felony. His right was confined to mere misdemeanors only.

Chase's Bl. Com. p. 1010; 4 Comyns's Dig. 409; *King v. Berchet*, 1 Shower, 107; *King v. Melling*, 5 Mod. 549; 13 Encyclopædia Britannica, p. 73; 4 Inst. 172-174; *Rea v. Lewis*, 1 Strange, 70; *Rea v. Sparling*, 1 Strange, 408, Loft, 253; *Atty. Gen. v. Sheffield Gas Consumers' Co.* 3 De G. M. & G. 304; *Atty. Gen. v. Cambridge Consumers' Gas Co.* L. R. 4 Ch. 71.

If the power of the district attorney to file informations *ex officio* is based upon the power of the attorney general to do so, and it is ascertained that the attorney general had no power to file such information in the class of cases to which this information belongs, then the district attorney does not possess the power.

State v. Dover, 9 N. H. 468; *Com. v. Wat-*

erborough, 5 Mass. 259; *State v. Kittery*, 5 Me. 254; *State ex rel. Giles v. Hardie*, 23 N. C. (1 Ired. L.) 42; *Com. v. Crotty*, 10 Allen, 403, 87 Am. Dec. 669; *Opinion of Justices*, 25 N. H. 541; *State v. Ransberger*, 106 Mo. 135, 17 S. W. 290; *State v. Fletchall*, 31 Mo. App. 296; *Territory v. Cutinola*, 4 N. M. 305, 14 Pac. 809.

Comparison between the attorney general of England and the district or prosecuting attorney is not proper. The only officer that can be correctly compared with the attorney general of England is the attorney general of the state.

The district or prosecuting attorney is an officer authorized by law to appear for and represent a circuit, district, county, or municipality, in actions and proceedings before courts and judicial officers.

23 Am. & Eng. Enc. Law, 2d ed. p. 271.

The powers and duties of the prosecuting attorneys cannot be implied, or loosely inferred from general principles.

23 Am. & Eng. Enc. Law, 2d ed. p. 275; *Atty. Gen. v. Devonshire*, L. R. 14 Q. B. Div. 195.

Upon the adoption of a constitution no official function can be exercised otherwise than is provided by such constitution.

8 Cyc. Law & Proc. p. 763; *Boyd v. United States*, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524.

Messrs. John Manning and A. M. Crawford, Attorney General, for respondent:

It is not essential to the validity of a criminal information that it should be verified by affidavit.

State v. Pohl, 170 Mo. 422, 70 S. W. 695; *State v. Kyle*, 166 Mo. 287, 56 L. R. A. 115, 65 S. W. 763; *State v. Wikson*, 36 Mo. App. 373; *State v. Buck*, 43 Mo. App. 443; *State v. Parker*, 39 Mo. App. 116; *State v. Ransberger*, 106 Mo. 136, 17 S. W. 290; *Long v. People*, 135 Ill. 435, 10 L. R. A. 48, 25 N. E. 851; *Obermark v. People*, 24 Ill. App. 259; *Gallagher v. People*, 120 Ill. 179, 11 N. E. 335; *Ratcliff v. People*, 22 Colo. 75, 43 Pac. 553; *State v. Fletchall*, 31 Mo. App. 296; *Re Boulter*, 5 Wyo. 329, 40 Pac. 520; *State v. McCarver*, 47 Mo. App. 650; *State v. Nulf*, 15 Kan. 404; *State v. White*, 55 Mo. App. 356; *Washburn v. People*, 10 Mich. 372; *Noble v. People*, 23 Colo. 9, 45 Pac. 376; 12 Cyc. Law & Proc. p. 326; 4 Bl. Com. 308 *et seq.*; 1 Bishop, Crim. Proc. 4th ed. § 144; Chitty, Crim. Law, 845.

The name of the district attorney was signed to the information by H. B. Adams, the chief deputy of the district attorney. This is sufficient.

Sess. Laws 1903, p. 32, special session: *State v. Belding*, 43 Or. 101, 71 Pac. 330; 69 L. R. A.

Hammond v. State, 3 Wash. 171, 28 Pac. 334; *Stout v. State*, 93 Ind. 150; *People v. Darr*, 61 Cal. 554; *United States v. Nagle*, 17 Blatchf. 258, Fed. Cas. No. 15,852; *People v. Etting*, 99 Cal. 577, 34 Pac. 237; *People v. Turner*, 85 Cal. 432, 24 Pac. 857; *State v. Faulkner*, 32 La. Ann. 725; *State v. Higgins*, 16 Mo. App. 559; *State v. Hayes*, 16 Mo. App. 560; *Raspberry v. State*, 1 Tex. App. 664; *People v. Griner*, 124 Cal. 19, 56 Pac. 625; *Broune's Appeal*, 69 Mo. App. 159; *State v. Hynes*, 39 Mo. App. 569; *Hamilton v. State*, 103 Ind. 96, 53 Am. Rep. 491, 2 N. E. 299; *Taylor v. State*, 113 Ind. 472, 16 N. E. 183; *Benson v. State*, 68 Ala. 545; *Triplett v. Gill*, 7 J. J. Marsh. 438; 3 Kent, Com. 458; 22 Am. & Eng. Enc. Law, p. 782, note; Mecham, Pub. Off. § 570.

The statute has authorized the district attorney to file an information charging the commission of a crime, without the examination of the charge by a committing magistrate; and no such examination is necessary.

State v. Belding, 43 Or. 95, 71 Pac. 330; *State v. Tucker*, 36 Or. 302, 51 L. R. A. 246, 61 Pac. 894; *State v. Krohne*, 4 Wyo. 347, 34 Pac. 3.

The act providing for the prosecution of crimes on information, as concurrent with indictment by a grand jury, is not repugnant to art. 7, § 18, of the state Constitution. It is a modification of grand juries within the meaning of the Constitution.

State v. Tucker, 36 Or. 291, 51 L. R. A. 246, 61 Pac. 894; *State v. Lawrence*, 12 Or. 297, 7 Pac. 116; *Re Dolph*, 17 Colo. 35, 28 Pac. 470.

Moore, J., delivered the opinion of the court:

The defendant, Frank Guglielmo, was informed against, tried, and convicted of the crime of murder in the first degree, alleged to have been committed in Multnomah county June 14, 1904, by killing one Freda Guarsascia, and from the judgment which followed he appeals.

It is insisted by his counsel that the court erred in denying their motion to set aside the information on the ground that it violated the 14th Amendment of the Constitution of the United States, and was also repugnant to § 18 of article 7 of that of this state. It is argued that these sections of organic law guarantee to every suspected person the right to be charged by indictment found and returned by a grand jury, before he can be required to plead; that, though our state Constitution authorizes the legislature to "modify or abolish" grand juries, it must do so either by increasing or diminishing the number of "the most com-

petent of the prominent citizens of the county" of which that body is composed (*State v. Lawrence*, 12 Or. 297, 7 Pac. 116; *Zabriskie v. Hackensack & N. Y. R. Co.* 18 N. J. Eq. 178, 90 Am. Dec. 617), or by totally abrogating the system; that the act of February 17, 1899 (Bellinger & C. Codes & Statutes, §§ 1258-1264), empowering the trial court to convene a grand jury, demonstrates that such inquisitorial body has not been abolished, nor has it been modified, for the authority attempted to be conferred by that act upon the district attorney to charge the commission of crimes by information only is the substitution of a single person, not chosen in the manner prescribed by the fundamental law of this state for the selection of grand jurors. This question was duly considered in the case of *State v. Tucker*, 36 Or. 291, 51 L. R. A. 246, 61 Pac. 894, and decided adversely to the defendant's contention; and, believing that the conclusion there reached is supported by reason and authority, we adhere to and reaffirm the legal principles thus announced. *Hurtado v. California*, 110 U. S. 516, 28 L. ed. 232, 4 Sup. Ct. Rep. 111, 292; *Bolln v. Nebraska*, 176 U. S. 83, 44 L. ed. 382, 20 Sup. Ct. Rep. 287. In *Re Boulter*, 5 Wyo. 329, 40 Pac. 520, Mr. Chief Justice Groesbeck, in a very able opinion, answers the questions presented by defendant's counsel on this branch of the case, and shows that the doctrine contended for herein is without merit.

The defendant, never having had or waived a preliminary examination, was charged with the commission of the alleged crime by an information not sworn to by any person, upon filing which the court ordered a bench warrant to be issued for his arrest, though he was then in custody; having been apprehended for the crime with the commission of which he was charged. It is maintained by his counsel that this warrant was issued without probable cause, because it was not supported by oath or affirmation, and that an error was committed in overruling the motion to set aside the information, based on the ground that it violated § 9 of article 1 of the Constitution of this state, prohibiting the issuing of warrants for the arrest of any person, except upon probable cause, supported by oath or affirmation. At common law the commission of crimes was charged either by indictment or information, depending in most instances upon the grade of the offense. An indictment was an accusation at the suit of the sovereign based on the oath of twelve men of the county wherein the offense was committed. 2 Hawk. P. C. 287. The form usually prescribed for the commencement of an indictment was, after stating the venue, as fol-

lows: "The jurors for our lady the Queen upon their oath present," etc. 1 Archbold, Crim. Pr. & Pl. *76. Sir Matthew Hale, in speaking of the caption of a written accusation, and of the necessity of stating therein the oath of the jurors, says: "It must return that the indictment was made *per sacramentum*." 2 Hale, P. C. 167. The form of indictment prescribed by the legislative assembly of this state omits a recital of the oath of the grand jurors. Bellinger & C. Codes & Statutes, § 1304. Before the grand jury can enter upon the discharge of their duties, however, an oath is required to be administered to them, the form of which is also ordained. Id. § 1271. It has been repeatedly held in this state that the form of indictment given in the statute was sufficient. *State v. Dodson*, 4 Or. 64; *State v. Spencer*, 6 Or. 152; *State v. Brown*, 7 Or. 186; *State v. Lee Yan Yan*, 10 Or. 365; *State v. Ah Lee*, 18 Or. 540, 23 Pac. 424. In civil actions it is unnecessary to allege a fact which the law will presume. Bliss, Code Pl. 3d ed. § 175. It will be presumed that official duty has been regularly performed (Bellinger & C. Codes & Statutes, § 788, subd. 15); and hence, *arguendo*, it would seem that an indictment complying with the form recommended by the legislative assembly, though omitting a recital therein of the oath of the grand jurors, was sufficient.

At common law an information was a surmise or suggestion upon record, made on behalf of the sovereign to a court of criminal jurisdiction, charging a person with the commission of a misdemeanor. *Wilkes v. King*, 4 Bro. P. C. 360; *United States v. Tureaud*, 20 Fed. 621. "Informations," says a text writer, referring to such accusations made under the ancient rule, "are of two kinds: First, such as are merely at the suit of the King; secondly, such as are partly at the suit of the King, and partly at the suit of the party." 2 Hawk. P. C. 356. Blackstone, speaking of criminal informations, in distinguishing the two kinds, exhibited in the name of the King, says: "First, those which are truly and properly his own suits, and filed *ex officio* by his own immediate officer, the attorney general; secondly, those in which, though the King is the nominal prosecutor, yet it is at the relation of some private person or common informer; and they are filed by the King's coroner and attorney in the court of King's bench, usually called the master of the Crown office, who is for this purpose the standing officer of the public. The objects of the King's own prosecutions, filed *ex officio* by his own attorney general, are properly such enormous

misdeanors as peculiarly tend to disturb or endanger his government, or to molest or affront him in the regular discharge of his royal functions. For offenses so high and dangerous, in the punishment or prevention of which a moment's delay would be fatal, the law has given to the Crown the power of an immediate prosecution, without waiting for any previous application to any other tribunal, which power, thus necessary, not only to the ease and safety, but even to the very existence, of the executive magistrate, was originally reserved in the great plan of the English Constitution wherein provision is wisely made for the due preservation of all its parts. The objects of the other species of informations filed by the master of the Crown office upon the complaint or relation of a private subject are any gross and notorious misdemeanors, riots, batteries, libels, and other immoralities of an atrocious kind, not peculiarly tending to disturb the government (for those are left to the care of the attorney general), but which, on account of their magnitude or pernicious example, deserve the most public animadversion." 4 Bl. Com. *308. In the reign of Henry VII. the remedy by information, exhibited on leave of court by the master of the Crown office, became the means of great oppression to the subjects of England, and so continued with little abatement until 4 & 5 Wm. & Mary, chap. 11, and chap. 18, which provided, in effect, that the clerk of the Crown, in the court of the King's bench, should not, without express authority, to be given by the court when in session, exhibit, receive, or file any information for any of the causes for which it was allowable, nor issue any process thereon, without taking a recognizance from the person procuring such information to be exhibited, but that the act should not extend to any other information than such as should be exhibited in the court of King's bench by the master of the Crown office. 2 Hawk. P. C. 358. This learned author, after quoting the acts, the substance of which is here given, makes the following declaration: "From whence it follows that informations exhibited by the attorney general remain as they were at the common law." In *King v. Jolliffe*, 4 T. R. 285, Lord Chief Justice Kenyon, referring to the act regulating the exhibition of informations by the master of the Crown office, says: "Before the statute 4 & 5 Wm. & Mary, chap. 18, it was in the power of any individual to file an information, without disclosing to the court the grounds on which it was exhibited. But that practice being attended with the inconveniences recited in the preamble to that statute, it was enacted

that no information should be filed without the express order of the court, publicly given. That statute does not enumerate the grounds which are sufficient to enable us to grant the information, but the legislature left it to our discretion, trusting that we should not so far transgress our duty as to go beyond the rules of sound discretion. In ordinary cases affidavits are sworn in the court for the express purpose of praying an information upon them, but that does not preclude us from granting an information on affidavits equally authentic, although not made for that purpose." Sir James Fitzjames Stephen, in his *History of the Criminal Law of England* (vol. 1, p. 296), in referring to the act of 1692, regulating informations exhibited by the master of the Crown office, also observes: "The practical result of this statute has been to make a motion for a criminal information practically equivalent to a proceeding before magistrates in order to the committal of the accused." This distinguished jurist, on the page of his valuable work preceding that from which the foregoing excerpt is taken, in referring to the statute of 1494 (11 Hen. VII. chap. 3), remarks: "This act was the one under which Empson and Dudley earned their obscure infamy." Blackstone, alluding to the act last referred to, and also to another ordained in the reign of the same sovereign, makes the following statement: "But when the statute 3 Hen. VII. chap. 1, had extended the jurisdiction of the court of star chamber, the members of which were the sole judges of the law, the fact, and the penalty, and when the statute 11 Hen. VII. chap. 3, had permitted informations to be brought by any informer upon any penal statute, not extending to life or member, at the assizes or before the justices of the peace, who were to hear and determine the same according to their own discretion, then it was that the legal and orderly jurisdiction of the court of King's bench fell into disuse and oblivion, and Empson and Dudley (the wicked instruments of King Henry VII.), by hunting out obsolete penalties, and this tyrannical mode of prosecution, with other oppressive devices, continually harassed the subject and shamefully enriched the Crown." 4 Bl. Com. *310. It was the fear, undoubtedly entertained by the citizens of this country, that a violation of the rights of personal liberty, as practised in England in the reign of King Henry VII., might possibly be repeated to their injury, that prompted Congress to propose and secure the adoption of the 4th Amendment to the Constitution of the United States. As this amendment was never intended to limit the powers of the states in respect to their own

people, but was designed to operate on the national government only (*Spies v. Illinois* [*Ex parte Spies*] 123 U. S. 131, 31 L. ed. 80, 8 Sup. Ct. Rep. 21, 22; *Bolln v. Nebraska*, 176 U. S. 83, 44 L. ed. 382, 20 Sup. Ct. Rep. 287), the framers of the Constitution of this state embodied the substance thereof in the Bill of Rights, which declares: "No law shall violate the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search or seizure; and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or thing to be seized," Or. Const. art. 1, § 9. This restrictive clause has been incorporated into the statute of this state, which, so far as deemed involved herein, is as follows: An information is the allegation or statement made before a magistrate, and verified by the oath of the party making it, that a person has been guilty of some designated crime. *Beltinger & C. Codes & Statutes*, § 1581. When complaint is made to a magistrate of the commission of a crime, he must examine the informant on oath, and reduce his statement to writing, and cause the same to be subscribed by him, and also take the depositions of any witnesses that the informant may produce in support thereof. *Id.* § 1584. Thereupon, if the magistrate be satisfied that the crime complained of has been committed, and that there is probable cause to believe that the person charged has committed it, he must issue a warrant of arrest. *Id.* § 1585. The necessity of satisfying the magistrate that the crime complained of has been perpetrated, and that there is probable cause to believe that the person charged has committed it, as a condition precedent to the issuing of a warrant of arrest, is analogous to the leave of court which the master of the Crown office in England was obliged to secure before he was permitted to exhibit an information in the name of his sovereign.

At common law the attorney general, *ex officio*, was invested with a discretionary power of filing informations charging the commission of misdemeanors, and hence he was not obliged to ask for or obtain leave of court before exercising the responsibility that devolved upon him by virtue of his office. 4 Bl. Com. *309. Thus, in *Rex v. Philipps*, 3 Burr. 1564, it was ruled that the attorney general had a right himself, *ex officio*, to exhibit an information without leave of court; Lord Mansfield saying: "This is not a case within the act of 4 Wm. & Mary, chap. 18." To the same effect is *Rex v. Davis*, 4 Burr. 2089, in which case

the same learned justice also remarked: "If it appears to the King's attorney general to be right to grant an information, he may do it himself. If he does not think it so, he cannot expect us to do it." The discretionary power vested in and exercised by the attorney general at common law devolves, in this country, in the absence of any statutory regulations, on the district attorneys (*State v. Douglas County Road Co.* 10 Or. 198; *State ex rel. Taylor v. Lord*, 28 Or. 498, 31 L. R. A. 473, 43 Pac. 471), who are entitled to prosecute persons for the commission of crimes by information, as a right pertaining to their office, and without leave of court (1 Bishop, New Crim. Proc. § 144; *State v. Kyle*, 166 Mo. 287, 56 L. R. A. 115, 65 S. W. 763). "Therefore," says Mr. Justice Thomas in *State v. Ransberger*, 106 Mo. 135, 17 S. W. 290, "when the prosecuting attorney files an information, it is always official; it is his accusation, and for it he is responsible." In *Territory v. Outinola*, 4 N. M. 305, 14 Pac. 809, it was held, notwithstanding the 4th Amendment of the Constitution of the United States was in force in the territory of New Mexico, that, under the rules of the common law, as adopted in this country, it was not essential that an information filed *ex officio* by a prosecuting attorney, charging the commission of a misdemeanor, should be supported by affidavit. In that case the court criticizes the decision of Billings, J., in *United States v. Tureaud*, 20 Fed. 621, cited by defendant's counsel, and states that the part of the opinion relied upon "is the mere dictum of the judge, and cannot be regarded as authority." Section 11 of article 2 of the Constitution of Missouri, adopted October 30, 1875, declares that no warrant to seize any person shall issue without probable cause, supported by oath or affirmation reduced to writing. Section 12 of article 2 of the organic law of that state, which originally provided for the prosecution of felonies by indictment only, was amended by resolution of the legislature, which, having been adopted by a vote of the people, took effect December 19, 1900, substituting the following in lieu of the former clause, to wit: "No person shall be prosecuted criminally for felony or misdemeanor otherwise than by indictment or information, which shall be concurrent remedies; but this shall not be construed to apply to cases arising in the land or naval forces or in the militia when in actual service in time of war or public danger." Mo. Laws 1899, p. 382. After this amendment was adopted, it was held, notwithstanding the Constitution of that state required the oath or affirmation supporting the probable cause to be reduced to writing, that a prose-

cuting attorney might file a criminal information based on his official oath. *State v. Kyle*, 166 Mo. 287, 56 L. R. A. 115, 65 S. W. 763; *State v. Pohl*, 170 Mo. 422, 70 S. W. 695; *State v. Fletcher*, 31 Mo. App. 296; *State v. Wilkson*, 36 Mo. App. 373; *State v. Parker*, 39 Mo. App. 116.

The Bill of Rights of this state does not demand that the oath or affirmation sustaining the probable cause shall be reduced to writing, nor does our statute require an information charging the commission of a crime to be verified; and, in the absence of any enactment on the subject, the rules of the common law in relation to informations exhibited by the attorney general are applicable and controlling. The district attorney of the proper judicial district in this state is responsible for all informations filed and is not obliged to obtain leave of court to discharge his duty in this particular before he is permitted to exercise the discretion with which the law invests him. As the circuit court is authorized to convene a grand jury when deemed advisable (*Bellinger & C. Codes & Statutes*, § 1264), indictments and informations are therefore concurrent remedies, and, as the former means of charging the commission of a crime is based on and supported by the oath of the grand jurors, which fact, in this state, need not be recited in the written accusation, so an information, under our statute, need not be verified, for the official oath of the person whose duty it is to prosecute the formal charge complies with the requirement of the organic act, and supplies the necessary oath or affirmation, thereby supporting the probable cause.

It is contended by defendant's counsel that the district attorney for the fourth judicial district did not prepare or file the information herein, and hence the court erred in denying their motion to set it aside. John Manning, the officer mentioned, having been called as a witness by defendant's counsel, testified that his signature to the information was not affixed by him, and that he was not in Portland the day the information was filed. L. C. Hartman and J. P. Fones, whose names are indorsed on the information, appearing as defendant's witnesses, severally testified that, in furnishing evidence as a basis for the information, they were sworn and examined in the office of the district attorney by a deputy. That part of the statute authorizing a prosecuting officer to nominate representatives is as follows: "A district attorney, during his continuance in office, shall be entitled to appoint as many deputies in each county as he may deem necessary, and may, by a written appointment filed with the clerk of the circuit court of the county,

authorize such deputies, or any of them, to attend upon the sittings of the grand jury, and attend to and transact all business pertaining to the district attorney's office." *Bellinger & C. Codes & Statutes*, § 2927, as amended by act of December 28, 1903 (*Sp. Laws Or.* 1903, p. 32). No evidence was offered at the trial tending to show that the appointment of the deputy who signed the name of the district attorney to the information was in writing, or the extent of the power delegated to him. At common law, though the attorney general was authorized to exhibit informations, without leave of court, charging the commission of misdemeanors, if that office was vacant the solicitor general was empowered to discharge that duty. In *Wilkes v. King*, 4 Bro. P. C. 360, it was ruled that notice of the right of the solicitor general to exhibit an information would be taken, without proof of the vacancy in the office of attorney general. In that case it is said: "That the attorney and solicitor general are invested by their offices with general authority to commence and prosecute the suits of the Crown. It is true, the attorney general, as the superior officer, has the direction and control of His Majesty's prosecutions, in which the solicitor general seldom interferes; but it is equally true that during the vacancy of the office of attorney general all the suits of the Crown both criminal and civil, are commenced, prosecuted, and carried on by the solicitor general. That at the time when these informations were filed against Mr. Wilkes the office of attorney general was vacant, and consequently the solicitor general was the proper officer to exhibit them. But it is said that the fact of the vacancy ought to appear upon the record. The only pretense for such an averment is to inform the court of the vacancy, as an inducement to receive the information from the solicitor general, but there is no necessity for that intelligence. The attorney general is, in truth, an officer of, and has a place in, the court of King's bench, and the court will take notice of the vacancy of the office; and there are multitudes of instances of suits commenced and prosecuted by the solicitor general on behalf of the Crown, without any averment or notice taken of the vacancy of the office of attorney general." In *Choen v. State*, 85 Ind. 209, it was held that an indictment signed by a person as "special prosecuting attorney" was not subject to a motion to quash, or vulnerable to a plea in abatement, which did not deny the due appointment of such special prosecuting officer. In deciding that case, Mr. Justice Woods says: "A court takes cognizance of its own officers and of

the genuineness of their official signatures and designations."

In the case at bar the motion to set aside the information is based on the ground that it was not found, indorsed, or presented as required by law. This objection was insufficient to challenge the appointment of the deputy district attorney, and, as the trial court is presumed to be cognizant of its own officers and of the measure of their powers, no proof of the appointment of the deputy was necessary. There being no issue on this question, it must be assumed that the deputy district attorney possessed plenary power, and was authorized to examine witnesses to enable him intelligently to charge persons with the commission of crimes, to prepare informations, sign the name of the district attorney thereto, and to file them in the circuit court. *People v. Etting*, 99 Cal. 577, 34 Pac. 237; *United States v. Nagle*, 17 Blatchf. 258, Fed. Cas. No. 15,852. In *State v. Belding*, 43 Or. 95, 71 Pac. 330, it was held that the district attorney having filed an information containing his name, printed under the indorsement, "A true information," thereby adopted such printed name as his own signature, which bound him as effectually as if he had personally subscribed it to the accusation. So, too, in the case at bar, when the district attorney insisted on the defendant's pleading to the information, he thereby ratified the subscription of his name by his deputy. The district attorney, by virtue of his election and oath of office, was authorized formally to charge persons with the commission of crimes perpetrated or consummated in the judicial district in which he was chosen, and, invoking the maxim, *Qui facit per alium facit per se*, when he caused the defendant to go to trial on the information filed by his deputy he thereby verified under his official oath the facts constituting the gravamen of the charge.

The office of deputy district attorney was not created by the organic law of this state, so as to require the appointee to swear to support the Constitutions of the United States and of this state (Or. Const. art. 15, § 3), nor have we been able to find any statutory provision demanding that he shall take an oath of office; but as the deputy, in the case at bar, did not subscribe his own name to the information, but signed that of the prosecuting attorney, who is a constitutional officer (Or. Const. art. 7, § 17), and specially required to take an oath of office (Bellinger & C. Codes & Statutes, § 2502), the information, which states the facts constituting the probable cause (*Jones v. Robbins*, 8 Gray, 329), is supported by an oath.

Believing that the defendant had a fair and impartial trial in the manner prescribed 69 L. R. A.

by law, and that no prejudicial error was committed, the judgment is affirmed.

A petition for rehearing having been filed, Moore, J., on March 27, 1905, handed down the following additional opinion:

It is contended by defendant's counsel in their petition for a rehearing, that if it be conceded, as stated in the former opinion herein, that a district attorney in this state possesses the power, formerly exercised *ex officio* by the attorney general in England, of exhibiting informations for misdemeanors only, a district attorney in Oregon has no authority in that manner to charge a felony. The legal principle insisted upon challenges the power of the legislative assembly to confer upon the district attorney such authority. The only reason that can be assigned to support this point is that such a procedure is violative of the 14th Amendment to the Constitution of the United States, in that it may result in the deprivation of life or liberty without due process of law. The Supreme Court of the United States, in construing this clause, has settled all controversy on the subject by holding that the prosecution of a person for a felony by an information only constitutes due process of law. *Hurtado v. California*, 110 U. S. 516, 28 L. ed. 232, 4 Sup. Ct. Rep. 111, 292; *Bolln v. Nebraska*, 176 U. S. 83, 44 L. ed. 382, 20 Sup. Ct. Rep. 287.

The similarity of power exercised *ex officio* under the rules of the common law by the attorney general of England, and that employed by a district attorney in this state, lies in the fact that the former was, and the latter, in the absence of legislation on the subject, is, authorized to perform the duties devolving upon him without leave of court. A district attorney may therefore, in his own discretion, file an information charging the commission of any crime committed or triable in the county for which he is elected or appointed. An examination of the rules of the common law, and an investigation of the mode of practice pursued by the attorney general of England thereunder, necessarily lead to the conclusion that a district attorney in this state, in the absence of any enactment on the subject, possesses the same measure of power exercised by him, and hence is not, like the master of the Crown office, obliged to secure leave of court before he can exercise his discretion, but, like such attorney general, he has authority to file informations charging the commission of misdemeanors. This is the limit to the analogy between the powers of these officers, but, to the extent of the similarity indicated, the ancient law is germane and governs, demonstrating that a district attorney in this state possesses plenary power.

er to file informations without permission of court.

His authority, however, so far as it relates to the filing of informations charging the commission of felonies, is not derived from the common law, but directly from the legislative assembly. Bellinger & C. Codes & Statutes, § 1258. The organic law of this state, in commanding the method to be pursued in securing jurors, is as follows: "The legislative assembly shall so provide that the most competent of the permanent citizens of the county shall be chosen for jurors; and out of the whole number in attendance at the court, seven shall be chosen by lot as grand jurors, five of whom must concur to find an indictment. But the legislative assembly may modify or abolish grand jurors." Or. Const. art. 7, § 18. The legislative assembly, exercising the power thus reserved, passed an act, which was approved February 17, 1899 (Laws 1899, p. 99), authorizing the district attorney of any judicial district in this state to file informations charging persons with the commission of any crimes, defined and made punishable by the laws of Oregon, that have been committed in the county where the information is filed. Bellinger & C. Codes & Statutes, § 1258. The information specified shall be substantially in the form prescribed for an indictment (Id. § 1304), except that the words "district attorney" shall be used instead of the words "grand jury" wherever the same occur. Id. § 1259. The information, when filed, shall be construed like, and deemed to be in all respects the same as, an indictment, and the same proceedings shall be had, and with like effect, as in cases where indictments are returned by a grand jury. Id. § 1260. Any person within this state can be compelled by subpoena to appear before a district attorney to testify concerning any crime inquired of by him. Id. § 1261. The name of each witness thus examined by the district attorney shall be inserted at the foot of or indorsed upon the information before it is filed. Id. § 1262.

A perusal of the act in question, the substance of which is hereinbefore stated, will show that it is in effect a modification of the grand jury system, whereby that inquisitorial body has, except when in the opinion of the court deemed advisable (Id. § 1264), been superseded by the district attorney, who can find informations only on the testimony of witnesses taken before him, which tends to show that a crime has been committed in the county, and that there is reasonable cause to believe that the person to be charged is connected therewith and can upon a trial therefor be convicted thereof. The change in the manner of initiating criminal actions is a reasonable exercise by

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the legislative assembly of the power reserved by the people in the fundamental law, and because their representatives, when assembled, considered it appropriate to designate the district attorney as the proper person formally to charge the commission of crimes, his right to employ the authority conferred is as well founded as if the control in such matters had been delegated to any other person or number of persons.

"An information," as defined by the legislative assembly in 1864, "is the allegation or statement made before a magistrate, and verified by the oath of the party making it, that a person has been guilty of some designated crime." Id. § 1581. In modifying the grand jury system, the legislative assembly in 1899 designated the formal charge of the commission of a crime, made by the district attorney as an "information," but the accusation in writing might have been indicated as well by any other name. The word "information," as defined in the statute first enacted, refers to the charge made before a magistrate, and in the last act to the complaint made by a district attorney. We do not think the legislative assembly, by designating the formal charge last referred to as an "information," thereby intended that the word used should be understood as meaning a verified statement, and for this reason resort must be had to § 9 of the Bill of Rights of this state, and not to the statute defining the word, to determine whether or not the information filed by the district attorney should be verified by an oath indorsed thereon or specially made with reference thereto. The affidavits required to support the probable cause were originally sworn in the court for the express purpose of praying an information upon them. *King v. Jolliffe*, 4 T. R. 285. As at common law the attorney general in England *ex officio* exhibited informations for misdemeanors without leave of court, no necessity existed for the making of an affidavit to support the probable cause, except by the master of the Crown office. This was the rule of the common law, as announced in *King v. Jolliffe*, 4 T. R. 285, when the 4th Amendment to the Constitution of the United States was ratified, and also when § 9 of the Bill of Rights of this state was adopted, commanding that no warrant should be issued but upon probable cause, supported by oath or affirmation. A reasonable interpretation of the clause of the organic law of this state, to which attention is called, when read in connection with the rules of the common law, leads to the conclusion that an indictment found and returned by a grand jury need not be specially verified by an oath of any person, and that the same rule also applies to informa-

tions exhibited without leave of court, which are in effect indictments found and returned by the district attorney. Where, however, leave of court is required as a condition precedent to the filing of an information, it would seem that the probable cause must be supported by an oath or affirmation before any warrant can be issued, unless the accused has had or waived a preliminary examination. *Ratcliff v. People*, 22 Colo. 75, 43 Pac. 553; *Holt v. People*, 23 Colo. 1, 45 Pac. 374; *Noble v. People*, 23 Colo. 9, 45 Pac. 376. As a district attorney in this state is not required to secure leave of court before he can file an information charging the commission of a crime, and as he has in effect been subrogated in lieu of the grand jurors in this respect, so that an information filed by him is tantamount to an indictment returned by the grand jury, we think his oath of office, though promissory, is equivalent to the oaths of the grand jurors which are assertory, and each sufficiently supports the probable cause, though not indorsed thereon or specially connected therewith.

It is insisted by defendant's counsel that the bill of exceptions fails to disclose the person who subscribed the district attorney's name to the information. We think this question is unimportant, for the district attorney, having assisted in prosecuting the defendant, and being present when he was arraigned and secured an extension of time within which to plead, thereby adopted the signature appended to the written accusation, and ratified the act of the person who subscribed his name thereto. *State v. Belding*, 43 Or. 95, 71 Pac. 330.

The bill of exceptions shows that the district attorney was absent from Multnomah county June 15, 1904, the day the information was filed, at which time it also appears that a bench warrant for the arrest of the defendant was "ordered" to be issued on the motion of a deputy of the district attorney. Based on this condition of the transcript, it is contended by defendant's counsel that if ratification by the district attorney gave validity to the information, which they deny, such confirmation did not occur until after the bench warrant was executed, and hence is issued without authority. The court's order that a bench warrant be issued is in effect a judgment awarding the relief demanded by the deputy district attorney when the information was filed. The issuance of the warrant in pursuance of such judgment is a ministerial act performed by the clerk of the court, usually upon the request of the officer entitled thereto. The bill of exceptions shows that on June 16, 1904, the district attorney was in the court when the defendant first appeared 69 L. R. A.

therein, but, no copy of the warrant being set out in the record, it does not affirmatively appear that the *capias* was not "issued" at the request of the district attorney himself before he took any part in the action in open court, thereby ratifying the finding of the information, and verifying it with his official oath, prior to the issuance of the bench warrant. The defendant had been arrested for the commission of the crime of which he was convicted, and was confined in jail therefor when the information was filed. His incarceration, therefore, rendered the immediate issuance of a bench warrant unnecessary, and the reasonable probabilities strengthen the conclusion reached, that the *capias* was not issued by the clerk until June 16, 1904, and then, possibly, upon the *præcipe* of the district attorney.

It follows from these considerations that the petition for a rehearing is denied.

MANCHESTER ASSURANCE COMPANY
et al., Appts.,

v.

OREGON RAILROAD & NAVIGATION
COMPANY, Resp't.

(.....Or.....)

1. After a memorandum book has been introduced in evidence without objection no objection will lie to its use as evidence, or to a witness using it as a basis for the facts to which he testifies, on the ground that he did not make the entries.
2. If the memoranda of inspection of engines prepared by the men in charge of that work and filed in the office of the railroad company have been lost, and the facts with regard to the inspection forgotten by them, such facts may be proved by the introduction in evidence of a transcript of such memoranda, entered by the proper clerk in a book kept for that purpose, accompanied by his testimony and that of the inspectors, showing that inspections were made and properly entered in the book.
3. If the particular engine which caused a fire near a railroad track is not identified, the jury may, in determining the question of the negligence of the railroad company, consider evidence that fires were set out at about the time the loss occurred, by engines belonging to the defendant, which are not claimed to have started the fire in question.

(January 9, 1905.)

NOTE.—For other cases in this series as to admissibility of memoranda as evidence, see *Curtis v. Bradley*, 28 L. R. A. 143; *Hay v. Peterson*, 34 L. R. A. 581; *State v. Brady*, 36 L. R. A. 693.

As to admissibility of street-car conductor's trip report as to fares taken, see *Callihan v. Washington Water Power Co.* 58 L. R. A. 773.

A PPEAL by plaintiffs from a judgment of the Circuit Court for Umatilla County in favor of defendant in an action brought to recover damages for the alleged negligent destruction of plaintiffs' property. *Reversed.*

The facts are stated in the opinion.

Messrs. John J. Balleray and John McCourt, for appellants:

A witness is allowed to refresh his memory respecting a fact, by anything written by himself or under his direction at the time when the fact occurred, or immediately thereafter, or at any other time when the fact was fresh in his memory, and he knew that the same was correctly stated in the writing; but in either case the writing must be produced, and may be inspected by the adverse party, who may, if he chooses, cross-examine the witness upon it, and may read it to the jury. A witness may testify from such writing, though he retains no recollection of the particular fact.

1 Bellinger & C. Anno. Codes & Statutes, § 848, p. 407.

A witness cannot be allowed to testify or refresh his memory from something not written by himself, or under his direction; nor can a private writing of a witness, not written by himself, or under his direction, be read in evidence where the witness has no recollection of the fact.

Merrill v. Ithaca & O. R. Co. 16 Wend. 596, 30 Am. Dec. 130; 8 Enc. Pl. & Pr. pp. 138, 139, 142, 143; *Peck v. Valentine*, 94 N. Y. 571; *Watson v. Miller*, 82 Tex. 279, 17 S. W. 1053; *State v. Mayers*, 35 Or. 537, 57 Pac. 197, 36 Or. 44, 58 Pac. 892; *Susewind v. Lever*, 37 Or. 367, 61 Pac. 644; *Maxwell v. Wilkinson* (*Parsons v. Wilkinson*), 113 U. S. 656, 28 L. ed. 1037, 5 Sup. Ct. Rep. 691; *Marcy v. Shults*, 29 N. Y. 350; *Caldwell v. Bowen*, 80 Mich. 387, 45 N. W. 185; *Hematite Min. Co. v. East Tennessee, V. & G. R. Co.* 92 Ga. 268, 18 S. E. 25; *Rapalje, Witnesses*, §§ 280-284; *People v. McLaughlin*, 13 Misc. 287, 35 N. Y. Supp. 77; *People v. Munroe*, 100 Cal. 664, 24 L. R. A. 33, 38 Am. St. Rep. 323, 35 Pac. 326; *Fritz v. Burris*, 41 S. C. 149, 19 S. E. 305; *Chicago & A. R. Co. v. Adler*, 56 Ill. 348.

Evidence of other fires, or scattering of fire, sparks, or cinders of large size, or in large quantities, by engines of a railroad company, other than an engine causing a fire, the subject of litigation, at about the time and place of the fire complained of, is admissible.

Northern P. R. Co. v. Lewis, 2 C. C. A. 446, 7 U. S. App. 254, 51 Fed. 658; *Gulf, C. & S. F. R. Co. v. Johnson*, 4 C. C. A. 447, 10 U. S. App. 629, 54 Fed. 474; *Grand Trunk R. Co. v. Richardson*, 91 U. S. 464, 23 L. ed. 356; *Chicago, St. P. M. & O. R. Co. v. Gilbert*, 3 C. C. A. 264, 10 U. S. App. 375, 52 69 L. R. A.

Fed. 713; *Hoskinson v. Central Vermont R. Co.* 66 Vt. 618, 30 Atl. 27; *Campbell v. Missouri P. R. Co.* 121 Mo. 340, 25 L. R. A. 177, 42 Am. St. Rep. 530, 25 S. W. 936; *Koontz v. Oregon R. & Nav. Co.* 20 Or. 10, 23 Pac. 820; *Henderson v. Philadelphia & R. R. Co.* 144 Pa. 461, 16 L. R. A. 299, 27 Am. St. Rep. 652, 22 Atl. 851; *Thatcher v. Maine C. R. Co.* 85 Me. 502, 27 Atl. 519; *Chicago & E. R. Co. v. Zimmerman*, 12 Ind. App. 504, 40 N. E. 703; *Steele v. Pacific Coast R. Co.* 74 Cal. 323, 15 Pac. 851; *Longabaugh v. Virginia City & Truckee R. Co.* 9 Nev. 271; *St. Joseph & D. C. R. Co. v. Chase*, 11 Kan. 47; *Elliott, Railroads*, § 1243; *Sheldon v. Hudson River R. Co.* 14 N. Y. 219, 67 Am. Dec. 155; *Webb v. Rome, W. & O. R. Co.* 49 N. Y. 424, 10 Am. Rep. 389; *Annapolis & A. R. Co. v. Gantt*, 39 Md. 124; *Mills v. Louisville & N. R. Co.* 25 Ky. L. Rep. 488, 76 S. W. 29; *St. Louis, I. M. & S. R. Co. v. Lawrence* (Ind. Terr.) 76 S. W. 254; *Illinois C. R. Co. v. Barrett*, 23 Ky. L. Rep. 1755, 66 S. W. 9; *Lesser Cotton Co. v. St. Louis, I. M. & S. R. Co.* 52 C. C. A. 99, 114 Fed. 135.

Messrs. W. W. Cotton, Carter & Raley, and Henry F. Conner, for respondent:

When the witness Whitby saw the book, examined the entries, knew them to be correct, and signed them shortly after the fact of the inspection, the book became an original, and was therefore admissible.

Merrill v. Ithaca & O. R. Co. 16 Wend. 588, 30 Am. Dec. 130; *Abbott, Trial Ev.* 2d ed. pp. 395, 396; *Greenl. Ev.* 14th ed. § 437; *Stephen's Digest of Ev.* Chase's ed. § 136, note 2; *Hayden v. Howie*, 27 Ill. App. 533; *Flynn v. Gardner*, 3 Ill. App. 253; *Com. v. Ford*, 130 Mass. 64, 39 Am. Rep. 426; *Filkins v. Baker*, 6 Lans. 516; *Krom v. Levy*, 1 Hun, 171; *Gould v. Conway*, 59 Barb. 355; *Green v. Caulk*, 16 Md. 556; *Acklen v. Hickman*, 63 Ala. 494, 35 Am. Rep. 54; *Burton v. Plummer*, 2 Ad. & El. 341; *Beddo v. Smith*, Minor (Ala.) 397; *Queen v. Langton*, L. R. 2 Q. B. Div. 296; *Wood v. Cooper*, 1 Car. & K. 645.

An instruction which directs the attention of the jury to particular items of testimony is objectionable.

Church v. Melville, 17 Or. 413, 21 Pac. 387; *Crossen v. Oliver*, 41 Or. 505, 69 Pac. 308; *Blashfield, Instructions to Juries*, §§ 105-111; *State v. Huffman*, 16 Or. 15, 16 Pac. 640; *State v. Bowker*, 26 Or. 309, 38 Pac. 124.

Wolverton, J., delivered the opinion of the court:

The defendant, to show that it had observed proper care and precaution in keeping its engines and the smokestacks thereof in suitable repair, to prevent the escape of sparks and fire, and the consequent injury

to the property of others along the line of its railroad, called one Whitby as a witness, who testified that his occupation was that of a boilermaker; that he was and had been in the employ of the defendant; that he inspected locomotives at times, but that he could not testify from memory regarding any inspection of engine No. 400,—the one supposed to have done the damage. A book was then placed in his hands, and his attention called to a page purporting to show the examination, condition, and repair of the smokestack and ash pan of such engine at La Grande from time to time during the month of December, 1902. This book is ruled in columns headed, respectively: "Date of examination;" "Condition of smokestack and Netting;" "Repaired, State Nature of Repairs;" "Condition of Ash Pan and Netting;" "Repairs, State Nature of Repairs;" "Signature of Inspector;" and "Occupation." Within the column headed "Condition of Smokestack and Netting" is written the word "Good," opposite the figure "2" in the column headed "Date of Examination." The word "Good" is also written under the heading "Condition of Ash Pan and Netting;" the name of C. W. Ellsworth under the heading "Signature of Inspector," and the word "Inspector" under that of "Occupation." The same thing appears as of dates December 3d and 5th. So of the 7th, 11th, 13th, 15th, 23d, 30th, and 31st, except that the name of J. A. Whitby appears under "Signature of Inspector," and "Boilermaker" under "Occupation." The witness then further testified that the signatures on the page were those of the witness, except the first three, and that the word "Boilermaker" was written by him, but that the word "Good," wherever appearing, was written by a clerk in the division foreman's office; that it was entered from reports that the witness turned in in writing; that when he signed the page he knew the entries as indicated by the clerk opposite his signature to be correct.

On cross-examination the inquiry proceeded as follows:

Q. Do you know those entries there to correctly report the examinations made on those dates?

A. They do.

Q. What do you recall about the inspections except from this memoranda?

A. When the book is given to me to sign, we have the memoranda right there, and look them over when we sign the book, to make sure it is right when we sign it.

Q. You make those memoranda on what,—a book?

A. Yes, sir; a shopbook. . . .

Q. The book is still there, which you made the original entries in?

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A. I guess it is.

Q. It is not here, is it?

A. No, sir.

Q. The clerk makes this, and you sign them?

A. He keeps them, and copies them off of these reports.

Q. Who told you he copied it off?

A. I frequently see him.

It is further shown that this book is signed by the inspector from the 1st to the 5th of every month following. The page alluded to had previously been offered and received in evidence without objection while Ellsworth, the inspector signing as of dates December 2d, 3d, and 5th, was on the stand, and likewise the entire book had been offered and admitted, which shows the inspection of many other engines during the same month; but at this time there was an objection interposed both to the memorandum, and to the witness's using it, because it appears from the witness's statement that he did not make the entries, nor were they made under his supervision. Ellsworth, while a witness, testified that he made his reports sometimes on stubs, requisition stub books,—anything to get them on,—during the month, which he sent into the office, but that he had them before him when he signed up the exhibit. The objection to the memorandum itself is manifestly without merit, as at this time it had already been admitted in evidence without objection; and, as to the objection to the witness's using it, we are of the opinion that it is also without merit, for the reason that the exhibit was already a matter in evidence, and, being so, there existed no good reason why the witness should not have been examined concerning it, nor why he should not have made such statements touching the real facts as he was enabled to with its aid. However, as this case must go back for a new trial on another point, we will state briefly the result of our investigation as to the admissibility and use of this memorandum for any purpose in the case.

Under the testimony of Whitby, the result of the inspections were first noted in a shopbook, and the memorandum in question was subsequently made up from these notations by the division foreman's clerk, and verified by the witness, who appended his signature in testimony thereof. The original entries are those made in the shopbook. Memoranda made up therefrom are but secondary evidence, and are not *per se* competent evidence of what was done; nor are they competent for use by the witness under any conditions, unless they so refresh his memory that he would thereby be enabled to testify independently of them, or except the origin-

als be lost, or their absence legally excused. *State v. Magers*, 36 Or. 38, 42, 58 Pac. 892; *Haines v. Cadwell*, 40 Or. 229, 66 Pac. 910. By the old law a witness might have refreshed his memory from the memorandum or writing made by himself or under his direction, if made at or near the time, and while the fact or facts of which it speaks were fresh in his mind; and so he might have refreshed his memory from a memorandum or record made by another, if read by or to him when the matter was fresh in his memory, so that he was enabled to depose that the writing correctly represented his recollection at the time. 1 Greenl. Ev. 16th ed. § 439b, Abbott, Trial Brief, 2d ed. 395; Stephen's Digest of Ev. art. 136; 2 Philipps, Ev. *916; *Com. v. Ford*, 130 Mass. 64, 39 Am. Rep. 426. The statute has changed this rule, so that now a memorandum must have been made by the witness himself, or under his direction. 1 Bellinger & C. Anno. Codes & Statutes, § 848. This statute, in the light of the law as it formerly stood, was probably designed to apply more particularly, if not exclusively, to those memoranda where, after consultation by the witness, his memory is not so refreshed that he can speak from his own recollection independently of the writing, because, if wholly refreshed, so that he can speak without it, it is not always necessary that he produce it in court; but, if reference is made to it while testifying, it is proper for the opposite counsel to cross-examine concerning it, to determine whether he is using it as evidence aside from his recollection. *Friendly v. Lee*, 20 Or. 202, 25 Pac. 396; *State v. Magers*, 36 Or. 38, 42, 58 Pac. 892; *Haines v. Cadwell*, 40 Or. 229, 66 Pac. 910; *Hill v. State*, 17 Wis. 675, 86 Am. Dec. 736; *Folsom v. Apple River Log-Driving Co.* 41 Wis. 602. The theory of the law deducible from the books seems to be that a memorandum is but secondary evidence of the facts of which it speaks, the primary evidence being the knowledge of the witness, if he is able to testify truly as to the facts mentioned, or if he is enabled to testify from present recollection after having had his mind quickened by the memorandum,—that is to say, of his own knowledge, independent of the memorandum; and it is only when this primary proof is not available that resort may be had to the secondary, so that it becomes necessary to show that the witness cannot speak from knowledge of the facts, or from present recollection thereof, after having consulted the memorandum, before it can become of evidentiary value, either as auxiliary, or an aid to the mind in speaking from it. Bradner, Ev. 2d ed. 472; Abbott, Trial Ev. 2d ed. 395, 396; *Friendly v. Lee*, 20 Or. 202, 25 Pac. 396; *Howard v. McDonough*, 77 N. Y. 592; *Peck* 69 L. R. A.

v. Valentine, 94 N. Y. 569, 571; *National Ulster County Bank v. Madden*, 114 N. Y. 280, 284, 11 Am. St. Rep. 633, 21 N. E. 408; *Krom v. Levy*, 1 Hun, 171; *People v. McLaughlin*, 150 N. Y. 365, 44 N. E. 1017; *Acklen v. Hickman*, 63 Ala. 494, 35 Am. Rep. 54; *Hayden v. Howie*, 27 Ill. App. 533. But to enable a witness to testify from the memorandum, under the conditions stated, it must be the original, unless it be lost, or its absence excused. *Davis v. Field*, 56 Vt. 426; *Caldwell v. Bowen*, 80 Mich. 382, 45 N. W. 185; *Harrison v. Middleton*, 11 Gratt. 527, 547. If the original be produced, and it appears that it was made in the usual course of business, it may be introduced and received in evidence along with the testimony of the witness who made it, and is enabled to say that the facts stated in it were correctly minuted at the time; but this is because he has forgotten, so that he is unable to speak concerning such facts without the aid of the memorandum. Abbott, Trial Ev. 2d ed. 395, 396; *National Ulster County Bank v. Madden*, 114 N. Y. 280, 284, 11 Am. St. Rep. 633, 21 N. E. 408; *Peck v. Valentine*, 94 N. Y. 569, 571; *Krom v. Levy*, 1 Hun, 171; *Merrill v. Ithaca & O. R. Co.* 16 Wend. 586, 30 Am. Dec. 130; *Moots v. State*, 21 Ohio St. 653; *Burton v. Plummer*, 2 Ad. & El. 341; *Doe ex dem. Church v. Perkins*, 3 T. R. 749; *Tanner v. Taylor*, referred to by Mr. Justice Buller in the latter case. Memoranda made in the usual course of business, when made up from reports of subordinates, are admissible, under the rule, when accompanied by the testimony of such subordinates that they represent truly what had transpired, combined with that of the person minuting the transactions that they were also truly noted; but not so with merely private memoranda, not made in pursuance of any duty owed by the person making them. *New York v. Second Ave. R. Co.* 102 N. Y. 581, 55 Am. Rep. 839, 7 N. E. 905. To the same purpose, see *Harwood v. Mulry*, 8 Gray, 250; *Miller v. Shay*, 145 Mass. 162, 1 Am. St. Rep. 449, 16 N. E. 468. So the court in the case of *The Norma*, 15 C. C. A. 553, 35 U. S. App. 421, 68 Fed. 509, where entries were made in the usual way from memoranda furnished by foremen of the time of their workmen, the memoranda being lost, held that the proofs were sufficient as to certain items pertaining to the yacht; the foremen having been called in conjunction with the bookkeeper who made up the account. Citing *New York v. Second Ave. R. Co.* 102 N. Y. 581, 55 Am. Rep. 839, 7 N. E. 905. Another phase of the question was presented in *Peck v. Valentine*, 94 N. Y. 569, 571, where the plaintiff, for the purpose of proving that defendant had not entered in his cashbook all the moneys

received by him for the sales of lumber, called one Leggett, who testified that he kept on a loose piece of paper an account of moneys received by defendant, which he gave to the plaintiff. This the plaintiff supplemented by his own testimony that he received the memorandum from Leggett and had lost it, but that he had correctly copied the figures into a memorandum book, and that the entries had not been altered; and it was held error to receive the book in evidence, because the memorandum of Leggett was not produced, and he was not called upon to verify its contents. Of a kindred nature is *Hematite Min. Co. v. East Tennessee, V. & G. R. Co.* 92 Ga. 268, 18 S. E. 24. In the light of these rules and legal principles, we are of the opinion that the original memoranda of Ellsworth and Whitby, showing the dates of their inspections, should have been produced, if they were unable to testify to the facts thereby recorded without and independently of them. If produced, however, it would have been competent to submit them to the jury, as well as for the witnesses to speak from them. If, on the other hand, they have been lost, and the fact is satisfactorily shown, then the fact of the inspection could be proved by calling the inspectors in conjunction with the clerk in the division foreman's office who made up the present book in the usual course of business, and the book would then become competent evidence to go to the jury. Neither the inspector nor the clerk being able to testify as to the fact of the inspection and the result, with the attendant dates, from present recollection, the necessity for resort to the secondary evidence would thus be shown; otherwise the book could not be introduced. The book is not a memorandum made by the inspectors or under their direction, but it is a reproduction of the original memoranda made by them. It is a memorandum made by the clerk, however, and, when his testimony concerning it is conjoined with that of the inspectors, showing that inspections were made, and that their memoranda have been lost, or that their production is excusable, and they are able at the same time to verify this as being a correct transcript therefrom, there exists no good reason why the book should not go to the jury.

According to the bill of exceptions, the plaintiffs introduced evidence tending to prove that the fire occurred on the 3d day of December, 1902; that it started in a warehouse close to the railroad; that a passenger train passed, and that about fifteen minutes afterwards the fire was discovered; that when first seen it was a "little fire,—looked like a headlight of an engine at a short distance;" and that it started on the roof of a

warehouse. This was about 6 o'clock in the morning. Plaintiffs also introduced other evidence tending to show that other trains were seen passing there on previous mornings, and shortly after the fire, and that the engines were frequently seen to throw out sparks sufficient at times to set fire to grass along the way; that the engine hauling the same passenger train was at other times seen to emit sparks, some of them of large size; that the passenger train in question was No. 6, but it was not known what engine was attached to it. Under this record, plaintiffs requested the following instruction: "You are the judges of all the facts in the case, and should the defendant offer proof to establish the fact that the engines and the particular engine claimed to have caused the fire was equipped with the best modern appliances generally used, and that it was in good repair, and operated by careful and skilled mechanics, who were careful at the time, you will nevertheless take all the evidence into consideration, and determine from the whole evidence whether this is true or not; and, in doing this, you will take into consideration any evidence tending to show that other fires were caused by engines of the defendant at other times shortly prior or subsequent to the fire alleged in the complaint, or whether engines of the defendant, or this particular engine, scattered coals or sparks or cinders at the time of this particular fire, or shortly prior or subsequent thereto, in determining whether the defendant has been guilty of negligence or not." This the court modified so as to confine its application to the particular engine which it is claimed caused the fire, and its action in that regard is assigned as error. The particular engine that did the damage not having been identified by plaintiffs' pleadings or proof, plaintiffs were entitled to the instruction requested. 2 Thomp. Neg. 2371-2374; *Koontz v. Oregon R. & Nav. Co.* 20 Or. 3, 23 Pac. 820. The one given had the effect of saying to the jury at the last that, although evidence had been admitted tending to show that other engines than the one claimed by the defendant to have set the fire had shortly previous, and subsequent thereto, in passing in proximity to the place, scattered and communicated fire, they need not consider such evidence, but only such of the kind as related to the particular engine in question, in arriving at their verdict in the case.

This was error, for which the judgment of the Circuit Court will be reversed, and the cause remanded for such further proceedings as may seem proper.

Rehearing denied.

George W. RUCKMAN, *Appt.*,

v.

UNION RAILWAY *et al.*, *Respts.*

(.....Or.....)

1. A decree for defendant in an action to compel the surrender of corporate bonds to a corporation which had succeeded to the rights of the one which issued them, on the ground that they had been wrongfully transferred by one in whose hands they had been placed for negotiation for the benefit of the corporation, will estop the corporation plaintiff, in a subsequent suit to foreclose the mortgage by which the bonds are secured, from setting up that they had been paid, or that the present plaintiff's grantor was present when the corporation that issued the bonds transferred its property to the present defendant, and knew that the latter understood that it was acquiring the property free from the lien of the mortgage, since these were matters which should have been tried in the former suit.
2. A decree denying the right of a corporation to have bonds secured by mortgage on its property surrendered by a pledgee who was seeking to foreclose its lien on the bonds against the pledgee, on the ground that the bonds had been wrongfully put upon the market and had never been rightfully negotiated, is no bar to a subsequent suit against the corporation to foreclose the mortgage by which they are secured, since the latter question could not have been determined in the former action.

(December 12, 1904.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Union County in favor of defendants in an action brought to foreclose a mortgage. *Reversed.*

Statement by **Bean, J.:**

In January, 1893, the Union Railway Company issued and delivered to J. W. Shelton twenty bonds, of the par value of \$1,000 each, secured by mortgage on its property. Shelton sold four of the bonds, and they came into the hands of F. L. Richmond and W. T. Wright. Wright and Richmond borrowed \$1,500 of the First National Bank of Union on their promissory note, and deposited the four bonds as collateral security therefor, under an agreement that in case the note was not paid at maturity the bank might, at its option as to time and manner, and without notice to the pledgees, sell the bonds at public or private sale to pay the amount due on the note, together with ac-

cruing interest and costs. Default was made in payment of the note, and the bank elected and undertook to foreclose its lien upon the bonds in the manner provided in the agreement, whereupon the defendant the Union Street Railway Company, which had purchased the mortgaged property after the bonds had been transferred to the bank, brought a suit in equity to compel the bank to surrender up such bonds for cancellation, on the ground that they were issued in trust to Shelton, in order that he might negotiate them to intending purchasers for the use and benefit of the company, and had been delivered to the bank by Shelton for safe-keeping until so sold and disposed of; that no sale had been made, and therefore, in equity, they belonged to the plaintiff, as the purchaser of the property covered by the mortgage given to secure the payment thereof. Issue was joined, and the suit tried and determined on the merits, resulting in a decree in favor of the defendants. *Union Street R. Co. v. First Nat. Bank*, 42 Or. 606, 72 Pac. 586, 73 Pac. 341. The bank thereafter foreclosed its lien upon the bonds, and sold them to the present plaintiff, who brings this suit to enforce the mortgage given by the railway company to secure the payment thereof. For a defense to the present suit, the defendants allege, in brief, (1) that the bonds were paid in full to the bank out of the money paid by the promoters of the Union Street Railway Company for the mortgaged property; and (2) that W. T. Wright, the president of the bank, was present at, and participated in, the negotiations for the purchase, and knew that such promoters understood and believed at the time that such purchase would be free of all liens and encumbrances, notwithstanding which he failed and neglected to disclose to them the lien of the bank on the four bonds in suit, but permitted them to pay over the money and take a conveyance of the property in ignorance thereof, and therefore the bank and its successor with knowledge should now be estopped from asserting that such bonds are a lien upon the property. The plaintiff pleaded the decree in the former suit as a bar, and averred that all the matters and things now alleged as a defense to the present suit were known to the defendants at the time the former suit was commenced, and should have been alleged therein as a ground of recovery. The court below held the former decree not a bar or estoppel, found the facts in favor of the defendants, and dismissed plaintiff's complaint.

Messrs. C. E. Cochran and Crawford & Crawford, for appellant:

The terms of the contract of security govern the parties, and it was the duty of the

NOTE.—For a collection of authorities upon the doctrine of *res judicata*, see notes to *Wiese v. San Francisco Musical Fund Soc.* 7 L. R. A. 577, and *Shores v. Hooper*, 11 L. R. A. 308, and also the case of *Draper v. Medlock*, which immediately follows this, and which takes a somewhat different view of the question involved. 69 L. R. A.

First National Bank of Union to sell thereunder.

Colebrooke, Collateral Securities, § 118; *Footo v. Utah Commercial & Sav. Bank*, 17 Utah, 283, 54 Pac. 104; *Union Trust Co. v. Rigdon*, 93 Ill. 458; *Griggs v. Day*, 136 N. Y. 152, 18 L. R. A. 120, 32 Am. St. Rep. 704, 32 N. E. 612; *Waring v. Gaskill*, 95 Ga. 731, 22 S. E. 659.

Having followed the terms of the contract strictly, the appellant, as purchaser of the bonds, acquired a valid title to the property pledged,—all the property of the pledgeors and pledgee therein.

22 Am. & Eng. Enc. Law, 2d ed. p. 893, § 4; *Halliday v. Bank of Stewart County*, 112 Ga. 461, 37 S. E. 721; *Rozet v. McClellan*, 48 Ill. 345, 95 Am. Dec. 551; *Potter v. Thompson*, 10 R. I. 1.

A judgment of a court of competent jurisdiction, delivered upon the merits of the cause, is final and conclusive between the parties in a subsequent action or suit upon the same cause, not only as to all matters actually litigated and determined in the former action, but also as to every ground of recovery or defense which might have been presented and determined therein.

24 Am. & Eng. Enc. Law, p. 781, note 3; *Barrett v. Failing*, 8 Or. 152; *Neil v. Tolman*, 12 Or. 289, 7 Pac. 103; *Belle v. Brown*, 37 Or. 592, 61 Pac. 1024; *White v. Ladd*, 41 Or. 332, 93 Am. St. Rep. 732, 68 Pac. 739; 2 Black, Judgm. § 731; *Cromicell v. Sac County*, 94 U. S. 351, 24 L. ed. 195; *Lake County v. Platt*, 25 C. C. A. 87, 49 U. S. App. 216, 79 Fed. 571; *Holt County v. National L. Ins. Co.* 25 C. C. A. 469, 49 U. S. App. 376, 80 Fed. 689; *Stewart v. Stebbins*, 30 Miss. 66; *Burford v. Kersey*, 48 Miss. 642; *Patterson v. Wold*, 33 Fed. 793; *Farwell v. Brown*, 35 Fed. 811.

The issues in *Union Street R. Co. v. First Nat. Bank*, 42 Or. 606, 72 Pac. 586, 73 Pac. 341, were: First. Plaintiff's right to have the bonds and mortgage securing the same surrendered up and canceled, and the defendant's corresponding primary duty so to do; and second, the delict or wrongful act or omission of defendant by which primary right and duty have been violated.

Pom. Rem. & Rem. Rights, § 3, c. 3, § 518, also § 519; *Patterson v. Wold*, 33 Fed. 793.

The issues in the case at bar presented by the defendants are identical with those presented and tried in the former case, for the reason that the same evidence supports both the present defense and the former suit.

Freeman, Judgm. § 259; *Hahn v. Miller*, 68 Iowa, 745, 28 N. W. 51; *Hawk v. Evans*, 76 Iowa, 593, 14 Am. St. Rep. 247, 41 N. W. 368; *Prouty v. Matheson*, 107 Iowa, 259, 69 L. R. A.

77 N. W. 1041; *Stone v. United States*, 12 C. C. A. 451, 29 U. S. App. 32, 64 Fed. 667.

Messrs. Leroy Lomax and C. H. Finn, for respondents:

One who advises another to purchase property, without mentioning a lien which he claims thereon, is estopped from asserting it after the negotiations are completed and the purchase price paid.

Alabama G. S. R. Co. v. South & North Ala. R. Co. 84 Ala. 570, 5 Am. St. Rep. 401, 3 So. 286; *Jones v. Gates*, 24 Or. 411, 33 Pac. 989; *Titus v. Morse*, 40 Me. 348, 63 Am. Dec. 665; *Copeland v. Copeland*, 28 Me. 525.

A former judgment or decree can operate as a bar or estoppel only as to matters in issue which were actually litigated or determined.

Gentry v. Pacific Live Stock Co. (Or.) 77 Pac. 115; *La Follett v. Mitchell*, 42 Or. 465, 95 Am. St. Rep. 780, 69 Pac. 916; *Cromicell v. Sac County*, 94 U. S. 351, 24 L. ed. 195.

The essential qualities of *res judicata* are: "There must be a suit, *actor, reus, judex*, and the judgment must be final; that is, it must settle the matter which it purports to conclude."

Wells, *Res Adjudicata*, p. 8.

Bean, J., delivered the opinion of the court:

Upon the record, we have substantially this state of facts: A party commenced a suit against another to compel the surrendering up for cancelation of negotiable instruments on the ground that they were never issued for value. Issue was joined, the suit tried on the merits, and a decree rendered in favor of the defendant. At the time the suit was commenced, the plaintiff therein had two other grounds upon which he might have recovered, neither of which, however, he set up or alleged in the complaint. Thereafter, when the defendant in the former suit, or the party who had succeeded to his interest with knowledge, brought an action to enforce the payment of the instruments, and to foreclose the lien given as security therefor, the defendant therein and the plaintiff in the former suit pleads as a defense the two matters which he might have relied upon for relief in his first suit. The question for decision is whether he is estopped by the former decree against him from pleading such defenses.

It is settled law in this state, as elsewhere, that a judgment or decree rendered upon the merits is a final and conclusive determination of the rights of the parties, and a bar to a subsequent proceeding between them upon the same claim or cause of suit,

not only as to the matter actually determined, but as to every other matter which the parties might have litigated and had decided as incident to or essentially connected therewith, either as a matter of claim or defense (*Neil v. Tolman*, 12 Or. 289, 7 Pac. 103; *Morrill v. Morrill*, 20 Or. 96, 11 L. R. A. 155, 23 Am. St. Rep. 95, 25 Pac. 362; *Belle v. Brown*, 37 Or. 588, 61 Pac. 1024; *White v. Ladd*, 41 Or. 324, 93 Am. St. Rep. 732, 68 Pac. 739); but that when the action is upon a different claim or demand the former judgment can only operate as a bar or an estoppel as against matters actually litigated or questions directly in issue in the former action (*Barrett v. Failing*, 8 Or. 152; *Applegate v. Doucell*, 15 Or. 513, 16 Pac. 651; *LaFollett v. Mitchell*, 42 Or. 465, 95 Am. St. Rep. 780, 69 Pac. 916; *Caseday v. Lindstrom*, 44 Or. 309, 75 Pac. 222; *Gentry v. Pacific Live Stock Co.* (Or.) 77 Pac. 115). This distinction should always be kept in mind in considering the effect of a former judgment or decree. If the second action or defense is upon the same claim or demand, the former judgment is a bar, not only as to matters actually determined, but such as could have been litigated; but, if it is upon another claim or demand, the former judgment is not a bar, except as to questions actually determined or directly in issue. This case comes within the principle first stated. It is a suit between the same parties and upon the same claim or demand as the former suit. The claim or demand in the first suit brought by the defendant Union Street Railway against the bank was the validity of the bonds, and the right of the bank to enforce them as against it. This is the same identical question presented, and the only one for adjudication, in the present suit. It was determined in the former suit, and the decree therein is a bar to further litigation thereof between the same parties, although the plaintiff therein did not allege or urge all the reasons entitling it to relief as demanded. The law requires a party to try his whole suit or action at one time, and he cannot separate his claim or divide his grounds of recovery or defense. The application of this principle is illustrated by two Federal cases. In *Patterson v. Wold*, 33 Fed. 791, the plaintiff, a receiver of an insolvent estate, brought a suit to set aside a deed from the insolvent to his son, and a mortgage given by the son to certain creditors of the insolvent; alleging the deed to be without consideration, and the mortgage a fraudulent preference. Judgment was rendered for the defendants. Thereafter the plaintiff brought another suit to avoid the same deed, alleging that the son was a creditor of the father to the

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amount of \$1,200, and that the land was conveyed to him in payment of this debt, and was a fraudulent preference under the statute, and therefore void. The court (Mr. Justice Brewer presiding) held that the first judgment was a bar to the second, although the grounds of recovery were different. After quoting Mr. Pomeroy's analysis of the elements which constitute "a cause of action" (Pom. Rem. & Rem. Rights. § 519), he says: "Now, what is the plaintiff's primary right, as alleged in these cases? Obviously, in each the same,—the right to have the land; and the defendant's corresponding primary duty is to let him have the land; and the defendant's delict or wrongful act is the failure to let him have the land. These exist in each case, and in each case alike. It is true, the basis of complainant's primary right is, as alleged, different in one case from that in the other, but this is mere difference, in the language of the Supreme Court, in 'the grounds of recovery.' The mere fact that different testimony would be necessary to sustain the different allegations in the two bills does not of itself necessarily make two distinct causes of action. Take this illustration: Suppose a party bring suit to recover possession of real estate, and alleges in his complaint that he is owner by virtue of a patent from the government. After a judgment against him, would he be permitted to maintain a second action, alleging that he was the owner by virtue of certain tax proceedings or by virtue of a judicial sale? Yet different testimony would be required to sustain his allegations in the two actions. In both of such actions plaintiff's primary right—that of possession based on ownership—would be the same, the only difference being in the grounds of recovery. All the grounds of recovery, all the basis of plaintiff's title, must be presented in the first action, or they are lost to him forever, exactly the same as when a party sued upon a note, and having several defenses, pleads only one,—the balance are as though they never existed. The party who has his day in court must make his entire showing. He cannot support a claim or a defense in different actions on different grounds." The recent case of *United States v. California & O. Land Co.* 192 U. S. 355, 48 L. ed. 476, 24 Sup. Ct. Rep. 266, was a suit by the government for the purpose of having a certain patent of land declared void on the ground that the land was in Klamath Indian reservation, and therefore not within the provisions of the grant to the company. One plea of the land company was that the plaintiff had filed an earlier bill against it to avoid the same patent, that it had pleaded matter showing the patent to be valid, and that it was an innocent purchaser, and

that a final decree on the merits had been rendered in its favor. The circuit court held the plea to be bad, but upon an appeal the Supreme Court reversed the case, holding that the former decree was a bar, although the grounds of recovery were essentially different, and it was urged that the plaintiff was suing in a different capacity from that in which it brought the first suit. The court, by Mr. Justice Holmes, said: "On the general principles of our law, it is tolerably plain that the decree in the suit, under the foregoing statute, would be a bar. The parties, the subject-matter, and the relief sought all were the same. . . . Here the plaintiff is the same person that brought the former bill, whatever the difference of the interest intended to be asserted. . . . The best that can be said, apart from the act just quoted, to distinguish the two suits, is that now the United States puts forward a new ground for its prayer. Formerly it sought to avoid the patents by way of forfeiture. Now it seeks the same conclusion by a different means; that is to say, by evidence that the lands originally were excepted from the grant. But in this as in the former suit it seeks to establish its own title to the fee. It may be the law in Scotland that a judgment is not a bar to a second attempt to reach the same result by a different medium *concludendi*. . . . But the whole tendency of our decisions is to require a plaintiff to try his whole cause of action and his whole case at one time. He cannot even split up his claim . . . and *a fortiori* he cannot divide the grounds of recovery. Unless the statute of 1889 put the former suit upon a peculiar footing, the United States was bound then to bring forward all the grounds it had for declaring the patents void, and, when the bill was dis-

missed, was barred as to all by the decree." These two cases and the principles applied are decisive of the present suit. The claim or demand of the defendant Union Street Railway Company in the suit brought by it was that the bank had no interest in the bonds, and they should be surrendered up for cancellation. The reasons why this should be done were not the cause of action or primary subject of inquiry. There may have been many reasons why the bonds should have been surrendered up and canceled, and why the bank could not enforce them as against the property of the railway company; but, if the plaintiff in that suit was content to rely upon only one of such reasons as a ground for recovery, the others are lost to it as completely as if they never existed.

The position that the decree in the former suit is a bar to the right of the plaintiff to foreclose the mortgage given to secure the payment of the bonds is untenable, because that matter was not germane to or connected with the cause of action or suit, and did not in any way affect the merits of the controversy then before the court for determination. The bank was not the owner of the bonds, but held them as collateral security for the debt of persons not parties to the suit. It was bound by the terms of the contract between it and the pledgeors, and no decree of foreclosure could have been made in the former suit, because the proper parties were not before the court. *Union Street R. Co. v. First Nat. Bank*, 42 Or. 606, 72 Pac. 586, 73 Pac. 341.

The decree of the court below will, therefore, be reversed, and one entered here as prayed for in the complaint.

Petition for rehearing overruled.

GEORGIA SUPREME COURT.

William W. DRAPER *et al.*, Exrs., etc.,
Plffs. in Err.,

v.

R. O. MEDLOCK.

(.....Ga.....)

*1. Where a judgment is pleaded as an estoppel, the burden is upon the party relying upon the estoppel to

*Headnotes by FISH, P. J.

Note.—As to estoppel by judgment. See also in this series, notes to *Fowler v. Bowery Sav. Bank*, 4 L. R. A., on page 148, and *Morrill v. Morrill*, 11 L. R. A. 155.

See, upon the doctrine of *res judicata* generally, the proceeding case of *Ruckman v. Union Railway*, and note thereto.

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sustain the plea by showing that the particular matter in controversy was necessarily or actually determined in the former litigation; and if it appear, from the record introduced in support of the plea, that several issues were involved in such litigation, and the verdict and judgment do not clearly show that this particular issue was then decided, before such plea can be sustained this uncertainty must be removed by extrinsic evidence showing that such matter was then decided in accordance with the contention of the party relying upon the plea.

2. Evidence offered in opposition to such plea, which shows that in the former litigation the parties alleged to be estopped by the judgment therein sought to so amend their pleading as to have the question in controversy in the subsequent litigation

determined, and that the court disallowed such amendment, is admissible.

(March 4, 1905.)

ERROR to the Superior Court for Gwinnett County to review a judgment in favor of defendant in an action brought to enforce defendant's liability as indorser of a promissory note. *Reversed.*

The case sufficiently appears in the opinion.

Messrs. N. L. Hutchins and O. H. Brand for plaintiffs in error.

Messrs. T. M. Peeples, N. L. Hutchins, Jr., and Atkinson & Barn for defendant in error.

Fish, P. J., delivered the opinion of the court:

The plea of *res judicata* in the present case is more properly a plea of estoppel by judgment, as the decree relied on in support of the plea was not rendered in a case involving the same cause of action. Medlock's equitable action against Moore, Marsh, & Co., in which this decree was rendered, was brought for the purpose of setting up his defenses to the suit which they had instituted against him in the city court of Lawrenceville upon the three promissory notes which he individually had executed to them, and obtaining certain equitable relief, such as the cancelation of a security deed, etc., which he could not obtain in the city court. This action by Medlock was not an independent suit, but was merely in the nature of an equitable answer to the suit against him in the city court. It is evident that the cause of action in the suit brought by Moore, Marsh, & Co. against Medlock in the city court, which was tried under his equitable action in the superior court, was entirely different and distinct from the cause of action in the present case. In the suit in the city court the action was based upon three promissory notes given by Medlock to Moore, Marsh, & Co., payable to their order, and signed by him alone as maker. In the case in hand the suit is based upon Medlock's indorsements of two promissory notes, each payable to his own order, signed by Zachry and Richmond as makers, indorsed in blank by Medlock, and transferred to Moore, Marsh, & Co. It is clear that the two suits were upon different instruments or obligations, and the liability upon which the plaintiffs in the suit in the city court sought to recover against Medlock was different from that upon which the plaintiffs in the present case seek to recover against him. *Hill v. Freeman*, 7 Ga. 211, 220; *Worth v. Carmichael*, 114 Ga. 699, 40 S. E. 797. In the case last cited it was held: "A judgment rendered in litigation

between the same parties is not conclusive in a subsequent suit between them on a different cause of action, except as to issues actually made and determined in the former litigation. Accordingly, where two notes were given upon a consideration arising in one and the same transaction, a judgment rendered in favor of the payee against the maker upon one of such notes did not operate to estop the latter from setting up in a subsequent action brought by the former against him on the other note a defense which was not in issue when the judgment was rendered." If two notes given by the same maker to the same payee upon a consideration arising in one and the same transaction, when sued upon separately, represent different causes of action, then it is perfectly obvious that the suit against Medlock in the city court of Lawrenceville upon the three promissory notes payable to the order of Moore, Marsh, & Co., signed by him as maker, was upon a different cause of action from that involved in the present suit in the superior court of Gwinnett county against him upon his indorsements of two notes payable to his own order, and executed by Zachry and Richmond as makers. Even if, in comparing the causes of action, we look merely to the present case, and to whatever cause of action Medlock may be said to have had in his equitable action against Moore, Marsh, & Co., ignoring the fact that that was merely in the nature of an equitable answer to their suit against him, it seems hardly necessary to say that his cause of action in that proceeding was different from the cause of action of the plaintiffs in the present case against him. Whatever cause of action he had and set up then is obliged to be different and distinct from the cause of action set up against him now.

As "a judgment rendered in litigation between the same parties is not conclusive in a subsequent suit between them on a different cause of action, except as to issues actually made and determined in the former litigation," the question arises whether, in the case under consideration, Medlock showed that in the former litigation, upon the result of which he relied to support his plea of *res judicata*, the issue as to his liability to Moore, Marsh, & Co. upon his indorsements of the two Zachry and Richmond notes now sued on was both made and determined. For him to sustain his defense of estoppel by judgment, it was necessary for him to show not only that this issue was raised in the former litigation, but also that it was then determined in his favor. The defenses which he then set up were contradictory and inconsistent. One of them was that the two notes of Zachry and Richmond,

payable to the order of Medlock, upon the indorsement of which he is sued in the present case, had been accepted by Moore, Marsh, & Co. as payment *pro tanto* of his indebtedness to them, for which he was entitled to a credit upon the notes on which they were then suing him, and that he had subsequently paid to them the balance left due thereon in cash. It is obvious that, if this defense was found by the jury to be sustained by the evidence, their verdict, finding generally in his favor, and that his three individual notes and the deed which he had given to secure them be surrendered and canceled, and Moore, Marsh, & Co. be required to execute a deed reconveying the property described in the security deed to him, naturally followed; and it was wholly unnecessary for them to pass upon the merits of his other defenses. It is impossible to tell, from the record introduced in support of the plea of estoppel by judgment, upon which of the defenses set up by Medlock in his equitable proceeding against Moore, Marsh, & Co. the verdict therein was rendered, as the verdict was general. It is evident that, if that verdict was based upon the above-stated defense, the decree founded thereon is no bar to the present action against him, for the verdict would then mean no more than that Medlock, after paying his three individual notes which he had given to Moore, Marsh, & Co., with the two notes of Zachry and Richmond, indorsed by him, and a certain sum in cash to cover the balance, was entitled to have these individual notes surrendered to him, and the deed which he had given to secure them canceled, and the property therein described reconveyed to him.

A case decided by this court which is directly in point is *Hunter v. Davis*, 19 Ga. 413, where it was held: "A judgment is not a technical estoppel as to any matter, if the matter is not such that it had, of necessity, to be determined by the court and jury before the court could give the judgment." In that case the original trustee named in a deed which conveyed certain negroes and other property in trust for specified purposes and beneficiaries had been removed for cause, and another trustee appointed in his stead; and the new trustee had brought an action of trover for the recovery of four of these negroes, against the person who had them in possession, who was the husband of one of the beneficiaries. Upon the trial of this action the defendant introduced in evidence a transcript of the record of a suit in equity against him and his wife and the original trustee, brought by the other beneficiaries of the trust, and relied upon the decree therein rendered as an estoppel upon the plaintiff in the trover suit. Upon the

trial of the trover case, the judge, in effect, charged the jury that the plaintiff, being a party to the decree, was estopped from denying the right of the defendant to hold the negroes during the lifetime of his wife. This court held such charge to be erroneous, upon the ground that, in order for the decree in the equity cause to be rendered, "it was not a matter of necessity that the court should first determine the question" which was involved in the trover suit. Benning, J., who delivered the opinion, said: "Was the right asserted in the action of trover such that it had, of necessity, to be determined by the court in the equity suit before it could render the decree which it did render in that suit?" Then, after discussing this question, he concluded that "it was at least not a matter of necessity that the court, before making the decree, . . . should have determined" this question, and that therefore the decree could be no bar to the action of trover.

Another case which is equally in point is *Bradley v. Johnson*, 49 Ga. 412. In that case the complainant, as the widow and heir at law of Bradley, filed a bill against the defendant, as the administrator of Bradley, for an accounting and distribution of Bradley's estate, with a prayer for injunction. On the trial of the case, Johnson, the defendant administrator, introduced in evidence an exemplification from the court of ordinary of the county, from which it appeared that he had made application to that court for letters of administration upon such estate, to which the complainant had entered a caveat, claiming that she, as the widow of Bradley, was entitled to the administration; that the ordinary had granted letters of administration to her; that an appeal had been entered to the superior court; and that the trial in that court resulted in a judgment that the appellant, Johnson, was entitled to administration upon Bradley's estate, which judgment had been certified to the court of ordinary and made the judgment of that court. The administrator relied upon this evidence as showing that the question whether the complainant was the widow of Bradley had been made in the case in the court of ordinary, and there determined against her; and, upon such evidence, under the charge of the court, he obtained a verdict and judgment in his favor. This court, in reversing the judgment, held that the judgment in the court of ordinary "was conclusive as to the fact that letters of administration had been granted to Johnson on Bradley's estate, when offered in evidence on the trial of the equity cause, but it was not conclusive on that trial upon the point as to whether the complainant was the widow of Bradley;"

that it was not an adjudication directly upon that point, and did not purport to decide that question. In the opinion of the court, Chief Justice Warner, after saying this much, continued as follows: "Moreover, it does not affirmatively appear from the verdict and judgment thereon that the fact of her being the widow of Bradley was the only question made and decided by the judgment of the court of ordinary. . . .

The judgment itself is not directly upon that point, and, unless the judgment of the court of ordinary was rendered directly upon that point, as shown by the record, the complainant was not estopped by that judgment from proving that she was the widow of Bradley, on the trial of the equity cause." Upon a subsequent trial of the case in the superior court, the trial judge held that the complainant was estopped by the judgment in the court of ordinary, and the jury, under his charge, found in favor of the administrator; and, upon writ of error to this court, the judgment was again reversed. This court then held: "A judgment in the court of ordinary, on an issue as to the grant of administration on an estate, that the letters do issue to one Johnson, does not estop a woman claiming to be the widow of the deceased from the assertion of her right to the estate by bill in equity, though she was a party to the suit in the ordinary's court, and the question there was as to her marriage to deceased, and though Johnson was contesting with her at the instance of the heirs at law of deceased." [55 Ga. 354.] Judge Jackson, delivering the opinion, said that the facts in the record did not affect the principle ruled in 49 Ga., and that it was "immaterial for what reason the ordinary granted Johnson the administration; he was not bound to pass upon the question of the marriage,"—and quoted the headnote in *Hunter v. Davis*, 19 Ga. 413. To the same effect, see *Henderson v. Fox*, 80 Ga. 479, 6 S. E. 164.

A leading case in this country, which has been often approvingly cited and followed, is *Russell v. Place*, 94 U. S. 606, 608, 24 L. ed. 214, 215, in which it was held: "It is undoubtedly settled law that a judgment of a court of competent jurisdiction upon a question directly involved in one suit is conclusive as to that question in another suit between the same parties. But to this operation of the judgment it must appear, either upon the face of the record, or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit. If there be any uncertainty on this head in the record,—as, for example, if it appear that several distinct matters may have been litigated, upon one or more of which the judgment may have passed, with-

out indicating which of them was thus litigated and upon which the judgment was rendered,—the whole subject-matter of the action will be at large and open to a new contention, unless this uncertainty be removed by extrinsic evidence showing the precise point involved and determined." This case was followed in *De Sollar v. Hanscome*, 158 U. S. 221, 39 L. ed. 959, 15 Sup. Ct. Rep. 816, the facts of which case make the decision there rendered peculiarly in point in the case with which we are dealing. In that case De Sollar filed a bill against Hanscome for the specific performance of an agreement for the sale of certain real estate, made with him by an agent of the defendant. The defendant claimed that the agent had exceeded his authority, but the plaintiff contended that the defendant, after full knowledge of the agreement made by his agent, had ratified it. De Sollar also contended that, by a judgment which had been rendered in his favor in a common-law action which Hanscome had instituted against him to recover damages alleged to have been sustained in consequence of his having placed this agreement and a certain letter written by Hanscome to his agent upon record, Hanscome was estopped to deny that he had ratified the act of his agent in making the contract in dispute. Mr. Justice Brewer, in delivering the opinion, said: "The plaintiff insists—and that is the burden of his contention—that the judgment in the law action is conclusive as to the fact of defendant's assent to the contract as executed by his agent, while the defendant claims that it settles only that this plaintiff, acting under the advice of counsel in placing the papers on record, was guilty of no wilful or malicious wrong, and therefore not liable in damages." Then, after showing from the charge of the court in the action for damages that the jury trying that case "were at liberty to find for the defendant if they thought that in fact the plaintiff had suffered no damages by the filing for record of the letter and agreement," notwithstanding the judge had charged them that "the chief question" was whether the plaintiff had ratified what had been done in his name by his agent, he said: "There is in this case no extrinsic testimony tending to show upon what the verdict of the jury was based. We have simply the record of the former judgment, including therein the testimony and the charge of the court, from which to determine that fact; and, in the light of the charge, it is obviously a matter of doubt whether the jury found that the agreement made by the agent was ratified by the principal, or that no damage had in fact been sustained by placing the papers upon record. We are not now concerned with the inquiry

whether the instructions of the court were correct or not. We look to them simply to see what questions were submitted to the jury, and, if they left it open to the jury to find for the defendant upon either of the two propositions, and the verdict does not specify upon which the jury acted, there can be no certainty that they found upon one rather than the other. The principal contention therefore, of the plaintiff, fails." The principle ruled was stated both in the opinion and the headnote as follows: "It is of the essence of estoppel by judgment that it is certain that the precise fact was determined by the former judgment."

Another case directly in point is *Greene v. Merchants, & Planters' Bank*, 73 Miss. 542, 19 So. 350, where it was held: "Where one has been sued as acceptor of a lost bill of exchange alleged to have been drawn by a certain firm to its own order, and indorsed by the firm and one of the members thereof, and on his pleas of *non est factum* and payment, and the evidence in support of the same, the defendant has defeated a recovery, he cannot, in a second suit against him as acceptor of a lost bill in all respects similar to the preceding bill, save that it was alleged to have been drawn not by the firm, but by said member thereof, maintain a plea of *res judicata*, since it is impossible to say on which of his pleas the jury found for him in the prior suit, and, if not on that of payment, the only matter determined was that he did not accept the particular bill then sued on, which would not preclude an action on the bill that he did accept."

Still another is *Augir v. Ryan*, 63 Minn. 373, 65 N. W. 640, where it was held: "In order that a former judgment should bind parties in a subsequent action by way of estoppel as to any question of fact, it must appear, from the judgment or by extrinsic evidence, that such question was within the issues of the former action, and actually litigated and determined therein. If such judgment and extrinsic evidence leave it a matter of conjecture as to what questions of fact were litigated and determined in the former action, the judgment is not an estoppel." It appeared in that case, as it does in this, that several defenses had been interposed in the former action, but it did not appear upon what issue the verdict in favor of the defendant was founded.

In *Hearn v. Boston & M. R. Co.* 67 N. H. 320, 29 Atl. 970, it was held: "A town having been sued for damages caused by an obstruction in a highway, and the person who placed the obstruction there having been notified of the suit and having conducted the defense, a general verdict for the defendant is not a bar to a subsequent suit against such person for the same injuries, since it

might have been based upon the lack of notice to the town of the existence of the obstruction; and the testimony of jurors . . . is not competent for the purpose of showing that their verdict was in fact based solely on issues material in the second action." In the opinion, Chase, J., said: "As the record does not show upon which of the issues the former judgment was founded, it was incumbent upon the defendants, in order to establish an estoppel by that judgment, to prove by extrinsic evidence that it was founded upon the matters that are in issue in this action."

The principle is briefly and succinctly stated in *Thompson v. N. T. Bushnell Co.* 80 Fed. 332, as follows: "Unless it appears from the record or consistent extrinsic evidence that the particular matter sought to be concluded was necessarily tried and determined, so that the judgment could not have been rendered without deciding it, there is no estoppel."

It follows that the trial judge erred when, at the close of the evidence, he withdrew the case from the jury, sustained the plea of *res judicata*, and dismissed the plaintiffs' action.

2. The plaintiffs offered in evidence a paper which purported to be an amendment which had been offered by Moore, Marsh, & Co. to their answer to the equitable petition of Medlock against them, and which had been disallowed by the court. The court refused to allow this paper to be introduced in evidence, upon the ground that it was no part of the record in the case of *Medlock v. Moore, Marsh, & Co.* It does not appear that when this paper was offered in evidence any question was raised as to the necessity for proving that it really was what it purported to be. The title and description of the case which appeared at its head was: "R. O. Medlock v. Moore, Marsh, & Co. In Equity, in Gwinnett Superior Court, March Term, 1900." What purported to be the order of the judge disallowing the amendment appeared at the end of the document, in the following language: "This amendment disallowed by the court, the makers of the notes (against whom Medlock, as a surety, would have the right to proceed) not being legally in court." This was signed officially in the name of the judge of the western circuit,—the same judge who was presiding in the trial in the present case. The paper was, as we have seen, excluded simply upon the ground that it was no part of the record in the case to which it purported to relate.

This proposed and rejected amendment prayed that, in the event it should be determined that Moore, Marsh, & Co. had, as alleged by Medlock, accepted the two notes of Zachry and Richmond, payable to the order

of Medlock, and indorsed by him, in part payment of the three individual notes of Medlock, upon which they were suing him in the city court of Lawrenceville, then they should have judgment against him for the amount of the Zachry and Richmond notes. While this paper could not be introduced as a part of the record in the case of *Medlock v. Moore, Marsh, & Co.*, yet it showed upon its face that in that case Moore, Marsh, & Co. had sought to have the question as to their right to recover against Medlock as indorser upon the very two notes now sued on determined, in the event the jury should find that they, as alleged by him, had accepted these notes as payment *pro tanto* of his three individual notes upon which they were then suing him, and that they were not allowed to do so because Zachry and Richmond were

not parties to that case. This was a circumstance tending to show that the court did not then consider that the question of Medlock's liability as indorser on the Zachry and Richmond notes was involved in that case, and that it was not determined by the judgment which is relied upon in the present case as an estoppel. We are clearly of opinion that the mere fact that this paper was no part of the record in the case of *Medlock v. Moore, Marsh, & Co.* did not render it inadmissible in evidence. *Butler v. Tifton, T. & G. R. Co.* 121 Ga. 817, 49 S. E. 763.

Judgment reversed.

All the Justices concur, except Cobb, J., disqualified.

PENNSYLVANIA SUPREME COURT.

City of NEW CASTLE, *Appt.*,

v.

Julia Maria KURTZ *et al.*

(210 Pa. 183.)

1. A municipal corporation which has imposed the duty upon property owners of keeping the sidewalks in front of their property free from ice under penalty, and has provided that, in case of their neglect to remove the ice, it will be removed by the city at their expense, assumes the duty of keeping the walks clear; and, in case it is held liable for injury to one falling upon the walk, it cannot recover over against the property owner on the theory that he was primarily liable for the injury.

2. Owners of property in possession of tenants are not bound to keep watch to see that ice dangerous to travel does not form on the walks in front of it which are properly constructed and in proper repair, where their negligent construction of their buildings does not contribute to its formation; and therefore they cannot be held liable for injuries to a traveler by falling upon ice of the existence of which they have no notice.

3. Placing a conductor pipe so as to lead water from the roof of a building adjoining a sidewalk and empty it upon the walk in the manner customary in the community is not a nuisance *per se*, where it does not ordinarily interfere with travel; and the property owner cannot be held liable to one who is injured by ice formed upon the walk many years after the con-

struction of the pipe, as the result of a severe and unusual storm.

(*Mestrezat and Potter, JJ., dissent.*)

(December 31, 1904.)

APPEAL by plaintiff from a judgment of the Court of Common Pleas for Lawrence County in favor of defendants in an action brought to hold them liable for damages which plaintiff had been compelled to pay because of an injury to a traveler who fell upon the sidewalk in front of their property. *Affirmed.*

The facts are stated in the opinion.

Messrs. James A. Gardner and Robert K. Aiken, for appellant:

Defendants created and maintained a public nuisance,—an obstruction upon the sidewalk, a hindrance and a danger to public travel.

The primary duty of keeping the sidewalk in repair is upon the abutting property owner.

Lohr v. Philipsburg, 156 Pa. 249, 27 Atl. 133; *Duncan v. Philadelphia*, 173 Pa. 554, 51 Am. St. Rep. 780, 34 Atl. 235; *Pittsburg use of Flanagan v. Fay*, 8 Pa. Super. Ct. 275; *Pittsburg use of Flanagan v. Daly*, 5 Pa. Super. Ct. 532; *Mintzer v. Greenough*, 192 Pa. 144, 43 Atl. 465; *Dutton v. Lansdowne*, 198 Pa. 563, 53 L. R. A. 469, 82 Am. St. Rep. 814, 48 Atl. 494.

Where a municipality has been sued, and has paid a judgment for injuries sustained either by a defective sidewalk, or by reason of a nuisance caused or maintained by the property owner, recovery over can be had

NOTE.—As to liability for permitting water to accumulate and freeze on sidewalks to the injury of travelers, see also *note* to *Brown v. White*, 58 L. R. A. 321.
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by the municipality against the property owner.

Brookville v. Arthurs, 130 Pa. 501, 18 Atl. 1076, 152 Pa. 334, 25 Atl. 551; *Chester v. First Nat. Bank*, 9 Pa. Super. Ct. 517; *Mintzer v. Greenough*, 192 Pa. 137, 43 Atl. 465; *Dutton v. Lansdowne*, 198 Pa. 563, 53 L. R. A. 469, 82 Am. St. Rep. 814, 48 Atl. 494; *Reading v. Reiner*, 167 Pa. 41, 31 Atl. 357; *Brown v. White*, 202 Pa. 297, 58 L. R. A. 321, 51 Atl. 962; *Kirchner v. Smith*, 207 Pa. 431, 56 Atl. 947; *Dickson v. Hollister*, 123 Pa. 429, 10 Am. St. Rep. 533, 16 Atl. 484; *Gates v. Pennsylvania R. Co.* 150 Pa. 50, 16 L. R. A. 554, 24 Atl. 638; *Philadelphia Co. v. Central Traction Co.* 165 Pa. 461, 30 Atl. 934; *Isham v. Broderick*, 89 Minn. 397, 95 N. W. 224; *Leahan v. Cochran*, 178 Mass. 566, 53 L. R. A. 891, 86 Am. St. Rep. 506, 60 N. E. 382; *Lowell v. Short*, 4 Cush. 275; *West Boylston v. Mason*, 102 Mass. 341; *Westfield v. Mayo*, 122 Mass. 100, 23 Am. Rep. 292; *Chicago v. Robbins*, 2 Black, 418, 17 L. ed. 298, 4 Wall. 657, 18 L. ed. 427; *Reedy v. St. Louis Brewing Asso.* 161 Mo. 523, 53 L. R. A. 805, 61 S. W. 859; 2 Dill. Mun. Corp. §§ 1032-1035.

The nuisance in this case was occasioned by the construction of the conductors without any provision being made to carry the water across or under the sidewalk, and was a continual nuisance of which the defendants had notice.

Gates v. Pennsylvania R. Co. 150 Pa. 50, 16 L. R. A. 554, 24 Atl. 638; *Fowler v. Jersey Shore*, 17 Pa. Super. Ct. 375; *Reading v. Reiner*, 167 Pa. 42, 31 Atl. 357; *Isham v. Broderick*, 89 Minn. 397, 95 N. W. 224.

The casting of the water from the roofs of the buildings, through a large conductor, out upon the sidewalk, there to freeze in a ridge of ice, without making any provision to carry the same away, was clearly a nuisance.

Brown v. White, 202 Pa. 297, 58 L. R. A. 321, 51 Atl. 962; *Reedy v. St. Louis Brewing Asso.* 161 Mo. 523, 53 L. R. A. 805, 61 S. W. 859; *Isham v. Broderick*, 89 Minn. 397, 95 N. W. 224.

The landowner is not relieved from liability when he leases his premises having a nuisance thereon.

Reading v. Reiner, 167 Pa. 41, 31 Atl. 357; *Knauss v. Brua*, 107 Pa. 85; *Fow v. Roberts*, 108 Pa. 489; *Wunder v. McLean*, 134 Pa. 334, 19 Am. St. Rep. 702, 19 Atl. 749; *Brown v. White*, 202 Pa. 297, 58 L. R. A. 321, 51 Atl. 962; *Kirchner v. Smith*, 207 Pa. 431, 56 Atl. 947; *Lewin v. Pauli*, 19 Pa. Super. Ct. 447; *Isham v. Broderick*, 89 Minn. 397, 95 N. W. 224; *Reedy v. St. Louis Brewing Asso.* 161 Mo. 69 L. R. A.

523, 53 L. R. A. 805, 61 S. W. 859; 2 Shearm. & Redf. Neg. § 709a.

The ordinances passed under the police power create no new liability on the part of the municipality, nor does failure to enforce them.

Betham v. Philadelphia, 196 Pa. 312, 46 Atl. 448; *Elliott v. Philadelphia*, 75 Pa. 347, 15 Am. Rep. 591; *Boyd v. Insurance Patrol*, 113 Pa. 270, 6 Atl. 536; *Philadelphia & R. R. Co. v. Ervin*, 89 Pa. 75, 33 Am. Rep. 726; *Philadelphia & R. R. Co. v. Boyer*, 97 Pa. 102; *Davidson v. Schuylkill Traction Co.* 4 Pa. Super. Ct. 94; *McDade v. Chester*, 117 Pa. 414, 2 Am. St. Rep. 681, 12 Atl. 421; *Allebrand v. Duquesne*, 11 Pa. Super. Ct. 223; *Ewen v. Philadelphia*, 194 Pa. 548, 75 Am. St. Rep. 712, 45 Atl. 339; *Grant v. Erie*, 69 Pa. 420, 8 Am. Rep. 272; *Chattanooga v. Reid*, 3 Mun. Corp. Cas. 308. and note, 103 Tenn. 616, 53 S. W. 937; *Tarbutton v. Tennessee*, 110 Ga. 90, 35 S. E. 282; 2 Dill. Mun. Corp. 4th ed. §§ 950-952 notes.

The provision in the sidewalk ordinance introduced by the defendants under objections, which required the street commissioner to see that "the work is done, or caused to be done, according to the provisions of this ordinance," or like provisions, imposed no duty or liability on the city.

Harrison v. Collins, 86 Pa. 153, 27 Am. Rep. 699; *Coates v. Chapman*, 195 Pa. 117, 45 Atl. 676; *Wray v. Evans*, 80 Pa. 105; *White v. Philadelphia*, 201 Pa. 512, 51 Atl. 332; *Uppington v. New York*, 165 N. Y. 222, 53 L. R. A. 550, 59 N. E. 91; 1 Smith. Mun. Corp. § 744, p. 745.

The only defenses open to a defendant in cases involving defects in the sidewalk are, (1) that he did not own the property, (2) that he was not under any duty or obligation to keep the sidewalk in good repair, (3) that the accident did not happen through any neglect of duty on his part.

Fowler v. Jersey Shore, 17 Pa. Super. Ct. 372.

While the city may be primarily liable to a person injured, by reason of its duty to see that the sidewalk is reasonably safe, yet the primary duty of keeping a sidewalk in order is upon the property owner, and that of the city is secondary. The negligence of the city consisted in not compelling the property owners to remove the defect or nuisance.

Lohr v. Philipsburg, 156 Pa. 246, 27 Atl. 133; *Fowler v. Jersey Shore*, 17 Pa. Super. Ct. 373; *Dutton v. Lansdowne*, 198 Pa. 566, 53 L. R. A. 469, 82 Am. St. Rep. 814, 48 Atl. 494; *West Boylston v. Mason*, 102 Mass. 341.

The city and the property owner are not

in *pari delicto*; there is no contribution between them.

Dutton v. Lansdowne, 198 Pa. 566, 53 L. R. A. 469, 82 Am. St. Rep. 814, 48 Atl. 494.

The city is not liable for a defect or nuisance not occasioned by its own act, unless it had actual or constructive notice of the nuisance; and it was just because of this notice that the city became liable to Dean.

Duncan v. Philadelphia, 173 Pa. 550, 51 Am. St. Rep. 780, 34 Atl. 235; *Dean v. New Castle*, 201 Pa. 51, 50 Atl. 310.

Messrs. S. W. Dana, D. B. Kurtz, Aaron L. Hazen, Oscar L. Jackson, and Richard F. Dana, for appellees:

By ordinances for many years the city recognized these conductors by providing that there should be gutters across the sidewalk sufficient to carry the water coming from them. Such conductors were a usual and common means of bringing water from roofs, and were reasonably necessary.

Even though Dean might have recovered against the owners, the city, under the peculiar circumstances of the case, should not be subrogated to Dean's action against them, and is without remedy.

Dill. Mun. Corp. § 795.

When a charter imposes upon lot owners the duty of keeping the sidewalk in repair, and free from snow or ice or other obstructions; and also provides that the superintendent of streets shall repair any sidewalk where the owner of the property neglects to repair the same for a fixed number of days after the service upon him of a written notice so to do, and that the superintendent shall collect the expense of such repair from the owner of the property,—it only imposes upon the owner a statutory liability for the expense of such repairs. It does not directly and specifically make him liable for any damages in case of personal injury to persons from a failure to keep such sidewalks in repair; and the municipality, though it may in an action be held liable to the person injured, and pay the same, cannot maintain the action against the lot owner for indemnity.

2 Smith, Mun. Corp. § 1305; *Port Jervis v. First Nat. Bank*, 96 N. Y. 550; *Chicago v. Robbins*, 2 Black, 418, 17 L. ed. 298; *Brooklyn v. Brooklyn City R. Co.* 47 N. Y. 475, 7 Am. Rep. 469; *Lowell v. Boston & L. R. Corp.* 23 Pick. 24, 34 Am. Dec. 33; *Rochester v. Campbell*, 123 N. Y. 405, 10 L. R. A. 393, 20 Am. St. Rep. 760, 25 N. E. 937; *Moore v. Gadsden*, 93 N. Y. 12.

Dean could not have recovered against the owners if he had sued them instead of the city. They are liable, under the ordinance, to the penalty, and to reimburse the expense of clearing, but are under no new

liability to persons injured through the non-observance of the same.

Philadelphia & R. R. Co. v. Ervin, 89 Pa. 71, 33 Am. Rep. 120; *Pennsylvania R. Co. v. Lewis*, 79 Pa. 33; *Philadelphia & R. R. Co. v. Boyer*, 97 Pa. 91; *Buente v. Pittsburg, A. & M. Traction Co.* 2 Pa. Super. Ct. 185; *Taylor v. Union Traction Co.* 184 Pa. 465, 47 L. R. A. 289, 40 Atl. 159; *McNerney v. Reading*, 150 Pa. 611, 25 Atl. 57.

The owners being out of possession, the premises being in the possession of their respective tenants, and the landlords being under no obligation by contract to keep the sidewalk in repair, the owners would not be liable to persons who might be injured by defects arising in the sidewalk for want of repairs while so in possession of the tenants.

Bears v. Ambler, 9 Pa. 193; *Early v. Ashworth*, 15 W. N. C. 142; *Tout v. Philadelphia*, 173 Pa. 314, 33 Atl. 1034; *Grier v. Sampson*, 27 Pa. 183.

Abutting owners are not liable to passengers for personal injuries, caused by defects in, or want of repairs of, a sidewalk, arising while the owners are not in possession, but the premises are in possession of their tenants, and the owners are under no contract to repair. The liability is by virtue of city ordinances; and, if there was no liability by the common law, none would result from the ordinances.

Lowell v. Boston & L. R. Corp. 23 Pick. 24, 34 Am. Dec. 33; *Rochester v. Campbell*, 123 N. Y. 405, 10 L. R. A. 393, 20 Am. St. Rep. 760, 25 N. E. 937; *Wilhelm v. Defiance*, 58 Ohio St. 56, 40 L. R. A. 294, 65 Am. St. Rep. 745, 50 N. E. 18.

The right of the city to recover at all is one existing in pure equity. In order to have any right in equity to be subrogated to the right of Dean against the owners, the city must itself have done equity.

The street commissioner had express notice of the ice ridge and its very dangerous character, and also was personally present and viewed it, and could easily have removed it, or notified the tenants, while the owners were not in possession, and could and did know nothing of it. It was his duty, as between the city and the owners, to have done one or the other; and still he did nothing.

Such neglect would be criminal. Both officer and the city would be indictable for it.

2 Dill. Mun. Corp. §§ 745-747; 1 Dill. Mun. Corp. § 1761, note; Wharton, Crimes, §§ 1594a, 1591-1593.

Against such criminal neglect the city can get no indemnity.

Weckerly v. German Lutheran Congregation, 3 Rawle, 172.

Certainly what the city cannot get in law, equity will not decree.

Further, the persons against whom the indemnity is claimed are entirely ignorant of wrong, and, if negligent at all, are so merely by intentment of law.

Weekerly v. German Lutheran Congregation, 3 Rawle, 172; *Coventry v. Barton*, 17 Johns. 144, 7 Am. Dec. 376; *Doe ex dem. Cheny v. Batten*, 1 Cowp. 243.

If the city, knowing of the ridge of ice, and knowing, also, the necessary want of knowledge on part of the owners, had done its duty, there could have been no accident. It is therefore in the same situation as a plaintiff seeking to recover when his own neglect contributed to the injury.

Armstrong County v. Clarion County, 66 Pa. 218, 5 Am. Rep. 368; *Horbach v. Elder*, 18 Pa. 33.

Thompson, J., delivered the opinion of the court:

This was an action by the appellant to recover from the appellees the amount of a verdict that it was by suit compelled to pay to a person who had been injured by a fall caused by a ridge of ice formed in front of, and upon the pavement of, the properties owned by the appellees, and occupied by tenants. The liability of the appellant in that action sprang from the actual notice to it of the dangerous condition of the ice upon the pavement, and, after such notice, its neglect to remove it. The proof there was that its street commissioner had express notice of the ridge of ice that caused the accident, and its dangerous character. Having such notice, and having failed to perform its duty, and having been mulcted in damages for such failure of duty, appellant now seeks to recover the amount of such damages from appellees, who had no notice or knowledge of the condition of the ice on the pavement, and whose properties were in the occupancy of tenants.

The principle underlying the right to be reimbursed for damages paid by a municipality in cases of accident is that the owner or occupier of the property, as the case may be, is primarily liable to the person injured. The right of subrogation springs from that liability. The primary liability in that case was upon the appellant. It assumed the duty of removing the ice. By its ordinance it required owners, tenants, or occupiers of properties to remove the ice in front of the same before 10 o'clock of the next day after its accumulation, and, failing to do so, to be liable to a fine; and, in case the owner or occupier did not remove when so required, it undertook to do so. The appellant, having undertaken that duty, had express notice of the condition of the ice and the necessity

for its removal. Thus its negligence arose directly from its failure to perform it. It now practically seeks to have a right of subrogation for the repayment of the damages which were the direct consequence of its own negligence. It is an attempt, therefore, to make a wrong, and not a right, the basis of such subrogation. In 2 Smith's Municipal Corporations, § 1305, it is said: "But where a charter imposes upon lot owners the duty of keeping the sidewalk . . . in repair, and free from snow or ice or other obstruction, and also provides that the superintendent of streets should repair any sidewalk when the owner of the property neglected to repair the same for a fixed number of days after the service upon him of a written notice to do so, and that the superintendent should collect the expense of such repair from the owner of the property, it only imposes upon the lot owner a statutory liability for the expense of such repairs. It does not directly and specifically make him liable for any damages in case of personal injury to persons from a failure to keep such sidewalks in repair, and the municipality, though it may in an action be held liable to the person injured, and pay the same, cannot maintain the action against the lot owner for indemnity." He there cites numerous authorities to sustain the above.

The failure of the appellant to remove the ice ridge in question, with notice of its dangerous condition, or to give notice to the tenants to remove it promptly, or, in case of their failure, to do so at their expense, negatives an equal liability basis upon which to build a right in equity for subrogation against the appellees, the owners of the property, not in occupancy, and without the slightest knowledge or information in regard to the condition of the pavement; but, in any contingency, the right to reimbursement by appellant could only spring from a liability of the appellees, which Dean, who recovered a verdict against the appellant, might have enforced against them. They were the owners of the properties, and their tenants were, and had been for many years, the actual occupiers of them. The accident was not caused by the bad condition of the pavement or its want of repair, but by a sudden accumulation of ice, to which water from the buildings may have contributed. It was an unusual condition produced by the elements, and seemed to have had no similar recurrence in a period of many years. Whatever the duties of the tenants to keep the pavements free and clear of ice may have been, the appellees, out of possession, with the pavement in proper repair, and the properties prop-

erly constructed and also in proper repair, were not bound to keep watch and guard over the pavement to prevent the formation of ridges of ice upon it; and, if so, they cannot be held liable for an injury consequent upon a sudden accumulation of ice there. In *Lohr v. Philipsburg*, 156 Pa. 246, 27 Atl. 133, Mr. Justice Mitchell said: "In the recent case of *Burns v. Bradford*, 137 Pa. 361, 11 L. R. A. 726, 20 Atl. 997, our Brother McCollum said: 'A municipal corporation is not an insurer against all defects in its highways, but it is answerable for negligence in the performance of its duties in the construction and care of them. For a defect arising in them without its fault or neglect, it is not liable, unless it has express notice, or the defect be so notorious as to be evident to all passers.'" It was accordingly held in that case that, although "it is a fact well known to the inhabitants of all our municipalities that sidewalks are liable in the winter to be thrown out of level by the action of the frost," yet the plaintiff, who was injured—very much in the same manner as the present plaintiff was—by the stringers of a plank walk being raised higher on one side than the other, could not recover without proof that the defect was observable by all passers. So here the proper instruction to the jury should be that the borough was bound to keep a reasonable supervision over the condition of its sidewalks, but it was not liable for negligence unless it had actual notice or knowledge of the defect complained of, or it was so plain to observation and had existed so long a time that officers exercising a reasonable supervision ought to have observed it.

The primary liability on the part of the owner out of occupancy may arise where the injury is the result of negligence springing from a failure to repair a pavement, but where no such condition exists, and there is no failure of duty in regard to any repairs, no negligence can be said to be attributed to him. There was no evidence in this case that the pavement was in a bad condition or out of repair, and none that there was danger by reason of the failure to construct across it a gutter to the street. No such gutters were laid across pavements in the locality, and none required. This is apparent from the fact that there was no proper storm gutter in the street to carry off water, and especially so in the case of appellees' pavement, as a telegraph pole over a foot in diameter had been erected, under the direction of appellant's engineer, directly opposite the waterspout from appellees' property, which precluded the construction of a small gutter. It is, however, manifest that, if even a small gutter had been constructed across the pavement, under the stress of the intense weather which caused the ridge of ice upon the pavement it would not have successfully operated to prevent such accumulation. It follows, then, that, unless there was such a failure of duty on the part of the appellees in the construction of a water pipe as resulted in a nuisance *per se*, continuing as such, no liability on their part could arise. The conductor or waterspout was constructed at the time of the erection of these houses, some twenty years previous, was such as was in common use, was proper and necessary to remove water from the roof of the houses, and was so recognized. As its construction was proper, and as it was used for a necessary purpose, and as it was not out of repair, it was not a nuisance *per se*, and the fact that a severe storm at some remote period of time might possibly cause an unusual flow of water would not necessarily make it so. There is no evidence that any such flow ever previously made any mischief. Such being the case, there was no such failure of duty on the part of appellees as to be the foundation of any liability. The case of *Brown v. White*, 202 Pa. 297, 58 L. R. A. 321, 51 Atl. 962, was a case in which the construction was a nuisance *per se*, and the owner's liability was placed distinctly upon that ground; and Mr. Justice Mestrezat, quoting from the case of *Knauss v. Brua*, 107 Pa. 85, says: "But the converse of this proposition is also true: If the premises are so constructed, or in such a condition, that the continuance of their use by the tenant must result in a nuisance to a third person, and a nuisance does so result, the landlord is liable."

The learned trial judge was not guilty of error in giving binding instructions for the appellees, and this judgment is affirmed.

Mestrezat and Potter, JJ., dissent.

RHODE ISLAND SUPREME COURT.

Ex parte Elizabeth E. CHACE.

(.....R. I.....)

1. The marriage of a ward, solemnized in a sister state where it is valid, is not void because no license was procured with the consent of the guardian, as required by the laws of his domicile, nor because such laws render void all his contracts.
2. The marriage of a ward, valid where made in a sister state, must be regarded as valid at his domicile, although it would not have been so had it been solemnized there because of statutory limitation of his right to contract.
3. The wife of one illegally restrained of his liberty may maintain a petition for a writ of habeas corpus to obtain his release.
4. One appointed guardian of another because of his lack of discretion to manage his estate has no authority over the person of his ward, which will entitle him to separate him from his wife.

(July 28, 1904.)

PETITION for a writ of habeas corpus to obtain the release of Henry C. Chace from the custody of Andrew D. Wilson, who was attempting to exercise control over him as his guardian. *Granted.*

The facts are stated in the opinion.

Messrs. George S. Engle, F. P. Owen, and *Willis B. Richardson* for petitioner.

Mr. Clarence A. Aldrich for respondent.

Tillinghast, J., delivered the opinion of the court:

This is a petition for a writ of habeas corpus brought by Elizabeth E. Chace in behalf of her husband, Henry C. Chace. The material facts in the case are these: On the 23d day of May, 1899, Andrew D. Wilson was appointed guardian of the person and estate of said Henry C. Chace, a person of full age, under the provisions of Gen. Laws 1896, chap. 196, § 7, on the ground that, from want of discretion in managing his estate, he was likely to bring himself to want. Subsequently, on the 20th of November 1902, Mr. Chace married his present wife. The marriage was solemnized in Massachusetts, although both of the parties were domiciled in Rhode Island, and it was entered into by Mr. Chace without obtaining the written consent of his guardian, which is made one of the requisites for obtaining a marriage license in this state,

under Pub. Laws 1898, 1899, chap. 549, § 11, p. 49. Soon after the marriage, Mr. and Mrs. Chace returned to this state, and lived together as husband and wife for some months, until some time last August, when the guardian aforesaid removed Mr. Chace from his home, against his protest and that of the petitioner. The petitioner avers that the respondent guardian thereupon imprisoned Mr. Chace, and is now unlawfully restraining him of his liberty at No. 9 Lemon street, Providence; that he is deprived of the companionship, assistance, and care of his wife, which he desires; that he is not permitted to have social intercourse with her, save in the presence of his guardian; and that he is being treated in a manner inconsistent with the relation of guardian and ward.

In determining whether the petitioner is entitled to the relief she prays for, the first question calling for decision is whether she was lawfully married to Mr. Chace, for, if not, she shows no standing to petition in his behalf as his wife. It is argued by the counsel for the guardian that the marriage is invalid, and that the petitioner never became the wife of Mr. Chace. The reasons advanced are (1) that by our statute, cited above, a ward is rendered unable to obtain a marriage license without the consent of his guardian, and that no such consent was given by the respondent; (2) that by the provisions of Gen. Laws 1896, chap. 196, § 16, "all contracts, bargains, and conveyances made by any person under guardianship shall be utterly void;" (3) that these provisions show that it is the policy of our law to deny any validity to any kind of a contract which a ward attempts to make, and that therefore, although the marriage took place in Massachusetts, and may have fulfilled the requirements of Massachusetts law, it will not be recognized in this state.

We do not think that any of these arguments are sound. As to the first two, we think it is clear that the statutes relied upon can have no direct application to this marriage, for it was celebrated in another state, and under the provisions of other laws.

The third argument, however, requires more consideration. It is said by counsel for the guardian that "marriage, in evasion of the laws of the domicile, and contrary to the public policy or laws of the domicile will not be recognized as valid." But it must be noticed, in the first place, that it nowhere appears, either in the pleadings or proof, that the marriage involved here was entered into in evasion of the laws of the

NOTE.—For conflict of laws as to validity of marriage, see also, in this series, *Hills v. State*, 57 L. R. A. 155, and *nota*. 69 L. R. A.

domicil, and contrary to the public policy thereof. For aught that appears, the parties may have entered into this contract of marriage in the most perfect good faith, and without any intention of evading the laws of Rhode Island. And, as is said by Mr. Bishop in the first volume of his work on Marriage, Divorce, & Separation, §§ 77, 836: "Each particular instance of what is meant for marriage has the aid of all the presumptions, both of law and fact, and equally whether the marriage was domestic or foreign." Furthermore, it is not clear that, even if the marriage had been solemnized in this state, it would have been void. Pub. Laws 1898, 1899, p. 49, chap. 549, § 11, merely provides that no marriage license shall issue to a person under guardianship without the written consent of the guardian; but it by no means necessarily follows that a marriage procured without first obtaining such license would be void, although the official or other person who performed the ceremony might be liable to punishment under § 19 of the same chapter. See *Parton v. Hervey*, 1 Gray, 119, 121. For, while our statutes prescribe certain formalities and requirements in connection with the entering into the marriage relation, it is to be carefully borne in mind that they nowhere declare that the failure to observe any or all of said formalities or requirements shall have the effect to render a marriage void.

Again, although Gen. Laws 1896, chap. 196, § 16, provides that all contracts made by a ward shall be void, it is at least very questionable whether the legislature intended that section to refer to the contract of marriage. Indeed, the words of the section referring to bargains and conveyances would clearly seem to show that it was only intended to affect contracts relating to property. Certainly the provision is not of universal application for, under Pub. Laws 1898, 1899, chap. 549, § 11, p. 49, there must be an implied exception in the case of a marriage contract to which the guardian consents in writing. Upon the questions of interpretation thus raised, however, we refrain from expressing any opinion, as we think that, even assuming that the marriage would have been void in this state, yet, as, so far as appears, it was lawfully celebrated in Massachusetts, it must be considered valid here. We are aware that the authorities are not entirely uniform upon this point, now for the first time presented in Rhode Island; but the general principle, as we gather it from text writers and decisions, both English and American, is that the capacity or incapacity to marry depends on the law of the place where the marriage is celebrated, and not on that of the domicil of the parties. Story, Conf.

L. 8th ed. § 89. See Id. §§ 113, 121, 123a, 123b; Bishop, Marr. Div. & Sep. § 843, and cases cited; *Putnam v. Putnam*, 8 Pick. 433; *West Cambridge v. Lexington*, 1 Pick. 506, 11 Am. Dec. 231; *Van Voorhis v. Brintnall*, 86 N. Y. 18, 40 Am. Rep. 505. In *Medway v. Needham*, 16 Mass. 157, 8 Am. Dec. 131, a statute made a marriage between a negro or mulatto and a white person void. A couple, one of whom was a mulatto and the other white, in order to evade the statute, came into Rhode Island, where such connections were allowed, were there married, and immediately returned. And the marriage, being good in Rhode Island, was held to be good in Massachusetts. The reasoning upon which these cases proceed is well stated by Sir Edward Simpson in *Scrimshire, v. Scrimshire*, 2 Hagg. Consist. Rep. 395. He says on page 417: "All nations allow marriage contracts. They are *juris gentium*, and the subjects of all nations are equally concerned in them; and from the infinite mischief and confusion that must necessarily arise to the subjects of all nations with respect to legitimacy, successions, and other rights, if the respective laws of different countries were only to be observed as to marriages contracted by the subjects of those countries abroad, all nations have consented, or must be presumed to consent, for the common benefit and advantage, that such marriages should be good, or not according to the laws of the country where they are made. By observing this law no inconvenience can arise, but infinite mischief will ensue if it is not."

The counsel for the guardian, however, cites several cases which at first sight seem to support the position that marriage in evasion of the laws of the domicil is invalid. Thus in *Stull's Estate*, 183 Pa. 625, 39 L. R. A. 539, 39 Atl. 16, and *Pennegar v. State*, 87 Tenn. 244, 2 L. R. A. 703, 10 Am. St. Rep. 648, 10 S. W. 305, a statute forbade any person from whom a divorce was obtained on the ground of adultery to remarry. In both cases a party forbidden to marry went into another state and remarried. The second marriage in both cases was held invalid in the state where the party was domiciled. In *Dupre v. Boulard*, 10 La. Ann. 411, a statute forbade the intermarriage of blacks and whites, and it was held that any such marriage, although valid where performed, would not be recognized in Louisiana. To the same effect are *State v. Kennedy*, 76 N. C. 251, 22 Am. Rep. 683, and *Kinney v. Com.* 30 Gratt. 858, 32 Am. Rep. 690. And in *Brook v. Brook*, 9 H. L. Cas. 193, where a statute declared that a marriage with a deceased wife's sister should be invalid, it was held that such a

marriage, entered into between British subjects in a country where the marriage was not forbidden, was absolutely void in England. We consider these cases inconclusive. Most of them, if not all, fall within a well-recognized exception to the general rule laid down above, namely, that, if a marriage is odious by the common consent of nations, or if its influence is thought dangerous to the fabric of society, so that it is strongly against the public policy of the jurisdiction, it will not be recognized there, even though valid where it was solemnized. Thus a polygamous marriage, although valid and binding in the country where it was contracted, would probably be denied validity in all countries where such unions are prohibited. See *Re Bethell*, L. R. 38 Ch. Div. 220. Probably the rule would be the same in case of an incestuous marriage, although valid in the place where contracted. See Bishop, *supra*, §§ 858 *et seq.*; *Com. v. Lane*, 113 Mass. 458, 463, 18 Am. Rep. 509. The cases cited from Louisiana, North Carolina, and Virginia may be explained, then, on the ground that the tendency of such unions in those states was considered destructive of society; and their apparent conflict with *Medway v. Needham* rests, not upon any conflict of opinion regarding the general principle governing foreign marriages, but only upon the different conceptions of the courts regarding the importance of the public policy forbidding such marriages. The first two cases cited by counsel for the respondent guardian are harder to distinguish, although we think that here, again, the difference in the result is attributable to the same difference in the conception of the public policy regarding such marriages. But if the cases really are in conflict, we believe that the current of authority is in favor of the principle already enunciated. It is true that in the important case of *Brook v. Brook*, 9 H. L. Cas. 193, decided by the House of Lords, a contrary position was taken, and the Massachusetts cases were expressly disapproved. That case, however, although of great weight, has been considerably criticised, and is believed to be contrary to the weight of American authority. For a learned criticism of the case, see the opinion of Gray, Ch. J., in *Com. v. Lane*, 113 Mass. 467, *et seq.*, 18 Am. Rep. 509. See also Bishop, *supra*, § 827. The case of *Andrews v. Andrews*, 188 U. S. 14, 47 L. ed. 366, 23 Sup. Ct. Rep. 237, has no bearing upon the question at issue. In that case the only question was whether the court of Massachusetts constitutionally could refuse to recognize a divorce granted by the court of South Dakota, in view of a Massachusetts statute providing that a divorce obtained in fraud of the laws of the 69 L. R. A.

domicil should be invalid; and it was held that, as the divorce was granted to one who had never obtained a bona fide domicil, the court of South Dakota never acquired jurisdiction, and hence the due faith and credit clause of the Constitution did not require the enforcement of the decree in Massachusetts against the public policy of that state as expressed in its statutes. It is to be noticed that both the first and second marriages involved in that case took place in Massachusetts. And as to the invalidity of the divorce, it is clear that different considerations apply to the determination of the validity of divorces than to the validity of marriages procured in evasion of the law of the domicil. Bishop, *supra*, §§ 836, 837.

Coming now to the case in hand, it requires no argument to show that, even if the marriage might have been void if solemnized in this state, it is nevertheless not such a union that it can in any sense be considered so subversive of good morals, or so threatening to the fabric of society, as to fall within the exception to the general rule regarding foreign marriages. In other words, if valid in Massachusetts, it is equally valid here. As to its validity in Massachusetts, no authorities were cited by counsel, and we have not succeeded in discovering any Massachusetts statute or decision which would tend to show that the marriage is not valid there. Indeed, the only authorities we have found which seem to bear upon the point look the other way. In *Parton v. Hervey*, 1 Gray, 119, 121, the facts were in some respects similar to those in the case at bar. The petitioner had married a female infant of the age of thirteen years, with the free assent of said infant, but without the knowledge or consent of her mother, who was her only surviving parent. The latter, claiming that the marriage was invalid without her consent, locked her daughter up, and refused to allow her husband to have the custody of her person. The petitioner was allowed a writ of habeas corpus against the mother. The court says on page 122: "But in the absence of any provision declaring marriages not celebrated in a prescribed manner, or between parties of certain ages, absolutely void, it is held that all marriages regularly made according to the common law are valid and binding, although had in violation of the specific regulations imposed by statute." And in *Milford v. Worcester*, 7 Mass. 48, 54, 55, Parsons, Ch. J., said: "When a justice or minister shall solemnize a marriage between parties who may lawfully marry, although without publication of the banns of marriage, and without the consent of the parents or guardians, such marriage would unquestionably be lawful, although the of-

ficer would incur the penalty of £50 for a breach of his duty." See 2 Parsons, Contr., 9th ed. p. 93. In the absence, then, of any showing that Mr. Chace was either an idiot or lunatic at the time of the marriage, we are of opinion that the marriage in Massachusetts was valid.

It is argued by counsel for the petitioner that, as there was at least the form of a marriage in this case, it cannot be collaterally attacked, but must, for the purposes of this proceeding, be considered valid and binding. As the respondent's counsel took no notice of this point in his brief, however, and relies chiefly upon the invalidity of the marriage, we prefer to express no opinion upon that question, but to decide this branch of the case upon the ground selected by the respondent for his defense.

Having, now, as we think, established the validity of the marriage, we proceed briefly to inquire whether the facts of the case warrant the issuing of the writ.

In the first place, it is clear that the husband or wife of a person illegally restrained of his liberty is a proper person to petition for a writ of habeas corpus. *Parton v. Hervey*, 1 Gray, 119, 121; 15 Am. & Eng. Enc. Law, 2d ed. p. 181, and cases cited; Id. p. 193. As to the effect of the marriage upon the status of guardian and ward, it is strenuously argued on the part of the petitioner that the marriage relation is inconsistent with the guardianship, and that, as marriage is paramount to any other social status, the guardianship, at least of the person of Mr. Chace, terminated upon his marriage. In support of this proposition he cites a number of authorities of great weight, including Woerner, American Law of Guardianship, 335, 336; Schouler, Dom. Rel. 5th ed. § 313; Reeve, Dom. Rel. 4th ed. 409; and 2 Kent, Com. 12th ed. *226. None of these authorities, however, cites any decided case in support of this proposition, save in the case of the marriage of a female ward. Counsel for respondent, on the other hand, maintains that, if the guardianship can be terminated by the ward's own act, without any action by the probate court, then, although he is incompetent, and has been so adjudged, he immediately becomes competent to remove his own disability, while still incompetent for every other purpose; and it must be admitted that this argument is a very cogent one. Fortunately, however, we are not under the necessity of deciding the question thus raised, for, even granting that the marriage of the ward did not terminate the guardianship of his person, the petitioner is still, under our own decision, entitled to the relief she prays. In *Tillinghast v. Holbrook*, 7 R. I. 230, the court passed upon the question whether a

guardian of the person and estate of a married woman could properly be appointed on the ground that she, for want of discretion in managing her estate, was likely to bring herself to want. It was held, in a learned opinion by Brayton, J., that such an appointment was valid. On page 250 he says: "Neither do we think that it is any sufficient objection to the decree that the guardianship of the property is coupled with the guardianship of the person. It is not necessary, in the exercise of any of the guardian's powers, to invade any of the rights of the husband, either in the disposition and control of the property of the wife, or the custody of her person. Whatever control of her person may be necessary for her protection and for the assertion of her just rights must necessarily be given to the guardian, but this may be, and would be, in subordination to every just right of the husband. The custody of her person would not be taken from him, unless for her protection." In view of this decision, the remainder of the case is free from difficulty, and may be decided without questioning the authority, either of the text-writers cited by petitioner, or of the decision last cited. If the marriage terminated the guardianship of the person, the petitioner is obviously entitled to the relief she seeks. If the guardianship is not thus terminated, yet, under our own decision, the control exercised by the guardian must be in subordination to every just right of the wife. It needs no argument nor citation of authority to show that, in the absence of very exceptional circumstances, a wife is entitled to the society of her husband, free from the restraint of any third person. No such circumstances appear in this case. And, taking the facts above recited as true, as they must be assumed to be in the absence of anything to the contrary, it appears that the wife of the ward is prohibited by the guardian from enjoying the society of her husband, and that he is being restrained of his liberty in a way which calls for the interference of this court. See *Whitten v. Tomlinson*, 160 U. S. 231, 242, 40 L. ed. 406, 412, 16 Sup. Ct. Rep. 297. Whether the guardianship is terminated or not, therefore, the petitioner's right to a writ of habeas corpus is made out.

Blodgett, J., concurring:

I concur in the conclusion reached in the foregoing opinion, for the reason that the appointment of a guardian in Rhode Island had no effect upon the person or property of the ward in Massachusetts. *Mitchell v. People's Sav. Bank*, 20 R. I. 500, 40 Atl. 502. And such is the law in Massachusetts. *Woodworth v. Spring*, 4 Allen, 321; *Milli-*

ken v. Pratt, 125 Mass. 374, 28 Am. Rep. 241, and cases cited. And see *Hoyt v. Sprague*, 103 U. S. 613, 26 L. ed. 585; *Morgan v. Potter*, 157 U. S. 195, 39 L. ed. 670, 15 Sup. Ct. Rep. 590; *Wuesthoff v. Germania L. Ins. Co.* 107 N. Y. 580, 14 N. E. 811. The ward, Henry C. Chace, when in Massachusetts, was not under the disability of guardianship there, and was accordingly *sui juris* in that state. And certainly, in the absence of affirmative proof of fraud upon our law, he is entitled to the benefit of the maxim, *Nullus videtur dolo facere qui suo jure utitur*. Since this is decisive of the question, I prefer to withhold an expression of opinion as to whether the rule in *Medwoy v. Needham* (decided in 1819) 16 Mass. 157, 8 Am. Dec. 131, upon the validity of a marriage celebrated prior to 1770, and which has been much criticised, or the opposing view taken by the House of Lords nearly fifty years later, in *Brook v. Brook*, 9 H. L. Cas. 193, which has been also much questioned, shall be held to be the law of this state, until such time as a case shall arise in which it shall affirmatively appear that there was a deliberate attempt to evade the provisions of our law, and it shall become necessary to determine between them. The writ will issue as prayed.

John W. HUNT

v.

George E. DARLING.

(.....R. I.....)

A subcontractor may pursue simultaneously a proceeding to enforce his mechanic's lien against the property and an action against the contractor for the amount due him, in which he attaches funds due the contractor from the property owner.

(November 25, 1904.)

ON MOTION by respondent to compel petitioner to elect as to which remedy he would pursue, where he was proceeding to enforce a mechanic's lien, and to recover the amount of his claim from the principal contractor. *Denied*.

The facts are stated in the opinion.

Mr. Terence M. O'Reilly, for petitioner:

There is no more reason why the petitioner should be compelled to elect than there would be in a case of a plaintiff in

several suits against joint and several makers of a note.

Briggs v. Titus, 13 R. I. 138; *Quidnick Co. v. Chafee*, 13 R. I. 388; *Stillwell v. Bertrand*, 22 Ark. 380; *Selz v. Collins*, 55 Mo. App. 63; *Welch v. Seligman*, 72 Hun, 138, 25 N. Y. Supp. 363.

Douglas, J., delivered the opinion of the court:

These are petitions for mechanics' liens, brought by subcontractors to recover for work and materials performed and used in the construction of buildings for the respective respondents. In each case the respondent has filed a motion alleging "that said petitioner has commenced an action at law against the original contractors, in the common pleas division of this court, for the recovery of the same sum of money, for the same materials, labor, etc., mentioned in the petition, and has in said action at law attached the fund from which said lien might be satisfied, to wit, the last payment due under said original contract, which suit is still pending," etc., and praying that the petitioner may be required to elect between the two remedies.

The question is thus presented whether a petition for a mechanic's lien may be prosecuted simultaneously with a suit at common law to recover the same debt from the contractor. It is a corollary from the maxim, *Nemo debet bis vexari pro eadem causa*, that, if a complainant sues a defendant at the same time in law and in equity to enforce the same obligation, the court in equity will require him to elect which remedy he will pursue. 1 Foster, Fed. Pr. § 295; Fletcher, Eq. Pl. & Pr. § 365, note 1; *Quidnick Co. v. Chafee*, 13 R. I. 367. If he chooses to proceed in equity, the court will enjoin his suit at law; and, if he elects to proceed at law, it will dismiss his bill, but without prejudice. Mitford & T. Eq. Pl. 340; Dan. Ch. Pr. *817, note 9; *Royle v. Wynne*, Craig & P. 252. The courts, however, exercise a wide discretion in applying this rule, and are careful not to make it an instrument of oppression by enforcing it where both remedies sought may be necessary to complete satisfaction of the claim. Dan. Ch. Pr. *634, note 3; Story, Eq. Pl. § 742a. Lord Cranworth says in *Ostell v. Le Page*, 21 Eng. L. & Eq. 640: "But when the court interferes upon motion to stop the plaintiff from proceeding, it is taking upon itself a very delicate jurisdiction, and one in which it ought to see that by no possibility can it be doing injustice." Thus, in the absence of a statute to the contrary, the holder of a bond or note secured by mortgage may sue the parties to the instrument at common

NOTE.—For a collection of authorities upon the subject of the enforcement of mechanics' liens, see *note* to *Farmers' Loan & T. Co. v. Canada & St. L. R. Co.* 11 L. R. A. 740. 60 L. R. A.

law, and may at the same time maintain his suit for foreclosure. *Dunkley v. Van Buren*, 3 Johns. Ch. 330; *Mundy v. Whittemore*, 15 Neb. 650, 19 N. W. 694; *Aylet v. Hill*, 2 Dick. 551; *Perry v. Barker*, 13 Ves. Jr. 198; *Priddy v. Hartsook*, 81 Va. 67; *Central R. Co. v. New Jersey West Line R. Co.* 32 N. J. Eq. 67; *Jones v. Conde*, 6 Johns. Ch. 77; *Way v. Bragaw*, 16 N. J. Eq. 214, 84 Am. Dec. 147; 20 Enc. Pl. & Pr. p. 271. In *Jones v. Conde*, 6 Johns. Ch. 77, Chancellor Kent says: "The one remedy is *in rem*, and the other *in personam*; and the general rule, to which this case is an exception, applies only to cases where the demand at law and in equity are equally personal, and not where the cumulative remedy is *in personam*, while the other remedy is upon the pledge;" citing *Booth v. Booth*, 2 Atk. 343; *Schoole v. Sall*, 1 Sch. & Lef. 176; Lord Kenyon in *Smart v. Wolfe*, 3 T. R. 342; *Boyd v. Heinzelman*, 1 Ves. & B. 381; *Jackson ex dem. Ireland v. Hull*, 10 Johns. 481; Lord Erskine in *Perry v. Barker*, 13 Ves. Jr. 205; and *Dunkley v. Van Buren*, 3 Johns. Ch. 330. The distinction drawn by Chancellor Kent applies as reasonably to the present cases as to the case of a mortgage.

A mechanic's lien is additional security given by statute upon certain conditions, but does not in any way abrogate the contract between the workman and his employer. It has been held that, like a mortgage, the liability to a mechanic's lien is an obligation voluntarily assumed by the owner when he engages a builder. *Briggs v. Titus*, 13 R. I. 136. The lien proceedings are *in rem* against the land, and the common-law action is *in personam* against the employer. In some cases both remedies may be required, to procure full payment of the debt, and in some cases part of the claim only may be enforceable as a lien against the land. The defendants are not the same any more than in the case of a mortgagor who is also the maker of a note which is secured by it. The land is the real defendant in this proceeding, whoever actively represents it in the trial of the case, and the contractor is the defendant in the common-law action, no matter on what fund attachment may have been laid, as the land is responsible in the foreclosure of a mortgage, whether it is still owned by the maker of the note, or has been transferred to a new owner.

It is represented to us in these cases that the owners hold a certain part of the contract price of the building, out of which they may satisfy any mechanics' liens which may exist, and that they have left to the contractor the defense of these suits. We do not see how that alters the relations
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of the parties which we have to consider. In every case, if the owner is so fortunate or has been so prudent as to hold in his hands money due to the contractor, he can charge against such sum any payments which he may be obliged to make to satisfy mechanics' liens; but the workman has no lien upon such fund, and is not pursuing it by this proceeding. Even if the owner has no such fund, such payments would constitute a debt from the contractor to him, so that the rights of the parties in these cases are not different from their respective rights in all cases of petitions for mechanics' liens by subcontractors or workmen. So, in the case of the sale of mortgaged land, the parties to the sale may make such arrangement between them as they please with respect to the mortgage debt, but the holder of the mortgage may pursue his several remedies notwithstanding.

A mechanic's lien is more nearly analogous to a maritime lien even than to a mortgage, and it is held that a lien may be prosecuted in admiralty while a suit for the debt is pending at common law. *Russell v. Alvarez*, 5 Cal. 48; *People ex rel. Granger v. Wayne Circuit Judge*, 27 Mich. 406, 15 Am. Rep. 195, and cases cited.

Following these analogies, we must deny the motions. If the petitioners should elect to discontinue the common-law actions, they could not renew their attachments if their liens should prove insufficient; and, if they should elect to abandon their liens, these would be wholly lost if the attachments should not satisfy the claims. It is manifestly impossible to discontinue a petition for a mechanic's lien without prejudice. From the fact that the garnishee in each of these common-law cases cannot answer as to the amount of his debt to the contractor until the claims for liens are settled to which he has a right to devote the funds in his hands, the common-law suits cannot probably be satisfied until these proceedings are terminated; but we see no reason why they should not proceed to judgment simultaneously, if the plaintiffs desire to press them.

Counsel have not cited to us any cases directly in point, but those which we have found sustain the view we have expressed. It is held in *Bates v. Santa Barbara County*, 90 Cal. 543, 547, 27 Pac. 438, the right to a money judgment against the person who employs the mechanic or purchases the materials is not lost or waived by a proceeding to enforce the lien, or recover from the owner the balance of the contract price remaining in his hands. In *West v. Flemming*, 18 Ill. 248, 68 Am. Dec. 539, it was held that a party may proceed to col-

lect his debt by attachment and by enforcing a mechanic's lien, as concurrent remedies, and the lien is not waived by so doing. The court says: "The proceeding under the statute is additional or cumulative of such other remedies for enforcement of the contract out of which the lien arises as the party may have either against person or property. He may therefore at the same time pursue several remedies for satisfaction of one debt, which are not substantially the same in their nature and effect, as a proceeding against property and an action against the person, or two proceedings against different properties or things, but can have one satisfaction only;" citing 1 Chitty, Pl. 212, 254; *Delahay v. Clement*, 4 Ill. 201; *Branigan v. Rose*, 8 Ill. 123. This case is cited with approval in *Olson*

v. O'Malia, 75 Ill. App. 387. In Massachusetts it is provided by Pub. Stat. chap. 191, § 46, that a person having a mechanic's lien may maintain also an action at common law; and it was accordingly held in *Angier v. Bay State Distilling Co.* 178 Mass. 163, 59 N. E. 630, that a building contractor does not waive his lien by bringing an action at law attaching the real estate. The same doctrine is held in *Brennan v. Swasey*, 16 Cal. 140, 76 Am. Dec. 507; *Salt Lake Lithographing Co. v. Ilex Mine & Smelting Co.* 15 Utah, 440, 62 Am. St. Rep. 944, 49 Pac. 768, and in *Roberts v. Wilcoxon*, 36 Ark. 356, 363, without reference to any statute.

The motions are denied, and the cases will stand for hearing upon the merits.

SOUTH DAKOTA SUPREME COURT.

George KERR, Sheriff of Beadle County,
Respt.,
v.

John MURPHY et al., Appts.

(.....S. D.....)

A judgment of a justice of the peace, rendered within less than the time prescribed by statute after service of summons, is not so far void that its execution can be enjoined; but the defendant must take the proper steps to obtain a review on appeal.

(March 1, 1905.)

APPEAL by defendants from a judgment of the Circuit Court for Beadle County in favor of plaintiff in a suit to enjoin the execution of certain judgments. *Reversed.*

The facts are stated in the opinion.

Messrs. Kelley & Chamberlain, for appellants:

Injunction does not lie against an execution issued upon a void or voidable judgment rendered by a justice of the peace.

St. Louis & S. F. R. Co. v. Lowder, 138 Mo. 533, 60 Am. St. Rep. 565, 39 S. W. 799; *St. Louis, I. M. & S. R. Co. v. Reynolds*, 89 Mo. 146, 1 S. W. 208.

The judgments were not void. By reason of a defective service on the sheriff in giving him but two days to answer instead of three, there was simply an irregularity and an erroneous service, which must be rectified or taken advantage of in the justice court, or by appeal to the appellate court.

NOTE.—As to right to injunction against judgments for errors or irregularities, see also, in this series, *Gum-Elastic Roofing Co. v. Mexico Pub. Co.* 30 L. R. A. 700, and note. 69 L. R. A.

Sioux Falls Nat. Bank v. McKee, 3 S. D. 1, 50 N. W. 1057; *Quarl v. Abbott*, 102 Ind. 233, 52 Am. Rep. 662, 1 N. E. 476; *Brown v. Goble*, 97 Ind. 86; *Terre Haute v. Beach*, 96 Ind. 143; *McCormick v. Webster*, 89 Ind. 107; *Oppenheim v. Pittsburgh, C. & St. L. R. Co.* 85 Ind. 471; *Stout v. Woods*, 79 Ind. 108; *McAlpine v. Sweetser*, 76 Ind. 78; *Freeman*, Judgm. § 126; 1 High, Inj. §§ 225, 229, 231; *Leonard v. Sparks*, 117 Mo. 103, 38 Am. St. Rep. 646, 22 S. W. 899.

Where service is in some respect deficient or irregular jurisdiction attaches subject to be defeated by objections to the irregularity, interposed in some direct manner.

Pico v. Sunol, 6 Cal. 295; *Moyer v. Bucks*, 2 Ind. App. 571, 16 L. R. A. 231, 50 Am. St. Rep. 253, 28 N. E. 992; *Schee v. La-Grange*, 78 Iowa, 101, 42 N. W. 618; *Freeman*, Judgm. § 126; *Gandy v. Jolly*, 35 Neb. 711, 37 Am. St. Rep. 463, 53 N. W. 658; *Campbell Printing Press & Mfg. Co. v. Marder, L. & Co.* 50 Neb. 283, 61 Am. St. Rep. 573, 69 N. W. 774; *Whitwell v. Barbier*, 7 Cal. 57; *Drake v. Duvenick*, 45 Cal. 463; *Low v. Mills*, 61 Mich. 35, 27 N. W. 880; 1 Black, Judgm. § 223; 1 High, Inj. 3d ed. p. 126, §§ 165-169; *Carney v. Marseilles*, 136 Ill. 401, 29 Am. St. Rep. 328, 26 N. E. 491; *Lucas v. Spencer*, 27 Ill. 15; *Smith v. Powell*, 50 Ill. 21; *Allen v. Smith*, 72 Ill. 331; *Clark v. Ewing*, 93 Ill. 572; *Beaudry v. Felch*, 47 Cal. 183; 17 Am. & Eng. Enc. Law, 2d ed. p. 1007; *Harrington v. Wofford*, 46 Miss. 31; *Leonard v. Sparks*, 117 Mo. 103, 38 Am. St. Rep. 646, 22 S. W. 899; *Capwell v. Sipe*, 51 Fed. 667, 8 C. C. A. 419, 16 U. S. App. 704, 59 Fed. 970; *St. Louis, I. M. & S. R. Co. v. State*, 55 Ark.

200, 17 S. W. 806; *Peck v. Strauss*, 33 Cal. 678; *Ballinger v. Tarbell*, 16 Iowa, 492, 85 Am. Dec. 527.

A proceeding to enjoin the enforcement of a judgment or decree by execution or decretal order is a collateral attack upon the judgment, and cannot be maintained for mere errors or irregularities.

Davis v. Clements, 148 Ind. 605, 62 Am. St. Rep. 539, 47 N. E. 1056; *Shrack v. Co-vault*, 144 Ind. 260, 43 N. E. 229; *Krug v. Davis*, 85 Ind. 309; *Fitch v. Byall*, 22 Ind. App. 628, 47 N. E. 180.

Mr. Henry C. Hinckley for respondent.

Corson, P. J., delivered the opinion of the court:

This is an action in equity brought by George Kerr, as sheriff of Beadle county, against John Murphy, R. B. Brockway, justice of the peace, and A. B. Kenyon, coroner of Beadle county, to restrain the defendants from enforcing three certain judgments alleged to have been entered in the police justice court of Huron by the defendant R. B. Brockway, police justice, in actions wherein John Murphy was plaintiff and George Kerr was defendant. Findings and judgment were in favor of the plaintiff, and defendants have appealed.

The court's findings are, in substance, as follows: That said Brockway was the duly elected, qualified, and acting justice of the peace in and for the city of Huron; that defendant Kenyon was the duly elected, qualified, and acting coroner in and for Beadle county; that the plaintiff was the duly elected, qualified, and acting sheriff of Beadle county; that on the 5th day of November, 1902, the defendant John Murphy commenced three actions against the sheriff as sheriff of the county, in the court of the defendant Brockway; that said actions were in claim and delivery, to recover possession of certain personal property which had been levied upon and was in the possession of the plaintiff, Kerr, as sheriff aforesaid, as the property of one S. D. O'Connors; that on November 5, 1902, three summonses were issued by said Brockway, as such police justice, in said actions, requiring the plaintiff herein to appear before said Brockway on the 8th day of November, 1902, at the hour of 8 o'clock A. M., to answer the complaint of the defendant Murphy; that each and every one of said summonses were served on the plaintiff herein on the 6th day of November, 1902; that the plaintiff failed to appear in said Brockway's court in response to said summonses, or any one of them, on the 8th day of November, or at any time, and that the said Brockway, as justice aforesaid, without the knowledge or consent of the plaintiff herein, and without notice

to him, proceeded to, and did, enter judgments against him, and in favor of the defendant Murphy, at the hour of 8 o'clock of the 8th day of November, 1902, aforesaid, whereby said Murphy was awarded the possession of the property described in said Murphy's complaint, besides costs of suit; that each and every one of the judgments rendered by the said Brockway, as hereinbefore set out, in favor of defendant Murphy and against said plaintiff, is null and void, and of no force and effect, for the reason that said summonses were not served as required by statute, in that the defendant in said three actions was not given the said three days' notice, as required; and that said justice had no jurisdiction of said case whatever. And the court concludes from the said findings that the three summonses issued in the three several cases aforesaid were not served on the defendant in said action, and that the said Brockway, as justice aforesaid, acquired no jurisdiction by which he could render or enter judgments in said several causes against the said George Kerr, sheriff, aforesaid; that said judgments and all proceedings thereunder are void. The court thereupon entered judgment restraining the said defendants, and all persons claiming under them, from enforcing said judgments by execution or otherwise.

It will be seen from the findings of the court that the summonses in the three actions were dated the 5th day of November, 1902; that they were not served until the 6th; and that judgments were entered thereon on the 8th by default. Two questions are therefore presented by the record: (1) Were the judgments so entered by the police justice void or simply erroneous? (2) Was a suit in equity a proper proceeding to vacate and set aside the said judgments, and to restrain the defendants from proceeding thereunder?

It is contended by the appellants that the judgments were not void; that, as to the defective service upon the plaintiff, as sheriff, and defendant in those actions, in giving him but two days in which to answer, instead of three days, it was simply an irregularity on the part of the justice, which could only be taken advantage of in the justice court by motion to vacate and set aside the same, and, if denied, by appeal to the appellate court; that the defective service did not deprive the justice of jurisdiction; that, the moment that personal service was obtained on the plaintiff as defendant in the claim and delivery actions, jurisdiction attached, subject to be defeated by the proper proceedings before the justice, and by appeal to the circuit court having appellate jurisdiction of the same.

It is contended, on the other hand, by the respondent, that the justice's judgments, as found by the court, were absolutely void, and that, being void, an action in equity was the proper remedy to enjoin proceedings thereunder. Section 14 of the Revised Justices' Code provides, "The time specified in the summons for the appearance of the defendant shall in all cases be not less than three nor more than twelve days from the date of the service of the same;" and by § 15 it is provided that "when the defendant resides in the county, or is summoned therein, the summons cannot be served within two days of the time fixed for the appearance of the defendant."

It will thus be seen that the time specified in the summons shall, when served within the county, be not less than three nor more than twelve days from the date of the service of the same, and that, when the defendant resides in the county, he cannot be served within two days of the time fixed for the appearance of the defendant. These provisions of the Code are mandatory, and cannot be dispensed with, unless waived by the defendant by appearing in the action, generally at the time specified in the summons. The service of the summonses in the cases in the justice's court being made on the 6th of November, and the summonses requiring the defendant thereunder to appear on the 8th day of the same month, under no rule or computation of time gave him more than two days' notice. The view that a judgment in such a case is irregular, but not void, seems to be sustained by the great weight of authority. Mr. Freeman, in his work on Judgments, vol. 1, § 126, says: "There is a difference between a want of jurisdiction and a defect in obtaining jurisdiction. . . . From the moment of the service of process the court has such control over the litigants that all its subsequent proceedings, however erroneous, are not void. If there is any irregularity in the process, or in the manner of its service, the defendant must take advantage of such irregularity by some motion or proceeding in the court where the action is pending. The fact that defendant is not given all the time allowed him by law to plead, or that he was served by some person incompetent to make a valid service, or any other fact connected with the service of process on account of which a judgment by default would be reversed upon appeal, will not ordinarily make the judgment vulnerable to a collateral attack. In case of an attempted service of process, the presumption exists that the court considered and determined the question whether the acts done were sufficient or insufficient. If so, the conclusion reached by the court, being derived

from hearing and deliberating upon a matter which by law it was authorized to hear and decide, though erroneous, cannot be void." That learned author, in the note to the section, says: "A distinction is to be made between a case where there is no service whatever, and one which is simply defective or irregular. In the first case the court acquires no jurisdiction, and its judgment is void; in the other case, if the court to which the process is returnable adjudges the service to be sufficient, and renders judgment thereon, such judgment is not void, but only subject to be set aside by the court which gave it, upon seasonable and proper application, or reversed upon appeal. *Isaacs v. Price*, 2 Dill. 351, Fed. Cas. No. 7,097." Judge Black, in his work on Judgments, § 224, says: "Although the service of process in an action may have been characterized by some defect or irregularity, it does not necessarily follow that the ensuing judgment will be void. For, if the party would take advantage of such a matter, he must do so in the action itself, by some proper motion or proceeding. It is only when the attempted service is so irregular as to amount to no service at all that there can be said to be a want of jurisdiction. In any other case there may be error in the subsequent proceedings, but they will be sustained against a collateral attack." In § 223 that learned author says: "But where it appears that there was notice, though defective, and service, though imperfect, a decision of the court to which the process was returnable that such notice and service were sufficient will not be held void in a collateral proceeding. . . . Again, a judgment in an action in which the required number of days' notice was not given to the defendant is erroneous, but not void, and cannot be questioned in a collateral proceeding."

In the case of *Ballinger v. Tarbell*, 16 Iowa, 491, 85 Am. Dec. 527, the supreme court of Iowa, speaking by Judge Dillon, says: "It is claimed by the defendants, Claggett, Browne, and Claggett, that the judgment of the plaintiff against Tarbell and Robertson was wholly void as against Tarbell, because the justice of the peace who rendered the same had no jurisdiction of the person of the defendant Tarbell; and this is the first question which we are called upon to determine. . . . That this service, as to Tarbell, was defective, is apparent, because the statute requires five days' notice, and here were only four. It may also be defective because served by the justice himself, and not the constable. It was therefore clearly erroneous in the justice to have rendered judgment against Tarbell on this service. It would have been,

without doubt, reversed on writ of error. But it was erroneous simply, and not void. It is not a case where there is no service at all, but a case where there was a defective service. The justice erred in deciding that this service authorized him to render judgment against Tarbell; but neither Tarbell nor his assignees can question the validity of this judgment, or claim to have it treated as void in this collateral proceeding."

This question has been very fully considered by the supreme court of Missouri in *Leonard v. Sparks*, 117 Mo. 103, 38 Am. St. Rep. 646, 22 S. W. 899, and that learned court arrives, after an exhaustive review of the authorities, at the same conclusion, and in its opinion says: "But was complete jurisdiction obtained over Mr. Bouton? The latter personally received an official command to appear in the condemnation case before the mayor at a time named. The notice itself was valid and regular, in the prescribed statutory form, and duly served on Mr. Bouton within the territorial jurisdiction of the mayor. Mr. Bouton was entitled by law to six days' notice; but the mayor would have had jurisdiction over him if he had appeared without any notice, as he might have done. So, also, might he have objected to the shortness of the service, and have asserted his right to the full six days' notice by moving at the proper time to make that objection. But he did not see fit to do so. He was as competent to waive the full length of time of service as he was to appear without any notice whatever. The personal service of the process of the court brought the judicial power of the latter to bear upon him. He had his 'day' to object to the process, if he did not deem it sufficient because not timely, or for any other reason; but he did not avail himself of that opportunity. He certainly could not, by ignoring the command of the writ, deprive the court of authority to determine as to the sufficiency of its service. It was for the court, not the party, to decide whether or not it was sufficient. It held it to be good, and rendered judgment accordingly. In contemplation of law, Mr. Bouton was before the court, for he had been personally summoned to appear there, and might have done so. If the call for his appearance was too sudden, the court's ruling that it was adequate may be error, which could have been rectified by seasonable and direct moves for that purpose; but such error could not defeat the court's jurisdiction to render a judgment conclusive upon him, or subject that judgment to successful attack collaterally. A broad distinction is to be drawn between cases where no service on defendant appears, and those in which service is shown, but where

it is in some respect deficient or irregular. In the latter cases, jurisdiction attaches, subject to be defeated by objections to the irregularity, interposed in season in some direct manner. In the former class, jurisdiction is not obtained if the law requires service. Where the facts touching the acquisition of jurisdiction are fully disclosed, the principles of law governing liability to collateral attack are applied no less favorably to judgments of justices of the peace than to the adjudications of courts having more extensive powers. We conclude, therefore, that, on principle, the shortness of the service on Mr. Bouton furnishes no substantial ground in the present action to deny effectiveness to the judgment in the condemnation case. . . . In this condition of the precedents in Missouri, we have felt at liberty to re-examine the subject, and to declare the law as seemed in conformity with correct principles. In doing so, we find that the position we have taken has ample support in well-considered cases in other states bearing upon the precise point of present controversy. *Ballinger v. Tarbell* (1864) 16 Iowa, 491, 85 Am. Dec. 527; *McNeill v. Hallmark* (1866) 28 Tex. 157; *Glover v. Holman* (1871) 3 Heisk. 519; *Nelson v. Becker* (1875) 14 Kan. 509; *Betts v. Baxter* (1880) 58 Miss. 334; *Bowman v. Venice & C. R. Co.* (1882) 102 Ill. 472; *Jackson v. State* (1885) 104 Ind. 516, 3 N. E. 863."

This question was also very fully considered by the supreme court of Vermont in *Hammond v. Wilder*, 25 Vt. 343, in which that court, speaking by Redfield, Ch. J., says: "Two questions arise in the present case: (1) If a writ of attachment, returnable before a justice in a different county from that in which it is served, be served by attaching property less than twelve days before the return day, and no appearance is made by defendant, and judgment is given by default, is the judgment valid? . . . Is there any such case where the defect has been held fatal to the proceeding when the defendant does not appear? So far from this, it is true that even matters of error, and which, on writ of error, would be held fatal to the proceeding, when fully apparent upon the record, do not render the judgment void. There is no case in which the judgment of a court of record of general jurisdiction has been held void unless for a defect of jurisdiction. This seems to be conceded in argument, and it is attempted to make this defect amount to a want of jurisdiction. But this is certainly a new view of the subject. It is but a defect of service, and not more important than thousands of other defects. It was never supposed before that, because the proper time was not given to a

defendant to prepare for trial, the whole proceedings were rendered utterly void. And it is impossible to make this result from the form of the provisions of the statute. If we extend such a doctrine to one case, we must to all; and if it apply to justice courts, it must to the county court and to this court. And, to be consistent, we shall have to extend it to all omissions of the statute requisites, either in the writ or service, if apparent on the face of the proceedings. If a writ of summons is served by reading, the party may disregard it, and the judgment is void. This would certainly work a very important change upon this subject, and one of immense consequence in a practical point of view,—one which will virtually overthrow the whole doctrine of the conclusiveness of judgments, and make them to depend altogether upon their entire regularity in regard to all the preliminary proceedings, so far as they appear on the face of the papers, which is a very precarious reliance, and which leaves everything in such a state of uncertainty as to render nothing stable or secure, and virtually to encourage speculation and litigation." In the case at bar no question is raised as to the summonses issued by the justice, and, had they been served on the 5th,—the day they were issued,—the judgment would have been perfectly valid, as the plaintiff herein would then have had his three days' notice. As stated by the court, presumptively the police justice considered the return before him, and erroneously decided that the plaintiff in the actions had had proper notice. To say, therefore, that the judgment is void because the justice made an erroneous decision would, as stated by the supreme court of Vermont, virtually overrule the doctrine of the conclusiveness of judgments when defects appear in the record of such judgments, and would, as stated by that learned court, work a very great change in the law applicable to judgments. We are clearly of the opinion that the judgments in this case were not void, but simply erroneous.

This brings us to the last question, namely, Was this action in equity to restrain the defendants from executing the said judgments a proper remedy, or was the plaintiff required to make his motion in the justice's court to vacate and set aside the judgments, and, if denied, to appeal to the proper appellate court? In other words, Did the defendant in these actions have an adequate remedy at law? If he had such a remedy, then the action by injunction proceedings in a court of equity cannot be sustained, for the rule is well settled that, where a party has an adequate remedy at law, he cannot resort to a court of equity.

69 L. R. A.

In *Grand Chute v. Winegar*, 15 Wall. 373, 21 L. ed. 174, the Supreme Court of the United States, speaking by Mr. Justice Hunt, says: "It is an elementary principle of equity law that when full and adequate relief can be obtained in a suit at law a suit in equity cannot be maintained." The rule we have stated is so elementary that a further citation of authorities is unnecessary. In the case at bar, so far as the record discloses, there was nothing to prevent the defendant in these actions from moving to vacate and set aside the judgments in the justice's court, and, had this motion been denied, no reason is shown why he could not have appealed to the proper appellate court, and obtained a decision reversing the judgments of the justice's court. To hold that the plaintiff in the case at bar could invoke the equity powers of the court, ignoring his rights to make a motion to vacate and set aside the judgments in the justice's court, and his right of appeal, in case the motion was denied, to the appellate court, would be establishing a very dangerous doctrine; for, if it was proper in this case, we can see no reason why it would not be proper in all cases where the justice had committed some error which would render his judgments subject to reversal on appeal to an appellate court. Even if the judgment had, in fact, been void for the reason that there had been no service whatever upon the plaintiff in this action, the authorities are not in entire harmony as to the right of the defendant in such a case to proceed in equity to enjoin the proceedings. Mr. High, in his work on Injunctions, in speaking of this subject, in § 228 admits that there is a great conflict in the authorities, though he seems to take the view that the defendant in such a case would have the right to proceed in equity to restrain proceedings under such a judgment; but speaking of judgments that are simply erroneous that author, in § 225, says: "It is a well-established rule that the interference of equity will not be granted for the purpose of correcting mere irregularities or informalities in judicial proceedings. And where a judgment is assailed upon the ground of irregularity in the proceedings antecedent to obtaining the judgment an injunction will not be allowed. Thus, in the absence of allegations of fraud, irregularities in the service of process will not constitute ground for an injunction upon the general principle that equity will not sit as a court of review to revise irregularities in proceedings at law. . . . And it may be laid down as a rule that the powers of equity cannot be invoked to restrain execution upon the ground of irregularity, since it is the province of a court of law to annul its own process or correct any errors in its own

proceedings concerning executions. Nor, in the absence of fraud, will errors or irregularities in the action of the court warrant an injunction against a judgment, especially when the party complaining might have availed himself of such errors upon an appeal, if prosecuted in due season. And although no remedy be provided by appeal from the judgment of a justice, its enforcement will not be enjoined because of error in the proceedings."

The learned Circuit Court was clearly in error, therefore, in rendering a judgment restraining the proceedings upon the judgments in the Justice's Court, and its *judgment and order denying a new trial are reversed*, and that court is directed to dismiss the action.

STATE of South Dakota

v.

M. F. YEGGE, *Plff. in Err.*

(.... S. D.)

An ophthalmologist who prefixes to his name the letters "Dr." on his sign, and on notices in which he undertakes to correct certain diseased conditions by the fitting of glasses to the eyes, comes within the terms of a statute providing, that, when a person shall append the title "Dr.," in a medical sense, to his name, he shall be regarded as practising medicine, within the meaning of the statute which requires a license as a condition precedent to doing so.

(April 5, 1905.)

ERROR to the Circuit Court for Beadle County to review a judgment convicting defendant of practising medicine without a license. *Affirmed.*

The facts are stated in the opinion.

Mr. T. H. Null for plaintiff in error.

Mr. Aubrey Lawrence, with *Messrs. Philo Hall*, Attorney General, and **C. A. Kelley**, for the State.

Corson, P. J., delivered the opinion of the court:

Upon an information duly filed the plaintiff in error was tried and convicted of

the offense of practising medicine without a license.

It is contended by the plaintiff in error that the evidence was insufficient to warrant his conviction, in that it failed to show that he was practising, or attempting to practise, medicine within the provisions of the act of 1903, and that he was simply engaged in the business of fitting glasses to the eye. It was proved by the evidence of Dr. McNutt, secretary of the board of medical examiners, that no license had been granted to the plaintiff in error. The state then introduced in evidence the following notice, marked "Exhibit 1:" "Ophthalmology. A Science for the Analysis of the Cause of Human Ills and How to Abolish Them. Everybody should know that this is a science that practises by guesses. It differentiates between functional derangements and disease. By its assistance nature cures cross-eyes without operation; headache without drugs; hysteria without a straight jacket; female disorders without a trip to the hospital; and hundreds of nervous troubles. Simply removing causes is the secret. A true Ophthalmologist explains your case to you. Dr. M. F. Yegge, Huron, S. D. Office rooms over Huronite." There was also evidence tending to prove that the plaintiff in error had a sign in front of his office with the name "Dr. Yegge" thereon. There was also evidence tending to prove that ophthalmology is science which treats of the physiology, anatomy, and diseases of the eye; that any deformity in the eye is considered a disease of the eye; any abnormal condition of the eye should be considered as a disease; that it is so considered by the profession; and that the fitting of glasses for the relief of defective eyesight is a branch of the practice of medicine. The defendant, being called as a witness in his own behalf, testified, in substance, that he had lived in Huron since the 1st of June, 1903; that he was engaged in optics; that he had an office in the James Valley Bank building; that he was a graduate of the McCormick School of Ophthalmology of Chicago, Illinois, where they teach ophthalmology particularly; that it had been established twelve or thirteen years; that it is a reputable school; that

NOTE.—For a similar case in this series holding that a magnetic healer who styles himself "professor," and holds himself out as a healer of disease, is within the terms of a statute requiring a license from all persons announcing their readiness to cure disease, and who use, in connection with their names, the word "professor," or any other word intended to designate them as practitioners of medicine, see *Larks v. State*, 50 L. R. A. 190.

As to what constitutes practice of medicine or surgery generally, see, in this series, *State v.*

Buswell, 24 L. R. A. 68; *State ex rel. Swarts v. Mylod*, 41 L. R. A. 428 (Christian science); *State v. Liffing*, 46 L. R. A. 334; *Nelson v. State Bd. of Health*, 50 L. R. A. 383; *Little v. State*, 51 L. R. A. 717; *State v. Gravett*, 55 L. R. A. 791; *Bragg v. State*, 58 L. R. A. 925; *State v. MacKnight*, 59 L. R. A. 190 (osteopathy); *State v. Biggs*, 64 L. R. A. 139 (treatment by baths, massage, etc.); and *Territory v. Newman*, 68 L. R. A. 783 (magnetic treatment).

they issue diplomas to those taking a full course; that the degree of ophthalmology is conferred; that he received a regular course diploma, and graduated in ophthalmology,—the fitting of glasses; that the degree of doctor of ophthalmology was conferred upon him, and that he had a diploma, which he produced; that no disease was treated by him by the use of medicine; that they were not instructed to treat any disease by the use of medicine in that college; that the course of education in that college was purely nonmedical; and that they learned to correct errors in refraction by test. On cross-examination he stated that he took the course of a graduate, a two-weeks course,—a little over two weeks. He also testified that he studied anatomy and physiology of the eye for about two years; that previous to going to the school he studied for about a year in Iowa; that he was in a doctor's office, where he made a specialty of refraction. Chapter 176, p. 202, of the Laws of 1903, provides for creating a board of medical examiners, defines their duties, empowers them to grant licenses to qualified applicants, and prescribes penalties for practising without such a license. Section 21 provides as follows: "When a person shall append or prefix the letters 'M. B.', or 'M. D.', or the title 'Dr.' or 'Doctor' or any other sign or appellation in a medical sense to his or her name or shall profess publicly to be a physician or surgeon, or who shall recommend, prescribe, or direct for the use of any person any drug, medicine, apparatus, or other agency for the cure, relief, or palliation of any ailment or disease of the mind or body, or for the cure or relief of any wound, fracture, or bodily injury, or deformity after having received or with the intent of receiving therefor, either directly or indirectly, any bonus, gift, or compensation, [he or she] shall be regarded as practising within the meaning of this act." It will be observed that it is provided by the above section that, "when a person shall append or prefix the letters 'M. B.', or 'M. D.', or the title 'Dr.' or 'Doctor' or any other sign or ap-

pellation in a medical sense to his or her name, or shall profess publicly to be a physician or surgeon, . . . [he or she] shall be regarded as practising within the meaning of this act." The evidence seems to be uncontradicted that the plaintiff in error did, upon a sign in front of his office, and in the notice published, prefix to his name the letters "Dr.," and it is quite clear from the evidence that they were used in a medical sense, and we are of the opinion that the jury were fully justified in so regarding them.

The legislature evidently intended, in enacting the law, to prevent persons not properly educated in the science of medicine from assuming to act as a physician, and to protect the public, and it has deemed it proper that every person assuming to act as a physician or surgeon should be properly licensed. In carrying into effect this law, it was competent for the legislature to define, as it has assumed to do in § 21, what evidence shall be deemed sufficient to constitute a practitioner within the meaning of the act. In view of the testimony of the physicians as to the proper definition of ophthalmology, it is quite clear from the advertisement of the plaintiff in error that he had assumed to hold himself out as a physician within the meaning of the act. And it is not only clear from the language of the advertisement itself, which would be generally understood as an assumption on his part of being a regular physician, or at least a specialist in that branch of medicine treating of ophthalmology, but the legislature has declared that prefixing the term "Dr.," to his name shall be so regarded. The law should not be so construed as to deprive the people of the benefits intended by the act, but such a construction should be given it as to carry into effect the evident intention of the legislature. See 22 Am. & Eng. Enc. Law, p. 786, and cases there cited.

Finding no error in the judgment of the Circuit Court, the same is *affirmed*.

MICHIGAN SUPREME COURT.

PEOPLE of the State of Michigan

v.

Monroe J. MCPHEE, Exceptant.

(.....Mich.....)

The fact that each member is entitled to trade out the amount he has paid in whenever he chooses to withdraw

from the club does not prevent a suit club, which is a scheme by which a certain number of persons pay a small sum per week, and choose by lot each week one of the number who shall receive a suit of clothes worth much more than such weekly payment, upon receipt of which he ceases to be a member of the club, from being a lottery.

(April 21, 1905.)

NOTE.—As to what constitutes a lottery, see also, in this series, *People v. Elliott*, 3 L. R. A. 403, and *note*; *Yellowstone Kit v. State*, 69 L. R. A.

7 L. R. A. 599, and *note*; *Ballock v. State*, 8 L. R. A. 671; *State v. Bonell*, 10 L. R. A. 60; *State ex rel. Kellogg v. Kansas Mercantile*

EXCEPTIONS by defendant before sentence to a ruling of the Circuit Court for Chippewa County directing a verdict of guilty in a prosecution for conducting a lottery. *Affirmed.*

The facts are stated in the opinion.

Mr. Clyde Hayden, with **Messrs. Holden & Holden**, for exceptant.

Mr. John P. Conrick, for the People:

A lottery is "a scheme by which a result is reached by some action or means taken, and in which result man's choice or will has no part, nor can human reason, foresight, sagacity, or design, enable him to know or determine such result until the same has been accomplished."

People v. Elliot, 74 Mich. 264, 3 L. R. A. 403, 16 Am. St. Rep. 640, 41 N. W. 916.

Where skill or judgment is exercised in determining the result there is no lottery, but where pure chance determines we have one of the elements of a lottery.

Barclay v. Pearson [1893] 2 Ch. 154; *Caminada v. Hulton*, 17 Cox, C. C. 307; *Stoddart v. Sagar* [1895] 2 Q. B. 474; *People ex rel. Lawrence v. Fallon*, 152 N. Y. 12, 37 L. R. A. 227, 57 Am. St. Rep. 492, 46 N. E. 296; *Re Dwyer*, 14 Misc. 204, 35 N. Y. Supp. 884; *Reg. v. Dodds*, 4 Ont. Rep. 390; *Reg. v. Jamieson*, 7 Ont. Rep. 149; *Hudelson v. State*, 94 Ind. 426, 48 Am. Rep. 171.

A lottery is a scheme for distributing prizes by lot or by chance.

19 Am. & Eng. Enc. Law, 2d ed. p. 588; *State v. Clarke*, 33 N. H. 329, 66 Am. Dec. 723; *Wilkinson v. Gill*, 74 N. Y. 66, 30 Am. Rep. 284; *People v. Noelke*, 94 N. Y. 137, 46 Am. Rep. 128; *State v. Willis*, 78 Me. 73, 57 Am. Rep. 784, 2 Atl. 848; *Com. v. Sullivan*, 146 Mass. 142, 15 N. E. 491; *Equitable Loan & Security Co. v. Waring*, 117 Ga. 599, 62 L. R. A. 97, 97 Am. St. Rep. 177, 44 S. E. 320; *United States v. Wallis*, 58 Fed. 942; *United States v. McDonald*, 59 Fed. 563; *United States v. Fulkerson*, 74 Fed. 627.

A scheme where inequality in payment or distribution is to result from chance is a lottery.

Dunn v. People, 40 Ill. 465; *Meyer v. State*, 112 Ga. 20, 51 L. R. A. 496, 81 Am. St. Rep. 17, 37 S. E. 96; *United States v. Wallis*, 58 Fed. 942; *Ballock v. State*, 73 Md. 1, 8 L. R. A. 671, 25 Am. St. Rep. 559, 20 Atl. 184; *United States v. Politzer*, 59 Fed. 273; *Horner v. United States*, 147 U. S. 449, 37 L. ed. 237, 13 Sup. Ct. Rep. 409; *Reg. v. Harris*, 10 Cox, C. C. 352; *Sykes v. Beadon*, L. R. 11 Ch. Div. 170; *State ex rel. Atty.*

Gen. v. Interstate Sav. Invest. Co. 64 Ohio St. 283, 52 L. R. A. 530, 83 Am. St. Rep. 754, 60 N. E. 220; *United States v. McDonald*, 59 Fed. 563, 12 C. C. A. 339, 24 U. S. App. 25, 63 Fed. 426; *People v. Elliott*, 74 Mich. 264, 3 L. R. A. 403, 16 Am. St. Rep. 640, 41 N. W. 916; *United States v. Fulkerson*, 74 Fed. 619; *Re National Indemnity & E. Co.* 142 Pa. 450, 21 Atl. 879; *State v. New Orleans Debenture Redemption Co.* 51 La. Ann. 1827, 26 So. 586; *McLaughlin v. National Mut. Bond & Invest. Co.* 64 Fed. 908; *Pelts v. Supreme Chamber, O. of F. U.* (N. J. Eq.) 19 Atl. 668.

Ostrander, J., delivered the opinion of the court:

At the conclusion of the testimony in this case, counsel on both sides asserted that there was no issue of fact to be determined, and requested the court to direct a verdict either of conviction or acquittal, according to his opinion of the law. The court instructed the jury that, under the testimony, they should render, and they did render, a verdict of guilty as charged, and the case comes here upon exceptions before sentence.

Respondent is charged in the information with setting up and promoting a lottery for merchandise, and that he did dispose of merchandise by way of lottery and gift enterprise, contrary to the form of the statute. He is a merchant tailor doing business at the city of Sault Ste. Marie, and, in connection with, or as a part of, the regular business, he conducted what is known as a "tailor suit club," or "suit club." This suit club had 30 members, who each paid to respondent \$1 a week. Respondent gave receipts for the money, dated, and in the following form: "\$1.00. Received of — one dollar, club dues. M. J. McPhee." To each members a number was allotted by the members themselves. These were put in a cigar box, thoroughly mixed and shaken, and a drawing was made from this box by one of the members according to some plan agreed upon among themselves. The drawings took place each Saturday night, and some member, as a result of the drawing, received for whatever he had paid in a suit of clothes or an overcoat valued at and worth \$20, made to order by respondent. If a member won, he drew out of the club, and a new member was taken in. It might occur that one who had paid in but \$1 would get the suit of clothes or overcoat, and it might occur that a member would pay \$20

Asso. 11 L. R. A. 430; *Long v. State*, 12 L. R. A. 89, and *note*, 12 L. R. A. 425; *Thornhill v. O'Rear*, 31 L. R. A. 792; *Lynch v. Rosenthal*, 31 L. R. A. 835; *People ex rel. Lawrence v. Fallon*, 37 L. R. A. 227; *Meyer v. State*, 51 L. R. A. 496; *State ex rel. Sheets v. Interstate* 69 L. R. A.

Sav. Invest. Co. 52 L. R. A. 530; *State ex rel. Prout v. Nebraska Home Co.* 60 L. R. A. 448; *Equitable Loan & Security Co. v. Waring*, 62 L. R. A. 93; *Winston v. Beeson*, 65 L. R. A. 167; *People ex rel. Ellison v. Lavin*, 66 L. R. A. 601.

and participate in 20 drawings without securing either as a result of the drawing. It was a part of the agreement, however, and was the practice, to permit a member of the club to withdraw at any time, and upon such withdrawal he was entitled to receive from respondent clothing of the value of the money he had contributed to the club, or let the sum of money he had paid in stand as a credit and as part payment for clothing purchased of respondent. That is to say, if a member had paid \$1 a week for twenty weeks, he had a credit of \$20. If he had paid but six weeks, he had a credit of \$6, which he could use with the respondent in the purchase of garments.

Counsel for respondent say that the only question involved is whether, upon this state of facts, a verdict of guilty was properly directed, or, to put it in another way, whether respondent was conducting a lottery or gift enterprise, within the meaning of our statute. The statute in question is § 11,344 of the Compiled Laws of 1897, and is the first section of chapter 316, entitled, "Of Offenses against the Public Policy." It provides that "every person who shall set up or promote, within this state, any lottery or gift enterprise for money, or shall dispose of any property, real or personal, goods, chattels, or merchandise or valuable thing, by the way of lottery or gift enterprise, and every person who shall aid, either by printing or writing, or shall in any way be concerned in the setting up, managing, or drawing of any such lottery or gift enterprise, or who shall in any house, shop, or building owned or occupied by him or under his control, knowingly permit the setting up, managing, or drawing of any such lottery or gift enterprise, or the sale of any lottery ticket or share of a ticket, or any other writing, certificate, bill, goods, chattels, or merchandise, token or other device purporting or intended to entitle the holder or bearer or other person to any prize or gift, or to any share of, or interest in, any prize or gift, to be drawn in any such lottery or gift enterprise, or who shall knowingly suffer money or other property to be raffled for in such house, shop, or building, or to be there won by throwing or using dice, or by any other game or course of chance, shall for every such offense be punished by a fine not exceeding \$2,000, or by imprisonment in the county jail not more than one year." A subsequent section of the same chapter provides that if any person shall, after being convicted of any offense mentioned in this section, commit the like offense, or any other of the offenses therein mentioned, he shall, in addition to the fine provided therefor, be further punished by imprisonment in the

state prison not more than three years, or by imprisonment in the county jail not more than one year.

The single contention of counsel is that, inasmuch as there was no chance for a member of the club to sustain a loss, respondent was not conducting a lottery. We have been referred to many definitions of the word "lottery," some of them made by lexicographers, some by judges, and particularly to one given in the third edition of Bishop on Statutory Crimes, which counsel say supports their contention, and which is: "A lottery may be defined to be any scheme whereby one, on paying money or other valuable thing to another, becomes entitled to receive from him such a return in value, or nothing, as some formula of chance may determine." We do not understand how this definition aids respondent. It is well known that in most lottery schemes some of those who pay get nothing. It is difficult to see how a definition intended to be general, and to describe the results to participants in a lottery, could well omit language indicating that the result might be nothing. But the learned author does not mean that, to be classed as a lottery, the scheme must have blanks. This is evidenced by the context and by cases cited. § 952. In another place the same author says that the word has not yet been defined in a manner which is both inclusive and exclusive. Our statute does not define the word. Nor need we attempt a definition. Like similar statutes in other of the states, our own has a general purpose, and this purpose is not alone evidenced by the language of the statute. In a large majority of the states, including Michigan, there is a constitutional limitation upon the power of the legislature to authorize lotteries. Few definitions are directly or indirectly attempted. These various constitutional inhibitions in effect recognize and affirm the rule stated in *Stone v. Mississippi*, 101 U. S. 814, 25 L. ed. 1079, that lotteries are not in the legal acceptance of the term *mala in se*, but may properly be made *mala prohibita*. Such a provision has been held to be so far self-executing as to warrant and require the court, in the absence of penal or other statutes upon the subject, to declare the charter of a private corporation, whose scheme and plan of business was within the constitutional inhibition, to be forfeited. *State ex rel. Kellogg v. Kansas Mercantile Assn.* 45 Kan. 351, 11 L. R. A. 430, 23 Am. St. Rep. 727, 25 Pac. 984. In the case mentioned it was said that the word "lottery" must be construed in the popular sense, with the view of remedying the mischief intended to be prevented, and to suppress all evasions for the continuance of the

mischief. The word "lottery" is generic. No sooner is it defined by a court than ingenuity evolves some scheme within the mischief discussed, but not quite within the letter of the definition given. This is made very apparent in the large number of cases which we have examined in which various methods of distributing money or goods by chance are examined and discussed. It is said by counsel for respondent in their brief that this court, in *People v. Elliott*, 74 Mich. 264, 3 L. R. A. 403, 16 Am. St. Rep. 640, 41 N. W. 916, laid down a definition which did not include a possibility of loss. In that case, as in others, the language of the opinion is addressed to the facts before the court, and the contentions presented for decision. We approve the language used in the opinion in *Ballock v. State*, 73 Md. 1, 8 L. R. A. 671, 25 Am. St. Rep. 559, 20 Atl. 184, where it is said: "Our statute does not justify a court . . . in deciding a thing is not a lottery simply because there can be no loss, when there may be very large contingent gains, or because it lacks some element of a lottery according to some particular dictionary's definition, . . . when it has all the other elements, with all the pernicious tendencies which the state is seeking to prevent." In that case it was contended that no blanks were drawn, and the scheme considered provided for the ultimate return of the entire investment, with interest; the time of such return to certain holders of the bonds depending upon chance, and the inducement for investment being the possibility of getting a bonus, also determined by chance. See also *State ex rel. Atty. Gen. v. Interstate Sav. Invest. Co.* 64 Ohio St. 283, 52 L. R. A. 530, 83 Am. St. Rep. 754, 60 N. E. 220; *Den ex dem. Wooden v. Shotwell*, 23 N. J. L. 465; *United States v. Olney*, 1 Abb. (U. S.) 275, Fed. Cas. No. 15,918; *State v. Mumford*, 73 Mo. 647, 39 Am. Rep. 532; *MacDonald v. United States*, 12 C. C. A. 339, 24 U. S. App. 25, 63 Fed. 426; *Reg. v. Harris*, 10 Cox, C. C. 352. For a considerable collection of cases and general discussion, see *Equitable Loan & Security Co. v. Waring*, 117 Ga. 599, 62 L. R. A. 93, 97 Am. St. Rep. 177, 44 S. E. 320. The case of *State v. Moren*, 48 Minn. 555, 51 N. W. 618, is in its essential facts precisely like the case at bar. The only question considered by the court was whether the evidence was sufficient to bring the case within the condemnation of the statute. The Minnesota statute defines a lottery to be a scheme for the distribution of property by chance among persons who have paid, or agreed to pay, a valuable consideration for the chance, whether called a "lottery," "raf-

fle," or "gift enterprise," or by any other name. The court held the term "lottery" to have no technical meaning; but under the statute it was to be construed in the popular sense, and with the view to remedy the mischief intended to be prevented. "The statute is intended to reach all devices which are in the nature of lotteries, in whatever form presented, and the courts will tolerate no evasions for the continuance of the mischief. Of the fact that the holder had the option to receive in goods the amount he had paid, it was said that it would probably operate only as an additional incentive to aid the lottery scheme. "It does not take the scheme out of the statute. They were not bought in order to get their face value in goods. The vicious element still inheres in the transaction. . . . The sale of a ticket gave the purchaser the chance to obtain something more than he paid for, and that became an extra inducement for the purchase." Counsel for respondent say that the Minnesota statute differs from ours, and that the court had before it what we have not,—a statutory definition of the word "lottery." The definition, however, is very broad, and cannot be said to contain any language which would make the decision on that account inapplicable here. Upon the facts and the construction placed by the court upon the statute, the case is decisive.

It cannot be denied that the respondent sought to, and presumably did, increase his business by a device or scheme, the feature of which, so far as securing patrons and customers was concerned, was the chance to obtain \$20 worth of clothing for some sum of money less than \$20. It was calculated to, and did, appeal to the gambling propensity of men, was within the mischief at which the legislation is aimed, was within the terms of the statute, and, in our opinion, a disposition of property by way of lottery. We are referred by counsel to no case which sustains their contention.

We have not lost sight of the fact that the charters of various cities permit ordinances forbidding lotteries and punishing promoters of them, treating them as minor offenders, nor that the statute before us warrants the imposition of a considerable penalty, and makes a second offense a felony. The statute is general, as it must be, and applies to big and to little lotteries. The extent of the mischief done by respondent is not a consideration which ought to affect our determination.

We are of opinion that the court below was right, and the conviction is therefore affirmed.

MINNESOTA SUPREME COURT.

BIBB BROOM CORN COMPANY, Respt.,
v.
ATCHISON, TOPEKA, & SANTA FE
RAILWAY COMPANY, Appt.
 (.....Minn.....)

- *1. It is the duty of a common carrier to whom goods are delivered for transportation to forward them promptly, and without unreasonable delay, to their destination.**
- 2. If he fails to do so, and negligently and carelessly delays the shipment, and the goods are overtaken in transit, and damaged by an act of God which would not have caused the damage had there been no delay, he is liable, even though the act of God could not reasonably have been anticipated. The negligence and unreasonable delay is such a proximate or concurring cause as renders a carrier liable.**
- 3. This rule applies whether the goods in their nature are perishable or nonperishable.**

(February 24, 1905.)

A PPEAL by defendant from an order of the Municipal Court of Minneapolis denying an alternative motion for judgment *non obstante veredicto*, or for a new trial after verdict in plaintiff's favor, in an action brought to recover damages to property while in defendant's possession for transportation. *Affirmed.*

The facts are stated in the opinion.

Messrs. Belden, Hawley, & Jamison, for appellant:

Concurring negligence which, when combined with the act of God, is actionable, must be such as is in itself a real, producing cause of the injury.

Baltimore & O. R. Co. v. Sulphur Spring Independent School District, 96 Pa. 65, 42 Am. Rep. 531.

The character and magnitude of this flood are conceded to have been unprecedented, and such as have been denominated an act of God, properly so called.

Davis v. Wabash, St. L. & P. R. Co. 89 Mo. 340, 1 S. W. 327; *Libby v. Maine C. R. Co.* 85 Me. 34, 20 L. R. A. 812, 26 Atl. 943; *Blythe v. Denver & R. G. R. Co.* 15 Colo. 333, 11 L. R. A. 615, 22 Am. St. Rep. 403, 25 Pac. 702; *People v. Utica Cement Co.* 22 Ill. App. 159; *Smyrl v. Nolon*, 2 Bail. L. 421, 23 Am. Dec. 146; *Faulkner v. Wright, Rice*, L. 107; *Pearce v. The Thomas Newton*, 41 Fed. 106;

*Headnotes by BROWN, J.

NOTE.—As to liability of carrier for loss caused by its negligence combined with an act of God, see also cases in *note* to *Blythe v. Denver & R. G. R. Co.* 11 L. R. A., on page 616; *Lang v. Pennsylvania R. Co.* 20 L. R. A. 380; *Wald v. Pittsburg, C. C. & St. L. R. Co.* 35 L. R. A. 356.
 69 L. R. A.

Jones v. Minneapolis & St. L. R. Co. 91 Minn. 229, 103 Am. St. Rep. 507, 97 N. W. 893.

The test of liability is not whether the company used such particular foresight as is evident, after the accident happened, might have averted it had the danger been known, but whether it used that degree of care and prudence which a very cautious and prudent person would have used, under the apparent circumstances of the case, to prevent the accident, without reasonable knowledge that it was likely to occur.

Libby v. Maine C. R. Co. 85 Me. 34, 20 L. R. A. 812; 26 Atl. 943; *American Exp. Co. v. Smith*, 33 Ohio St. 511, 31 Am. Rep. 561.

The negligent delay of defendant in forwarding plaintiff's goods, but for which such goods would not have been damaged, does not, as a matter of law, create any liability on the part of the defendant.

Gilson v. Delaware & H. Canal Co. 65 Vt. 213, 36 Am. St. Rep. 838, 26 Atl. 70; *Norris v. Savannah, F. & W. R. Co.* 23 Fla. 182, 11 Am. St. Rep. 362, 1 So. 475; *St. Louis I. M. & S. R. Co. v. Commercial Union Ins. Co.* 139 U. S. 223, 35 L. ed. 154, 11 Sup. Ct. Rep. 554; *Hoadley v. Northern Transp. Co.* 115 Mass. 304, 15 Am. Rep. 106; *McClary v. Sioux City & P. R. Co.* 3 Neb. 44, 19 Am. Rep. 631; *Daniels v. Ballantine*, 23 Ohio St. 532, 13 Am. Rep. 264; *Dubuque Wood & Coal Assn. v. Dubuque*, 30 Iowa, 176; *International & G. N. R. Co. v. Bergman* (Tex. Civ. App.) 64 S. W. 999; *Lamont v. Nashville & O. R. Co.* 9 Heisk. 58; *Clark v. Pacific R. Co.* 39 Mo. 184, 90 Am. Dec. 458; *McVeagh v. Atchison, T. & S. F. R. Co.* 3 N. M. 327, 5 Pac. 457; *Reid v. Evansville & T. H. R. Co.* 10 Ind. App. 385, 53 Am. St. Rep. 391, 35 N. E. 703; *Davis v. Central Vermont R. Co.* 66 Vt. 290, 44 Am. St. Rep. 852, 29 Atl. 313; *Gleason v. Virginia Midland R. Co.* 5 Mackey, 356; *Michigan C. R. Co. v. Burrows*, 33 Mich. 6.

Mr. Arthur W. Selover, for respondent:

This flood, or one substantially as great, ought to have been anticipated by defendant in a reasonable view of all the conditions.

Beede v. Wisconsin C. R. Co. 90 Minn. 36, 101 Am. St. Rep. 390, 95 N. W. 454; *Fox v. Boston & M. R. Co.* 148 Mass. 220, 1 L. R. A. 702, 19 N. E. 222; *Smith v. Western R. Co.* 91 Ala. 455, 11 L. R. A. 619, 24 Am. St. Rep. 929, 8 So. 754; *Chicago, B. & Q. R. Co. v. Manning*, 23 Neb. 552, 37 N. W. 462; *Lamont v. Nashville & O. R. Co.* 9 Heisk. 58; *Adams Exp. Co. v. Jackson*, 92 Tenn. 326, 21 S. W. 666.

A common carrier is bound to take notice of the signs of approaching danger, and, if they are such as reasonably to awaken apprehension of danger, is bound to use all

available means and facilities for the safety of the goods.

Nelson v. Great Northern R. Co. 28 Mont. 297, 72 Pac. 642; *Pruitt v. Hannibal & St. J. R. Co.* 62 Mo. 527.

An act of God is no defense if the goods would not have been exposed to the accident but for an unreasonable delay in their shipment.

Armentrout v. St. Louis, K. O. & N. R. Co. 1 Mo. App. 158; *Michigan C. R. Co. v. Curtis*, 80 Ill. 324; *Merchants' Despatch Transp. Co. v. Kahn*, 76 Ill. 520; *Wald v. Pittsburg, C. O. & St. L. R. Co.* 162 Ill. 545, 35 L. R. A. 356, 53 Am. St. Rep. 332, 44 N. E. 888; *Ransier v. Minneapolis & St. L. R. Co.* 32 Minn. 331, 20 N. W. 332; *Dugan v. St. Paul & D. R. Co.* 40 Minn. 544, 42 N. W. 538; *Perry v. Tozer*, 90 Minn. 341, 101 Am. St. Rep. 416, 97 N. W. 137; *Ouerson v. Grafton*, 5 N. D. 289, 65 N. W. 676; *Cook v. Minneapolis, St. P. & S. Ste. M. R. Co.* 98 Wis. 624, 40 L. R. A. 457, 67 Am. St. Rep. 830, 74 N. W. 561; *Walrod v. Webster County*, 110 Iowa, 349, 47 L. R. A. 480, 81 N. W. 598; *Selleck v. Lake Shore & M. S. R. Co.* 93 Mich. 375, 18 L. R. A. 154, 53 N. W. 556; *Lutz v. Atlantic & P. R. Co.* 6 N. M. 496, 16 L. R. A. 819, 30 Pac. 912; *Salisbury v. Herchenroder*, 106 Mass. 458, 8 Am. Rep. 354.

Brown, J., delivered the opinion of the court:

The facts in this case are as follows: On or about May 12, 1903, plaintiff delivered to defendant at Stafford, Kansas, a car load of broom corn, to be transported to Minneapolis, this state. The route of transportation was by way of Kansas City, and defendant was to forward the car at that point, the terminus of its line, over the Chicago Great Western road. The car reached the freight yards of defendant at Kansas City on May 23d, but defendant wholly failed and neglected to send it forward or notify the Chicago Great Western Company of its arrival, though the evidence tends to show that immediately after the arrival of the car at Kansas City defendant sent a messenger to communicate the fact to the Great Western company, and that it was to be forwarded over its line, but through carelessness the messenger notified the Missouri Pacific company instead, and the Great Western was not informed of the matter at all. In consequence of the neglect of the messenger, the car remained in the yards of defendant until it was submerged by water in the great flood occurring during the last days of May and the first days of June at Kansas City, and the corn substantially destroyed. After the waters of the flood had receded, defendant, having first offered to forward the car

to Minneapolis, and plaintiff having refused to accept the corn in its damaged condition, caused the same to be sold, and tendered plaintiff the proceeds, less freight charges. Plaintiff brought this action to recover the value of the corn, alleging in its complaint that it was damaged and injured while in the possession of defendant, through its negligence and carelessness. The delivery of the corn to defendant for transportation, and that it was damaged while in defendant's possession, are admitted in the answer, but it is alleged in defense that the damage was caused by an act of God; that an unusual and extraordinary rainfall occurred at Kansas City and vicinity at the time the car was in its yards, causing the river to overflow its banks and submerge defendant's yards, the occurrence and extent of which could not have been foreseen or anticipated. The trial court instructed the jury in part that, if the corn was destroyed by an act of God, unaccompanied by the concurrent negligence of defendant, plaintiff could not recover; but, in effect, left to the jury to say whether the delay in forwarding the car was negligence, and whether such negligence concurred in causing the damage. The jury returned a verdict for plaintiff, and defendant appealed from an order denying its alternative motion for judgment notwithstanding the verdict or for a new trial.

The only assignments of error requiring consideration are those which challenge the charge of the trial court, in which the jury was instructed that, if the negligent delay of defendant in forwarding the car concurred in causing the injury or loss complained of, defendant was liable. It is contended with much earnestness and ability by defendant's counsel that, notwithstanding there might have been negligent delay in forwarding the car from Kansas City to Minneapolis, but for which the corn would not have been damaged, yet the damage complained of resulted proximately from the flood, an act of God, and that, as plaintiff failed to show that defendant was chargeable with neglect in not foreseeing or guarding against the danger, no recovery can be had. The question presented, then, is whether a common carrier is liable to the owner of goods delivered to him for transportation, which are damaged or destroyed by an act of God while in his possession, in consequence of a negligent delay in forwarding them, whether the act of God could reasonably have been anticipated or not. The question is an important one, and the authorities are not in harmony. We have considered it with care in all its bearings, and reach the conclusion that the carrier is liable.

As a general rule, applicable to all cases

of negligence, if damage is caused by the concurrent force of defendant's neglect and some other cause for which he is not responsible, including an act of God, he is nevertheless liable if his negligence is one of the proximate causes of the injury complained of, even though, under the particular circumstances, he was not bound to anticipate the interference of the intervening force which concurred with his own. In the application of this rule, however, the authorities are not agreed. It is held in some states, as applied to common carriers, that a negligent delay in forwarding property delivered to them for transportation, which are injured by an act of God, or other cause for which they are not responsible, and could not reasonably have been anticipated, does not render the carrier liable, although the property would not have been damaged had there been no delay. 1 Am. & Eng. Enc. Law, 2d ed. p. 596. Courts holding to this rule place their decisions on the ground that the act of God in such cases is the proximate cause of the injury, and not the delay in transportation. *Herring v. Chesapeake & W. R. Co.* 101 Va. 778, 45 S. E. 322. In other states the opposite doctrine is settled and adhered to. *Shearm. & Redf. Neg.* § 40. The authorities are not at variance where the property damaged is perishable, or inherently susceptible to damage from climatic influences, as sudden changes in the weather. Changes in the weather are conditions which the carrier is bound to anticipate as likely to occur, and for injuries resulting to perishable goods from such causes the carrier is liable where his negligent delay in forwarding them contributes to cause the injury. Goods in this class are those likely to be damaged by freezing or from excessive heat. The authorities are at variance, in so far as negligent delay is concerned, only in cases involving property not perishable. The property in the case at bar was of that character, and would not have been damaged but for the flood that submerged the car while in the yards at Kansas City; neither would it have been damaged had defendant forwarded the car to Minneapolis promptly, and without unreasonable delay, as it was required by law to do. So the question is, Was the negligent delay of defendant in forwarding the car one of the proximate causes of the damage to the corn, or did such delay concur with the flood in fact causing the damage? It may be conceded, for the purposes of this case, that the flood was an act of God; that it was unprecedented, and beyond the reasonable anticipation of the most prudent residents of the vicinity where it occurred; and, unless we are to hold that the negligent delay ren-

dered defendant liable, the case must be reversed.

One of the first cases reported in the books, so far as our research has extended, wherein the carrier is held liable for negligent delay in transporting goods, not perishable, which were injured in transit by an overpowering cause not reasonably to have been anticipated, is *Michaels v. New York C. R. Co.* 30 N. Y. 564, 86 Am. Dec. 415. In that case there was a delay of several days in forwarding certain dry goods delivered to the defendant for transportation, which were damaged in transit by an act of God,—a flood similar to the one in the case at bar. In disposing of the case and the contention of the railway company that it was exempt from liability for the reason that the injury complained of was the result of an act of God, the court said: When a carrier is intrusted with goods for transportation, and they are injured or lost in transit, the law holds him responsible for the injury. He is only exempted by showing that the injury was caused by an act of God or the public enemy; and to avail himself of such exemption he must show that he was himself free from fault at the time. His act or negligence must not concur or contribute to the injury. If he departs from the line of his duty, and violates his contract, and while thus in fault, and in consequence of that fault, the goods are injured by an act of God, which would not otherwise have caused the injury, he is not protected. That case has been consistently followed and adhered to in New York, and is now the settled law of that state. In *Read v. Spaulding*, 30 N. Y. 630, 86 Am. Dec. 426, it was held that, if a common carrier unreasonably delays goods received by him for transportation, and they are injured by an act of God in consequence of such delay, he must show, to exempt himself from liability, that the delay did not contribute to, or concur in, the injury. In *Condict v. Grand Trunk R. Co.* 54 N. Y. 500, it was said that it is the duty of a common carrier to forward goods delivered to him for transportation promptly, and within a reasonable time, and, if a loss occurs in which his negligence in part concurs, he is liable. See also *Dunson v. New York C. R. Co.* 3 Lans. 265. This doctrine has been followed and applied in other states. In *Wolf v. American Exp. Co.* 43 Mo. 421, 97 Am. Dec. 406, the court laid down the general rule in such cases in the following language: "The act of God which excuses the carrier must not only be the proximate cause of the loss, but the better opinion is that it must be the sole cause; and, where the loss is caused by the act of God, if the negligence of the carrier mingles with it as an active and co-operative cause, he is still responsible." In

Wald v. Pittsburg, C. C. & St. L. R. Co. 162 Ill. 545, 35 L. R. A. 356, 53 Am. St. Rep. 332, 44 N. E. 888, it appeared that plaintiff had purchased of defendant a ticket entitling him to passage from Chicago to New York upon one of its trains known as the "Limited Express." He was also entitled, as a matter of law, to have his baggage, which was checked at the time he procured his ticket, forwarded by the same train. The baggage was, however, by the negligence of the baggage-gaman, forwarded from some point on the line by the day express, a train following the "Limited Express" a number of hours later. Plaintiff reached his destination in safety, but the day express which carried his baggage was overtaken by a flood at Johnstown, Pennsylvania,—an act of God,—and the baggage destroyed. The court held the defendant liable, saying in the opinion that the unnecessary delay of a carrier which subjects goods in his possession to loss by an act of God, which they would not otherwise have met with, is in itself such negligence as will render him liable. In *Louisville & N. R. Co. v. Gidley*, 119 Ala. 523, 24 So. 753, it appeared that plaintiff delivered to defendant, a common carrier, at Gadsden, Alabama, goods to be transported to Philadelphia. The carrier unnecessarily delayed forwarding them for some days, and they were in the meantime destroyed by fire, for which defendant was in no way responsible, and for which it could not, under its contract, have been made liable to the owner of the goods. The court held that the unnecessary delay in shipment was the proximate cause of the loss, and that the carrier was liable. This rule of liability is followed in Kentucky. *Cassilay v. Young*, 4 B. Mon. 265, 39 Am. Dec. 505; *Hernsheim Bros. v. Newport News & M. Valley Co.* 18 Ky. L. Rep. 227, 35 S. W. 1115. Also in Maryland. *Baltimore & O. R. Co. v. Keedy*, 75 Md. 320, 23 Atl. 643. The foregoing cases all involve property not perishable, and the negligent delay was held either the proximate cause of the loss, or that it concurred with the act of God in causing the damage and rendered the carrier liable. Other cases, more or less in point, may be found collected in 36 Am. St. Rep. 839. See also *Deming v. Grand Trunk R. Co.* 48 N. H. 455, 2 Am. Rep. 287; *Michigan C. R. Co. v. Curtis*, 80 Ill. 324; *Campbell v. Morse*, Harp. L. 468; *Meyer v. Vicksburg, S. & P. R. Co.* 41 La. Ann. 639, 17 Am. St. Rep. 408, 6 So. 218; *Missouri, K. & T. R. Co. v. McFadden Bros.* 89 Tex. 138, 33 S. W. 853; *Pruitt v. Hannibal & St. J. R. Co.* 62 Mo. 527. And the rule was, in effect, laid down, though the precise question here under consideration was not there involved in *Jones v. Min-*

neapolis & St. L. R. Co. 91 Minn. 229, 103 Am. St. Rep. 507, 97 N. W. 893.

We have examined the authorities holding the opposite of this doctrine, and, while the courts adhering to the same are of eminent standing, we have no difficulty in adopting the view of the cases above cited. The rule that permits a carrier to excuse his negligence by an act of God overtaking him while thus in fault seems to us unsound. It is based on too strict an application of the rule of proximate cause. It is the duty of a common carrier to whom goods are delivered for transportation promptly and without unreasonable delay to forward them to their destination, and such was defendant's duty in the case at bar. This it failed to do, and its negligence in this respect is not seriously controverted. The car arrived at its yards in Kansas City on the 23d of May, and was permitted to remain there without proper effort to forward it until it was overtaken by the flood. It could have been moved from defendant's yards on any day after its arrival prior to the 29th of May, and, had this been done, the corn would not have been damaged. If defendant had acted as required by the terms of its contract, and as enjoined by law, the car would have been forwarded, and would have arrived at its destination prior to the flood. That defendant's neglect concurred and mingled with the act of God seems the only reasonable conclusion the facts will warrant, and we feel safe in applying the general rule that an act of God is not in such cases a defense. Every reason in equity and justice relieves a carrier from the performance of his contract and from liability for injuries to property in his custody for transportation, resulting exclusively from an act of God, or other inevitable accident or cause over which he has no control, and could not reasonably anticipate or guard against. But reasons of that nature lose their force and persuasive powers when applied to a carrier who violates his contract, and by his unreasonable delay and procrastination is overtaken by an overpowering cause, even though of a nature not reasonably to be anticipated or foreseen. If, but for his negligence, the loss would not have occurred, no sound reason will excuse him, and he should not be relieved by an application of the abstract principles of the law of proximate cause. No wrongdoer should be allowed to apportion or qualify his own wrong; and, if a loss occurs while his wrongful act is in operation and force, and which is attributable thereto, he should be held liable. *Davis v. Garrett*, 6 Bing. 716.

Our conclusions are that the trial court correctly instructed the jury, that the record presents no reversible errors, and *the order appealed from is affirmed.*

KANSAS SUPREME COURT.

UNION PACIFIC RAILWAY COMPANY,
Plff. in Err.,
v.

Adeline CAPIER.

(66 Kan. 649.)

- *1. A trespasser on a railway track was struck by a moving car, to which an engine was attached, and injured without fault on the part of the servants of the company. Held, that the failure of the railway employees operating the car and engine to take charge of the wounded man and give him care and attention was not the violation of a legal duty for which the company was liable.
2. The case at bar is distinguishable from those where the servants of the railway

*Headnotes by SMITH, J.

NOTE.—Care due to sick, infirm, disabled, and otherwise helpless persons, with whom no contract relation is sustained.

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company were at fault, and also from those where the injury was occasioned without fault, and the negligent acts or omissions occurred after the company had taken the injured person in charge.

(April 11, 1903.)

ERROR to the District Court for Wyandotte County to review a judgment in favor of plaintiff in an action brought to recover damages for the alleged negligent killing of plaintiff's son. *Reversed.*

The facts are stated in the opinion.

Messrs. N. H. Loomis, R. W. Blair, and H. A. Scandrett, for plaintiff in error:

Even if the deceased had been a passenger, and had been hurt without fault of the

VIII. Presumptions in absence of knowledge of disability.

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b. Limitations upon exercise of such presumption.

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3. "Last moment" to which presumption may be indulged, 554.

I. Scope of note.

The authorities upon the precise question determined in *UNION P. R. CO. V. CAPIER* are so few that it may be helpful to have the question considered in the light of established legal principles, and their application to somewhat similar situations, viz., those in which a person's ability to care for himself is more or less impaired because of some disability from which he suffers. The discussion will not be extended, however, to the consideration of the duty owing to childhood (see note, *Care required of railroad companies to prevent injuring small children upon the track*, 25 L. R. A. 791); nor to persons in a state of intoxication (see note, *Intoxication as affecting negligence*, 40 L. R. A. 131); nor to the duty owing persons under this and other disabilities where a contract relation exists (see notes, *Exposure of drunken passenger to danger by ejection from car*, 19 L. R. A. 327; *Duty of carrier to passengers taken ill during journey*, 31 L. R. A. 201; *Duty of master to furnish medical aid to servant*, 28 L. R. A. 546; and *Authority of agent or representative to employ medical services for employee or other third persons*, 20 L. R. A. 695); nor to the question of liability for injuries resulting in the aggravation of pre-existing disease or injury, except as it arises in respect to persons instrumental in causing the previous injury (see note, *Effect of previous disease of person injured on liability for causing the injuries*, 16 L. R. A. 268).

II. No duty as between strangers.

As stated in *UNION P. R. CO. V. CAPIER*, "It

defendant, it would not have been obliged to furnish him medical care and treatment.

Union P. R. Co. v. Beatty, 35 Kan. 265, 57 Am. Rep. 160, 10 Pac. 845; *Clark v. Missouri P. R. Co.* 48 Kan. 654, 29 Pac. 1138.

In the case of a trespasser there is no liability unless it is proved by affirmative evidence that the injuries resulted from culpable negligence after he was noticed upon the track.

Tennis v. Inter-State Consol. Rapid Transit R. Co. 45 Kan. 503, 25 Pac. 876.

The employees of a railroad company do not, by reason, merely, of their employment, owe any duty to the proprietors of lands adjoining the company's right of way to

extinguish a fire found on the right of way, unless the fire originated through its negligence.

Kenney v. Hannibal & St. J. R. Co. 70 Mo. 252.

Mr. C. W. Trickett, for defendant in error:

A railroad company owes a duty to even a trespasser after the injury.

Beach, Contrib. Neg. 2d ed. 277; *Northern O. R. Co. v. State*, 29 Md. 420, 96 Am. Dec. 545; *Redf. Railways*, 510; *Philadelphia & R. R. Co. v. Derby*, 14 How. 468, 14 L. ed. 502; *Whitesides v. Southern R. Co.* 128 N. C. 229, 38 S. E. 878; *Fagg v. Louisville & N. R. Co.* 111 Ky. 30, 54 L. R. A. 919, 63 S. W. 580; *Dyche v. Vicksburg, S. & P. R. Co.* 79

is the omission or negligent discharge of legal duties only which come within the sphere of judicial cognizance." Those duties which are dictated merely by good morals, or by humane considerations, are not within the domain of the law. Feelings of kindness and sympathy may move the good Samaritan to minister to the needs of the sick and wounded at the roadside, but the law imposes no such obligation, and suffering humanity has no legal complaint against those who pass by on the other side. Legal rights are relative, and arise out of those complex relations of human society which create correlative rights and duties, whose performance is so necessary to the good order and well being of society that the state makes their observance obligatory. Unless, therefore, the relation existing between the sick, helpless, or injured and those who witness their distress, is such that the law imposes the duty of providing the necessary relief, there is neither obligation to minister on the one hand, nor cause for legal complaint on the other. *Allen v. Ferguson*, 18 Wall. 1, 21 L. ed. 854; *West Virginia C. & P. R. Co. v. State*, 96 Md. 652, 666, 81 L. R. A. 574, 54 Atl. 669; *Western Maryland R. Co. v. Kehoe*, 83 Md. 434, 450, 35 Atl. 90; *Com. v. McDuffy*, 126 Mass. 469; *Williams v. Chicago & A. R. Co.* 135 Ill. 491, 11 L. R. A. 352, 25 Am. St. Rep. 397, 26 N. E. 681; *O'Leary v. Brooks Elevator Co.* 7 N. D. 554, 41 L. R. A. 677, 75 N. W. 919; *Illinois C. R. Co. v. King*, 179 Ill. 91, 70 Am. St. Rep. 93, 53 N. E. 552; *Baltimore & P. R. Co. v. Cumberland*, 176 U. S. 238, 44 L. ed. 451, 20 Sup. Ct. Rep. 380; *Pollock, Torts*, 4th ed. p. 389; and see note, *Duty is an essential element of negligence*, 12 L. R. A. 322.

III. Principles which determine duty in certain relations.

a. Duty of special care due to persons under disability in general.

It is a rule of the common law, recognized as necessary to good order and to the proper protection of society, that, in the exercise of his legal rights, one is bound to observe ordinary care not to injure others. As subjects of this general duty, persons under disability constitute no exception. And one who is guilty of a breach of such duty as to them may be held liable for the consequences, although his act or omission might have been attended with less serious results, or might not have resulted in injury at all, but for the injured

person's previous disability. But the law goes further, and imposes the duty of exercising special care toward persons more or less disabled from caring for themselves. What is ordinary care is dependent upon circumstances. When one is brought into relation to a child, he is bound to use more prudence than in dealing with an adult, and, if a person is blind or deaf, or unconscious from any cause, he cannot be treated as one in the full possession of his faculties, if his disability is known. Under such circumstances, ordinary care is such as men of ordinary prudence would exercise in a like situation. And when the law requires a railroad company to check the speed of its train upon discovering a child or person in a helpless condition on the track, when the sounding of the whistle would be an exercise of sufficient care as to a healthy adult, in the possession of all his faculties, it is no more than ordinary prudence and a due regard for human life dictate. As some of the authorities observe. It is a just and beneficent principle, running through all the cases, that what humanity requires must be done by those who act with knowledge of another's helplessness.

Upon the foregoing propositions the authorities are agreed. But when we turn to the cases involving some limitation upon this duty, as where the party under disability is a trespasser, and to those cases where the disability exposing a party to peril is due more or less to his own negligence, we are met with a great contrariety of opinion. These diverse opinions are collected in this note, and it will help us better to appreciate their respective values as authority if we first consider the principles upon which they are based.

b. Limitation upon this duty where disabled party is trespasser.

Some of the authorities, in considering the circumstances bringing persons into relation to each other, and the duty imposed thereby, seem to give undue prominence to the wrong of a merely technical trespass, and fail sufficiently to recognize the element of knowledge, with reference to the presence of another within the range of one's action, and the duty that comes with knowledge, under the general obligation to humanity, and the respect due the natural right of every man to the enjoyment of life. It is accordingly held by some courts that the only duty owing a disabled trespasser is to refrain from wilfully or wantonly injuring him, and

Miss. 361, 30 So. 711; *Atchison, T. & S. F. R. Co. v. Weber*, 33 Kan. 554, 52 Am. Rep. 543, 6 Pac. 877.

Smith, J., delivered the opinion of the court:

This was an action brought by Adeline Cappier, the mother of Irvin Ezelle, to recover damages resulting to her by reason of the loss of her son, who was run over by a car of plaintiff in error, and died from the injuries received. The trial court, at the close of the evidence introduced to support a recovery by plaintiff below, held that no careless act of the railway company's servants in the operation of the car was shown, and refused to permit the case to be considered by the jury on the allegations and

attempted proof of such negligence. The petition, however, contained an averment that the injured person had one leg and an arm cut off by the car wheels, and that the servants of the railway company failed to call a surgeon, or to render him any assistance after the accident, but permitted him to remain by the side of the tracks and bleed to death. Under this charge of negligence a recovery was had.

While attempting to cross the railway tracks, Ezelle was struck by a moving freight car pushed by an engine. A yardmaster in charge of the switching operations was riding on the end of the car nearest to the deceased, and gave warning by shouting to him. The warning was either too late, or no heed was given to it. The engine was

that no liability arises from the omission of ordinary care to avoid injury, even after the presence of the trespasser and his helpless condition are known. *Griawold v. Boston & M. R. Co.* 183 Mass. 484, 67 N. E. 854; *Mason v. Missouri P. R. Co.* 27 Kan. 83, 41 Am. Rep. 405.

But the preponderance of authority is with the position that a merely technical trespasser does not forfeit his right to the enjoyment of life; and that, while he assumes the risk of dangers incident to the condition of premises upon which he trespasses, and of instrumentalities with which he comes in contact, yet, when his presence becomes known to the owner, he comes at once under the protection of the rule that one must use ordinary care to prevent his conduct resulting in injury to another. As Lord Denman has well said: "Everyone in the conduct of that which may be harmful to others, if misconducted, is bound to the use of due care and skill, and the wrongdoer is not without the pale of the law for this purpose." *Colchester v. Brooke*, 7 Q. B. 377. It is relation, accompanied with knowledge, or the presumption of knowledge, which limits or conditions the freedom of one's right of action. A man who is alone in a wilderness is free to act as he pleases; but when he transfers his action to an inhabited locality, where he knows, or has reason to believe, there are persons liable to be affected by his acts, he must have respect to their right of security, and must so qualify his conduct as to avoid doing them harm. Likewise, the owner of premises may presume that he is alone in their enjoyment, except as he may have given invitation to others, and is entitled to the freedom of action which his exclusive possession warrants. But when that presumption is overcome by knowledge of another's presence, the duty of using ordinary care to avoid injury to such person immediately arises.

The farmer who discovers a trespasser crossing his field, and the railroad company that observes a man upon its right of way, have no more reason to omit ordinary care to prevent their affirmative acts resulting in injury to the person thus trespassing upon their premises, than they have toward one who is lawfully there. This knowledge of a trespasser's presence, however, is not sufficient to impose the duty of showing him special care because of some disability which increases his danger, unless his disability also is known, or is sufficient.

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ly evident to the senses to charge one with knowledge. Therefore, the duty of exercising such special care as the circumstances may require to avoid injury to a disabled trespasser is conditioned upon knowledge of his presence and knowledge of his disability.

c. *Duty limited by negligence of person under disability.*

Again the rule denying relief to a party injured, where his own negligence concurred with that of the defendant in causing the injury, seems to be regarded by some authorities as based upon the theory that the negligence of the plaintiff in such case "justifies or excuses the negligence of the defendant." Consistent with this theory, it is held that no duty is owing a person negligently coming within the range of another's action, save to refrain from wilfully or wantonly injuring him. Hence, these authorities deny to the person injured any remedy, even when his negligence was not the proximate cause of his injuries; as where the injury to which his negligence subjected him might have been avoided by the exercise of ordinary care on the part of the defendant.

But the better reason for the rule denying relief in cases of concurring negligence is that the courts will not undertake an apportionment of the damage where an injury occurs through the concurring acts of negligence of both parties. *Needham v. San Francisco & S. J. R. Co.* 37 Cal. 409, 419; *Isbell v. New York & N. H. R. Co.* 27 Conn. 393, 71 Am. Dec. 78; *Trow v. Vermont C. R. Co.* 24 Vt. 487, 494, 58 Am. Dec. 191; *Cleveland, C. & C. R. Co. v. Terry*, 8 Ohio St. 570, 581; *Simpson v. Hand*, 6 Whart. 311, 36 Am. Dec. 231. The party inflicting injury is allowed to escape judgment, "because, from the nature of the case, it is unable to ascertain what share of the damages is due to his negligence. He is both legally and morally to blame, but there is no standard by which the law can measure the consequences of his fault, and therefore, and therefore only, he is allowed to go free of judgment." Hence, where the negligence of the injured party is not the proximate cause of his injuries, he may be entitled to damages, notwithstanding his negligence, because the reason for denying him relief, where the negligence of both parties concurs in producing the injury, does not exist.

stopped. After the injured man was clear of the track, the yardmaster signaled the engineer to move ahead, fearing, as he testified, that a passenger train then about due would come upon them. The locomotive and car went forward over a bridge, where the general yardmaster was informed of the accident, and an ambulance was summoned by telephone. The yardmaster then went back where the injured man was lying, and found three Union Pacific switchmen binding up the wounded limbs and doing what they could to stop the flow of blood. The ambulance arrived about thirty minutes later, and Ezelle was taken to a hospital, where he died a few hours afterwards.

In answer to particular questions of fact, the jury found that the accident occurred

at 5:35 P. M.; that immediately one of the railway employees telephoned to police headquarters for help for the injured man; that the ambulance started at 6:05 P. M., and reached the nearest hospital with Ezelle at 6:20 P. M., where he received proper medical and surgical treatment.

Judgment against the railway company was based on the following question and answer:

Q. Did not defendant's employees bind up Ezelle's wounds, and try to stop the flow of blood, as soon as they could after the accident happened?

A. No.

The lack of diligence in the respect stated was intended, no doubt, to apply to the yardmaster, engineer, and fireman in charge

What duty, then, does the law impose upon one who is brought into relation to another through the latter's negligence? According to the preponderance of authority, it requires that he shall be in the exercise of ordinary care in the immediate action in which he is engaged; and, if that action is calculated to create circumstances which imperil human life, he must be on the lookout in places where persons may be reasonably expected to be present to prevent his action resulting in injury. The purpose of such lookout being to discover situations requiring preventive effort to avoid injury, its omission is negligence, which will subject one to liability, although the danger to which the injured party was subjected was unknown to him, if it might have been known in time to avoid injury, had the proper lookout been maintained. And, of course, where the danger of the negligent party is discovered, ordinary care requires preventive effort to avoid the infliction of injury according to the demands of the situation. In a word, the law holds all persons to the observance of ordinary care always when brought into relation to others, and charges them with the consequences of the failure of that duty, if such negligence, and not the preceding negligence of the injured party, is the proximate cause of the injury.

The leading authority for this doctrine is the early case of *Davies v. Mann*, 10 Mees. & W. 546, where it appeared that the plaintiff, having fettered the fore feet of his donkey, turned it into the highway. Thereafter the defendant coming down a slight descent with a team and wagon, at a smartish pace, ran against the donkey, and knocked it down, and, the wheels passing over it, it died from its injuries. Parke, B., said: "Although the ass may have been wrongfully there, still the defendant was bound to go along the road at such a pace as would be likely to prevent mischief. Were this not so, a man might justify the driving over goods left on a public highway, or even over a man lying asleep there, or the purposely running against a carriage going on the wrong side of the road."

The doctrine of this case is now generally accepted by the courts of the United States. See note, *Doctrine of "last clear chance,"* 55 L. R. A. 418.

The foregoing rules respecting the care due to trespassers and persons guilty of contributory negligence are applicable to situations

where the person to be affected is suffering from some disability, with this addition, that, where such person's disability is known, or with ordinary care might have been discovered, where the duty to discover exists, then ordinary care to avoid injury includes such an increased measure of care as an ordinarily prudent person would exercise, in view of the helplessness of the person to be affected, and the danger to be avoided. The law will not tolerate the infliction of unnecessary injury upon one who has negligently brought himself within the range of the otherwise lawful action of another. And where such person is not only less culpable, because of infirmities which render it more difficult for him to avoid the place of danger, or because of some disability which has overtaken him after coming to such place, but is also less able to escape from the danger into which he has come, there is the more reason for requiring those coming into relation to him to exercise due care to avoid doing him harm, and to so qualify their action as the nature of the disability may demand, if the same has come to their knowledge.

d. Another's negligence not excuse for wilful or wanton injury.

While some authorities deny the existence of the duty of observing ordinary care to avoid injury either to a trespasser or to one guilty of contributory negligence, even as to affirmative acts calculated to imperil human life, all courts agree that such circumstances are never an excuse for an injury wilfully or wantonly inflicted.

The elements necessary to characterize an injury as wilfully inflicted in such cases are: (1) Knowledge of a situation requiring the exercise of ordinary care and diligence to avert injury to another; (2) ability to avoid the resulting harm by ordinary care and diligence in the use of the means at hand; (3) the omission to use such care and diligence to avert the threatened danger, when to the ordinary mind it must be apparent that the result is likely to prove disastrous to another. Such omission, of course, may arise from a deliberate purpose to inflict injury, but it is more commonly due to that reckless disregard for the safety of others to which the law imputes an intention to do harm. *Western Maryland R. Co. v. Kehoe*, 83 Md. 434, 452, 35 Atl.

of the car and engine. These facts bring us to a consideration of the legal duty of these employees toward the injured man after his condition became known. Counsel for defendant in error quote the language found in Beach on Contributory Negligence, 3d ed. § 215, as follows: "Under certain circumstances, the railroad may owe a duty to a trespasser after the injury. When a trespasser has been run down, it is the plain duty of the railway company to render whatever service is possible to mitigate the severity of the injury. The train that has occasioned the harm must be stopped, and the injured person looked after, and, when it seems necessary, removed to a place of safety, and carefully nursed, until other relief can be brought to the disabled person."

90; West Virginia C. & P. R. Co. v. State, 96 Md. 652, 667, 61 L. R. A. 574, 54 Atl. 669; Gulf, C. & S. F. R. Co. v. Lankford, 88 Tex. 499, 31 S. W. 355.

The distinction between mere negligence toward a person in peril, after his situation has been discovered, and the wilful or wanton infliction of an injury, is frequently overlooked, and is the occasion for some conflict among the authorities. It is perhaps true, also, that some of the cases call for some discrimination in determining whether an act is merely negligent or wilful. And the question is troublesome mostly to those courts which refuse to apply the doctrine of proximate cause to plaintiff's negligence. But that such distinction exists is evident. For instance, a railroad company has been held liable for an injury inflicted through the negligent refusal of an engineer to obey a signal to stop his train upon the discovery by the brakeman of a sleeping boy under a car. If, however, the brakeman who made the discovery in such case had omitted his efforts to have the train stopped after seeing the boy's peril, the injury would have been wilful. *Garza v. Texas Mexican R. Co.* (Tex. Civ. App.) 41 S. W. 172. It is likewise apparent that the duty to a person in peril, after the discovery of his situation, may be performed in such a manner as to render the guilty party liable as for negligence, when his conduct could not be denominated as wanton or wilful. Thus, in *Donahoe v. Wabash, St. L. & P. R. Co.* 83 Mo. 543, where a locomotive engineer, seeing children near the track, and women running toward his train, and excitedly waving their hands, a quarter of a mile distant, put his hand on the throttle, "thinking something might turn up," but made no effort to check the speed of the train, until he discovered a child two and one-half years old on the track about 250 feet in front of him, the railroad company was held liable for negligence and carelessness in disregarding warnings with reference to a condition of danger, which clearly gave notice, and demanded that the train should be checked or stopped. And there are numerous authorities which hold that one may be liable for a mere inadvertence in his conduct toward a trespasser or person guilty of contributory negligence after the danger of such person has been discovered. See, among other authorities cited in this note, *Louisville & N. R. Co. v. Vanarsdell*, 25 Ky. L. Rep. 1432, 77 S. W. 1103; *Clark v. Wilmington* 60 L. R. A.

The principal authority cited in support of this doctrine is *Northern C. R. Co. v. State*, 29 Md. 420, 96 Am. Dec. 545. The court in that case first held that there was evidence enough to justify the jury in finding that the operatives of the train were negligent in running it too fast over a road crossing without sounding the whistle, and that the number of brakemen was insufficient to check its speed. Such negligence was held sufficient to uphold the verdict, and would seem to be all that was necessary to be said. The court, however, proceeded to state that, from whatever cause the collision occurred, it was the duty of the servants of the company, when the man was found on the pilot of the engine in a helpless and insensible condition, to remove him, and

ton & W. R. Co. 109 N. C. 430, 14 L. R. A. 749, 14 S. E. 43; *Isabel v. Hannibal & St. J. R. Co.* 60 Mo. 475; *Heddles v. Chicago & N. W. R. Co.* 77 Wis. 228, 20 Am. St. Rep. 106, 46 N. W. 115; *St. Louis, I. M. & S. R. Co. v. Wilkerson*, 46 Ark. 513; *Meeks v. Southern P. R. Co.* 56 Cal. 513, 38 Am. Rep. 67.

e. Summary.

The sum of the foregoing principles, and of the preponderance of authority under the decisions collected in this note, may be concisely stated as follows:

That the duty of exercising ordinary care to prevent injury resulting from one's lawful action arises immediately when one comes into relation to others. That this relation may be actual, as where persons are known to be present within the range of one's action, or it may be prospective, as where the action occurs in a place where others may reasonably be expected to be present. That, when the relation is prospective in its nature, ordinary care requires a due degree of caution in one's action, in proportion to the probability of others being affected, and in mere anticipation of their presence. It requires, further, that the person acting be on the lookout to discover the presence of others within the range of his action. And for an injury resulting from the failure of this duty, or from want of due care in the performance of the action causing injury, one may be liable in damages, although he was without knowledge of the injured person's presence, and although the injured party was guilty of negligence not the proximate cause of his injury. That this prospective relation cannot exist as to trespassers, because persons cannot reasonably be expected to be present in places where they have no right to be; and, therefore, no duty arises as to trespassers until one is brought into actual relation to them through knowledge of their presence. That, finally, when one is brought into actual relation to another, he is bound to use ordinary care to avoid injury to him, whether the latter is a trespasser or not, and although his negligence has contributed to the creation of a situation requiring preventive effort on the part of others to avoid injury; and neither of these circumstances can in any event justify a wilful or wanton injury. That in all these varied relations, except that imposing the duty of dis-

do it with proper regard to his safety and the laws of humanity. In that case the injured person was taken in charge by the servants of the railway company, and, being apparently dead, without notice to his family, or sending for a physician to ascertain his condition, he was moved to defendant's warehouse, laid on a plank, and locked up for the night. The next morning, when the warehouse was opened, it was found that during the night the man had revived from his stunned condition, and moved some paces from the spot where he had been laid, and was found in a stooping posture, dead, but still warm, having died from hemorrhage of the arteries of one leg which was crushed at and above the knee. It had been proposed to place him in the defendant's

station house, which was a comfortable building, but the telegraph operator objected, and directed him to be taken into the warehouse, a place used for the deposit of old barrels and other rubbish. The Maryland case does not support what is so broadly stated in Beach on Contributory Negligence. It is cited by Judge Cooley, in his work on Torts, in a note to a chapter devoted to the negligence of bailees (chap. 20), indicating that the learned author understood the reasoning of the decision to apply where the duty began after the railway employees had taken charge of the injured person. After the trespasser on the track of a railway company has been injured in collision with a train, and the servants of the company have assumed to take charge of

covery, the disability of the party to be affected by one's action imposes the duty of exercising greater care to avoid injury, according to the demands of the situation, than is required toward persons generally. But, since a person under disability is an exception to the condition of persons generally, the duty of observing special care as to such person does not arise until his disability is known, or until circumstances are presented which are sufficient to charge one with knowledge thereof; and until such disability is known, or may be known by the exercise of ordinary care, where the duty to discover exists, one has the right to presume that a person with whom he is brought into relation is in the possession of all his faculties, and has the ability of people generally to care for himself. That, while the duty to discover another's disability is imposed at places where persons are likely to be present, the measure of care required under such circumstances is no greater than that imposed as to persons generally, until the disability is known. That this duty of exercising special care in respect to helpless persons is applicable to situations where one's action has resulted in injury to another, either with or without his fault, and requires the removal of the injured party to a place of safety, where his injury may receive proper attention, to prevent aggravation of the injury.

IV. Duty to avoid injury.

a. To the sick and infirm.

The obligation to exercise greater care to avoid injury to the sick and the infirm, than is required toward the strong, is not based upon sentiment, other than the value which the law commonly sets upon human life. It is simply the recognition of a measure of helplessness in such persons, which must be met with a care commensurate with the necessities of their situation. *Bray v. Latham*, 81 Ga. 640, 8 S. E. 64; *Cincinnati, I. St. L. & C. R. Co. v. Cooper*, 120 Ind. 469, 473, 6 L. R. A. 241, 16 Am. St. Rep. 334, 22 N. E. 340.

But the greater care demanded in such cases is not different in degree from that required toward those having no bodily infirmity. In either case only ordinary care is required, as measured by the demands of the particular situation. *Culbertson v. Holliday*, 50 Neb. 229, 69 L. R. A.

69 N. W. 858; *Cleveland, C. & C. R. Co. v. Terry*, 8 Ohio St. 570, 581; *Sleeper v. Sandown*, 52 N. H. 244; *Stanley v. Cedar Rapids & M. C. R. Co.* 119 Iowa, 526, 532, 93 N. W. 489.

"A sick or aged person, a delicate woman, a lame man, or a child, is entitled to more attention and care from a railroad company than one in good health and under no disability. They are entitled to more time in which to get on or off the cars; they are entitled to more consideration when crossing a street, to the end that the cars shall not run over them." *Sheridan v. Brooklyn City & N. R. Co.* 36 N. Y. 39, 93 Am. Dec. 490.

The old, the lame, and the infirm are entitled to the use of the streets; and more care must be exercised toward them by engineers in charge of railroad trains than toward those who have better powers of motion. If an aged or infirm person is seen upon the track, and it appears that he will not escape in time to avoid injury, it is the duty of the engineer to stop the train, if he can, so that the disabled person can make his escape. *O'Mare v. Hudson River R. Co.* 38 N. Y. 445, 98 Am. Dec. 61; *Misouri P. R. Co. v. Weisen*, 65 Tex. 443.

It is the duty of a street railway company to run its cars with due regard to the rights of the infirm, of aged persons, and of children of tender years. All of these classes of persons have the right to use the public streets, and the railroad company is liable for the damages they sustain, if it does not use due care, in proportion to the danger, to prevent injury to the various classes. *Indianapolis Street R. Co. v. Schomberg* (Ind. App.) 71 N. E. 237.

A railroad company operating its trains along a public thoroughfare, and knowing that old and infirm persons, children, and drunken persons are liable at all times to be abroad on the street, must use every precaution to avoid inflicting injury. *Illinois C. R. Co. v. Hutchinson*, 47 Ill. 408.

Where a person upon a railroad track is taken with a sudden and violent sickness and prostration, it is the duty of those in charge of a railroad train to exercise ordinary care, not only to protect such person when discovered in a helpless condition upon the track, but also to ascertain whether he is upon the track in such condition. *Yoakum v. Mettasch* (Tex. Civ. App.) 26 S. W. 129.

A railroad company owes to a man lying insensible upon a railroad track the duty to avoid

him, the duty arises to exercise such care in his treatment as the circumstances will allow. We are unable, however, to approve the doctrine that when the acts of a trespasser himself result in his injury, where his own negligent conduct is alone the cause, those in charge of the instrument which inflicted the hurt, being innocent of wrongdoing, are nevertheless blamable in law if they neglect to administer to the sufferings of him whose wounds we might say were self-imposed.

With the humane side of the question courts are not concerned. It is the omission or negligent discharge of legal duties only which come within the sphere of judicial cognizance. For withholding relief from the suffering, for failure to respond to the calls

of worthy charity, or for faltering in the bestowment of brotherly love on the unfortunate, penalties are found not in the laws of men, but in that higher law, the violation of which is condemned by the voice of conscience, whose sentence of punishment for the recreant act is swift and sure. In the law of contracts it is now well understood that a promise founded on a moral obligation will not be enforced in the courts. Bishop states that some of the older authorities recognize a moral obligation as valid, and says: "Such a doctrine, carried to its legitimate results, would release the tribunals from the duty to administer the law of the land, and put in the place of law the varying ideas of morals which the changing incumbents of the bench might from time to

injuring him, if, by the exercise of due care, his situation can be discovered in time to stop the train; and the failure to make such discovery, and to stop the train, because of the unlawful speed at which the train is traveling, is negligence. *Hankerson v. Southwestern R. Co.* 59 Ga. 598, 61 Ga. 114, 72 Ga. 182.

A railroad company may be liable for running over an idiot at a crossing. If its employees in charge of the train saw him upon the track, or by the exercise of ordinary care could have seen him, in time to stop the train, and had actual knowledge, or reasonable ground for the belief, that, on account of some mental or physical infirmity, the idiot could not step off the track in time to avoid injury. *Dally v. Richmond & D. R. Co.* 106 N. C. 301, 11 S. E. 320.

But where an engineer at once gives the alarm signals upon discovering a man lying upon the track, reverses the engine, and does all in his power to avoid running over him, no liability, as for gross negligence, arises, although the man's presence on the track is due to his having fallen there in an unconscious condition from the effects of a fever. *Missouri P. R. Co. v. Brown* (Tex.) 18 S. W. 670.

It is well known that women when pregnant are more likely to be nervously affected, and that any fright or injury sustained under such circumstances is liable to be attended with serious consequences. Therefore, where a landlord entered upon the premises of his tenant, and, in the presence of the latter's wife, whom he knew to be far advanced in pregnancy, made an assault upon some negroes, and his conduct so frightened the lessee's wife that a miscarriage and consequent ill health resulted, he was held liable for these consequences. *Hill v. Kimball*, 76 Tex. 210, 7 L. R. A. 619, 13 S. W. 50.

In the foregoing cases the negligence for which a liability was imposed is based upon the failure to exercise the greater care which the known physical infirmity of the person injured manifestly demanded. But the physically infirm are, likewise, entitled to exemption from the consequences of another's omission to exercise the care due to persons generally, even though their disabilities are not known to the negligent party. One cannot escape from liability for the consequences of his negligent act because the person injured was already crippled or suffering from some disease which

tended to aggravate or enlarge the results of his negligence. If he has been guilty of an act which is negligent in its nature as to persons generally, he is liable for the consequences of his negligence to a person under disability, although the same consequences might not have attended the action if the person affected had been sound in body.

"The duty of care, and of abstaining from injuring another, is due to the weak, the sick, the infirm, equally with the healthy and strong, and when that duty is violated the measure of damage is the injury inflicted, even though that injury might have been aggravated, or might not have happened at all but for the peculiar physical condition of the person injured." In this case it was held that a child's inheritance of an hysterical diathesis in no manner affected her right to protection from injury through defendant's negligence. *Laplane v. Morgan's L. & T. R. & S. S. Co.* 40 La. Ann. 661, 1 L. R. A. 378, 4 So. 875; *Tice v. Munn*, 94 N. Y. 621.

Where a person partially recovered from a fractured limb, which is still weak and more susceptible to fracture than it would have been if the injury had not occurred, receives an injury resulting in a second fracture, the party causing the injury cannot escape liability for the consequences of his fault because such injury may have been aggravated, or more easily caused, by reason of the first fracture. *Drless v. Frederick*, 73 Tex. 460, 11 S. W. 493.

The duty of municipal corporations to keep their streets in reasonable repair extends to the sick and infirm, as well as to the healthy and strong. All have a right to use the streets, and to rely upon the performance of this duty. A person is not to be precluded, therefore, from recovering for injuries resulting from a breach of this duty, because at the time he was suffering from some disability which rendered him more susceptible to injury than one who is without physical infirmity, if he was in the exercise of ordinary care, as measured by the conduct of persons of ordinary prudence, when under like disability, and under similar circumstances.

The sidewalks of the city are for the use of those with organic predisposition to disease, as well as for the healthy and robust, and the former are entitled to have them made reasonably safe for such use. Any injuries which they may sustain by reason of defects in such sidewalks, which result in aggravating an already

time entertain." Bishop, Contr. § 44. Ezelle's injuries were inflicted, as the court below held, without the fault of the yardmaster, engineer, or fireman in charge of the car and locomotive. The railway company was no more responsible than it would have been had the deceased been run down by the cars of another railroad company on a track parallel with that of plaintiff in error. If no duty was imposed on the servants of defendant below to take charge of and care for the wounded man in such a case, how could a duty arise under the circumstances of the case at bar? In Barrows on Negligence, p. 4, it is said: "The duty must be owing from the defendant to the plaintiff; otherwise there can be no negligence, so far as the plaintiff is concerned. . . . And the duty must be owing to plaintiff in an individual capacity, and not merely as one of the general public. This excludes from actionable negligence all failures to observe the obligations imposed by charity, grati-

tude, generosity, and the kindred virtues. The moral law would obligate an attempt to rescue a person in a perilous position,—as a drowning child,—but the law of the land does not require it, no matter how little personal risk it might involve, provided that the person who declines to act is not responsible for the peril." See *Kenney v. Hannibal & St. J. R. Co.* 70 Mo. 252-257. In the several cases cited in the brief of counsel for defendant in error to sustain the judgment of the trial court it will be found that the negligence on which recoveries were based occurred after the time when the person injured was in the custody and care of those who were at fault in failing to give him proper treatment.

The judgment of the court below will be reversed, with directions to enter judgment on the findings of the jury in favor of the railway company.

All the Justices concur.

diseased condition, are results for which the city must respond, if due to its negligence. *Denver v. Hyatt*, 28 Colo. 139, 63 Pac. 403; *McNamara v. Clintonville*, 62 Wis. 207, 51 Am. Rep. 722, 22 N. W. 472; *Smalley v. Appleton*, 75 Wis. 18, 43 N. W. 826; *Hall v. Cadillac*, 114 Mich. 99, 72 N. W. 33.

A municipal corporation cannot escape liability for an injury caused by a defective sidewalk, resulting in necrosis of the humerus, although the injury would not have been attended with such result but for a previous organic tendency to scrofula in the party injured. A city is "chargeable with knowledge that people of different bodily conditions, travel its streets, and that among these are the weak, the decrepit, and those with organic predisposition to disease. It is reasonable to expect that in certain cases, if an injury happen to one of the latter class, his full recovery therefrom may be retarded or prevented by such predisposition or tendency to disease. In the present case the defendant is chargeable with knowledge that persons with a constitutional tendency to scrofula (a very large class in any community) constantly travel its streets and sidewalks, and that such tendency to that disease might greatly aggravate a bodily injury. Hence, it had reasonable grounds to expect that, if one of that class were injured by reason of the admitted defect in the sidewalk, the disease might develop, and greatly retard, and perhaps prevent, a cure, as in this case." *Stewart v. Ripon*, 38 Wis. 584, 591.

One who is crippled, and necessarily uses crutches, has the same right to use the sidewalks of a town as anyone who is not in his condition. And if the sidewalk is unsafe for persons having the use of their limbs, the fact that one is a cripple will not defeat his right of recovery for injuries sustained from a defect in the walk, if he used care proportionate to his condition. But "It is not the duty of the city, in the construction and repair of its sidewalks, to provide against injury to a person in a crippled condition any further than for persons having the ordinary use of their physical powers; all it is required to do is to use ordi-

nary care to keep the walks in a reasonably safe condition for persons using ordinary care, and with the ordinary capacity to care for themselves." *Mt. Vernon v. Brooks*, 39 Ill. App. 426.

This duty of a municipality to keep its highways in repair for the sick extends to women in the state of pregnancy. The susceptibility of a pregnant woman to injury does not relieve a municipality from liability for the consequences of an omission of such duty. It is under obligation to keep its streets in such repair that they will be reasonably safe for a woman in her condition to travel over. *Lewis v. Independence*, 54 Mo. App. 183.

Likewise, as to other negligent acts, pregnant women are held to be entitled to damages for injuries suffered in consequence thereof, although such consequences would not have attended the negligent act but for the existence of pregnancy. Thus, where a railroad company's cars leave its track, and are sent crashing into the house of a pregnant woman, and the fright thereby induced causes a miscarriage, the railroad company is liable. *Chicago & N. W. R. Co. v. Hunerberg*, 16 Ill. App. 387.

A trespasser who uses violent and abusive language to a woman, which so visibly affects her that he must know that injury will result, cannot be excused from the consequences of his misconduct, upon the ground that the same results would not follow but for her pregnancy, which fact is unknown to him. *Brownback v. Fralley*, 78 Ill. App. 262.

Likewise, a landlord who, with knowledge that the wife of a tenant holding over is confined to her bed with heart disease, commences to tear down the house on the next day after the expiration of the lease, thereby aggravating her illness, is liable for her miscarriage and death. If they are the proximate result of his trespass. *Prelser v. Wielandt*, 48 App. Div. 569, 62 N. Y. Supp. 890.

And where an intoxicated person causes a pregnant woman to flee in fright, and she falls while attempting to climb a fence, which results in a miscarriage, he is liable for the consequences. *Barbee v. Reese*, 60 Miss. 906.

But where the injury resulted from the use

of threats and abusive language to a pregnant woman's husband, and the defendant had neither knowledge of her presence nor of her condition, it was held that defendant was not liable for a miscarriage induced by his conduct. *Phillips v. Dickerson*, 85 Ill. 11, 28 Am. Rep. 607.

And in *Renner v. Canfield*, 36 Minn. 90, 1 Am. St. Rep. 654, 30 N. W. 435, recovery was denied for the miscarriage of a pregnant woman, produced by fright from the unlawful shooting of a dog, where the presence of the woman was unknown to the person doing the shooting.

According to some authorities, misconduct inducing fright, and which results in a miscarriage, does not subject the guilty party to liability. *Mitchell v. Rochester R. Co.* 151 N. Y. 107, 34 L. R. A. 781, 56 Am. St. Rep. 604, 45 N. E. 354; *Nelson v. Crawford*, 122 Mich. 466, 80 Am. St. Rep. 577, 81 N. W. 335. And see further, upon recovery for such injury, *notes, Recovery of damages for miscarriage*, 32 L. R. A. 142; and *Extent of trespasser's liability for consequential injuries resulting from the trespass*, 53 L. R. A. 626, 638.

b. To persons of defective sight or hearing.

The blind and the deaf are entitled to the same protection against injury that the law accords to those in the full possession of their faculties, and may recover damages for the negligent omission of the ordinary duties owing the latter, although their performance might not have saved them from the injury sustained. And, if their disabilities are known to those coming into relation to them, the duty of greater care to avoid doing them harm immediately arises; and the failure to exercise such increased care is culpable negligence within the rule of proximate cause, stated above. If a deaf man on a railroad track fails to heed the usual signals, and those in charge of an approaching train know of his disability, or if his appearance indicates that he is insensible to his danger, after warnings which a person in possession of all his faculties would be likely to heed, they must stop the train, if necessary, to avoid injuring him.

While a village owes a blind man no greater duty with respect to keeping its sidewalks in a safe condition for public travel than it owes to others in the full possession of their faculties, yet such person, in going upon the public streets and walks, is not to be deprived of the protection afforded to other citizens. *Carter v. Nunda*, 55 App. Div. 501, 66 N. Y. Supp. 1059.

"The streets and sidewalks are for the benefit of all conditions of people, and all have the right, in using them, to assume that they are in good condition, and to regulate their conduct upon that assumption. A person may walk or drive in the darkness of the night, relying upon the belief that the corporation has performed its duty, and that the street or the walk is in a safe condition. He walks by a faith justified by law, and if his faith is unfounded, and he suffers an injury, the party in fault must respond in damages. So, one whose sight is dimmed by age, or a near-sighted person whose range of vision was always imperfect, or one whose sight has been injured by disease, is each entitled to the same rights, and may act upon the same assumption. Each is, however, bound to know that prudence and care are in 60 L. R. A.

turn required of him, and that, if he falls in this respect, any injury he may suffer is without redress." *Davenport v. Ruckman*, 37 N. Y. 568; *Yeager v. Spirit Lake*, 115 Iowa, 593, 88 N. W. 1095.

Although an injury to a blind man, caused by a defective railing to a bridge, would not have happened if he had been possessed of his sight, the town is nevertheless liable, in the absence of any contributory negligence by such person; and the question whether he was negligent is for the jury to determine from all the circumstances of the case. *Sleeper v. Sandown*, 52 N. H. 244.

A contrary view is taken in *Garbanati v. Durango*, 30 Colo. 358, 70 Pac. 686, where an aged man with defective eyesight, though using the greatest precaution to avoid injury, was denied recovery for injuries sustained from a fall from an elevated sidewalk, the railing to which had been broken down, upon the ground that his defective sight was the proximate cause of the injury. Such decision, however, is opposed to the great preponderance of authority, if, indeed, it does not stand alone. See other cases cited in this division.

Notwithstanding the repeal of a statute requiring the blowing of a whistle or ringing of a bell a quarter of a mile before reaching a crossing, it is the settled law of New York state that railroad companies, at crossings, must give some adequate notice or warning to travelers upon highways of the approach of their trains. Therefore, an old person of defective sight, in crossing a railroad track, is justified in assuming that a proper warning of the approach of a train will be given, and in relying upon it; and if he is injured by a train which he can not see, and does not hear because of the failure to give warning, the railroad company is liable, although a person of perfect sight might not be entitled to recover under the same circumstances. *Lortz v. New York C. & H. R. R. Co.* 7 App. Div. 515, 40 N. Y. Supp. 253.

If not himself negligent, a blind man may recover for injuries received from falling into an excavation in the sidewalk. *Salem v. Goller*, 76 Ind. 291.

Whether allowing a trap door in the sidewalk of a city street to remain open and unguarded is such negligence as renders the owner liable for injuries to a blind man falling therein, is a question for the jury. *Smith v. Wildes*, 143 Mass. 558, 10 N. E. 446.

The existence of a doorway to a warehouse opening on to the street is not such an invitation to enter as to render the owner liable for injuries to a person of defective sight, who enters the building by mistake, and falls into an open hatchway. The defendant's duty to protect the hatchway is neither increased nor diminished by the fact of plaintiff's blindness under such circumstances. *Oysterbank v. Gardner*, 17 Jones & S. 263.

But where a man sixty-three years of age, and wearing glasses, enters a dimly lighted shipping room of a mercantile company on invitation, and falls into an unguarded elevator shaft, which is in close proximity to the place where his business is to be transacted, the company cannot escape liability by showing that young persons, whose eyesight is good, could see and avoid the danger, since it is equally bound to afford protection to those who come to its place of business with eyes more or less dimmed by age or other causes. *McCrum v. Well*, 125 Mich. 297, 84 N. W. 282.

And a storekeeper who has knowledge that a customer has defective eyesight, but not that he is deaf, does not perform his full duty in directing him to go to the rear of the store for the goods he desires, by telling him in an ordinary tone of voice to look out for the trap door, since the customer would have no reason to believe the door is in the middle of the floor, where people are standing around. *Brown v. Stevens* (Mich.) 11 Det. L. N. 27, 99 N. W. 12.

What would be ordinary care on the part of railroad employees in the case of exposure to danger of a man possessed of all his faculties would not be such care as to one who is deaf, and, therefore, unable to hear the warnings given of an approaching train. *International & G. N. R. Co. v. Garcia*, 75 Tex. 583, 13 S. W. 223.

When such disability is known to the employees in charge of a railroad train, their duty becomes entirely different from that where they are unaware of the person's infirmity. "The presumption that he will leave the track, which excuses the company in other cases, does not exist, and they have no right to act upon it, but must use all proper precautions demanded by the situation; and, if they do not, they will be liable for the consequences, notwithstanding the original negligence of the deaf person in attempting to walk the track of the railroad. Any infirmity of one traveling upon the track, or lying upon it, known to those in charge of the particular train, requires such diligence on the part of the company as will best protect him from harm." *International & G. N. R. Co. v. Smith*, 62 Tex. 252.

Likewise, if there is anything disclosed in the conduct or appearance of a person on a railroad track which raises a suspicion that he is deaf, or blind, or helpless, then the obligation on the part of the trainmen to use all necessary and proper care to avoid injuring him by stopping the train, if necessary, immediately arises. *Cincinnati, H. & D. R. Co. v. Murphy*, 17 Ohio C. C. 223; *Mobile & O. R. Co. v. Stroud*, 64 Miss. 784, 2 So. 171; *Omaha & R. Valley R. Co. v. Cook*, 42 Neb. 577, 60 N. W. 899.

And where the motorman of a street car sees a boy approaching the track without heeding the signals given to warn him of his danger, and that he will probably go upon the track in front of the car, it is his duty to do everything in his power, consistent with the safety of those on the car, to avoid injuring him, although not aware that he is deaf. *Galveston City R. Co. v. Hanna* (Tex. Civ. App.) 79 S. W. 639.

"Where the appearances indicate that a person upon the track is in such condition as to be either insensible of his danger or unable to avoid it, those in charge of a train must use all available means, consistent with the safety of those on the train, to stop. The same rule is applied with reference to a young child, who is unable to understand the peril of being upon a railroad track." *Campbell v. Kansas City, Ft. S. & M. R. Co.* 55 Kan. 536, 40 Pac. 997.

But whether there was enough in the appearance of a deaf-mute walking on a railroad track to indicate his infirmity to the locomotive engineer of an approaching train, so as to impose upon him the duty of increased caution to avoid injuring him, is not subject to proof by opinions of witnesses who saw him walking. *Tyler v. Sites*, 90 Va. 539, 19 S. E. 174.

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Since the questions of the ordinary care of one injured by being struck by a train at a railroad crossing, and that of the employees in charge of the train, are to be determined with reference to the peculiar facts and circumstances of each case, evidence of the deafness of the injured party is admissible on behalf of the plaintiff, although it is not proposed to show that such fact was known to defendant. But such fact, if unknown to the servants of the railroad company, will not increase their responsibility as to care. *Cleveland, C. & C. R. Co. v. Terry*, 8 Ohio St. 570.

A deaf or helpless person on a railroad track is entitled to such warnings as will reasonably alarm his fears, and cause him to leave the track. *International & G. N. R. Co. v. Smith*, 62 Tex. 254; *McDonald v. International & G. N. R. Co.* 86 Tex. 1, 40 Am. St. Rep. 803, 22 S. W. 939; *Houston & T. C. R. Co. v. Harvin* (Tex. Civ. App.) 54 S. W. 629; *Louisville & N. R. Co. v. Tinkham*, 19 Ky. L. Rep. 1784, 44 S. W. 439; *Chicago, B. & Q. R. Co. v. Triplett*, 38 Ill. 482.

And a railroad company cannot excuse its omission to give the usual train signals on the ground that they would not have been heard by a deaf-mute walking on the track, if given. If unaware of the condition of a man in such situation, the employees of the railroad company must exercise the same degree of care required with reference to those capable of hearing and understanding the warning given; and, if they have knowledge of the man's condition, it is their duty to stop the train in time to avoid injuring him. *Louisville & N. R. Co. v. Cooper* (Ky.) 6 Am. & Eng. R. Cas. 5; *Poole v. North Carolina R. Co.* 53 N. C. (8 Jones, L.) 340.

The fact that a person of defective hearing failed to hear the whistle of a train once sounded at the distance of 80 rods will not excuse the railroad company's disobedience of a statute requiring the whistle to be continuously sounded, or the bell rung, during the whole of that distance before reaching a crossing, upon the theory that the failure of the single blast to warn the injured party shows that he was either too deaf to have heard a continuous signal, or too reckless to have regarded it if heard. A deaf person is at least entitled to such warning of the approach of danger as the law designs to give those in full possession of their faculties, and to enjoy such chances as his infirmity has left him of hearing, and being saved by the warning. *Chicago, B. & Q. R. Co. v. Triplett*, 38 Ill. 482.

A street railway company is liable for the killing of a deaf and dumb boy fourteen years of age, where the motorman, after discovering that the sounding of the gong failed to attract the boy's attention, was prevented from stopping the car in time to avoid the injury by reason of the brakes not being in good condition; and this is so, although the boy failed to look to see if a car was approaching, and, if his hearing had been good, might have had his attention attracted to the approach of the car by the sounding of the gong. *Thompson v. Salt Lake Rapid Transit Co.* 18 Utah, 281, 40 L. R. A. 172, 87 Am. St. Rep. 621, 52 Pac. 92.

Contrary to the current of authority, it is held in *Cogswell v. Oregon & C. R. Co.* 6 Or. 417, that, if a deaf man walking upon a railroad track fails to hear the warning signals, because of his deafness, and does not leave the track on that account, his deafness is the prox-

mate cause of his injuries, although the engineer had observed him for $\frac{1}{4}$ of a mile.

And in *Schexnaydre v. Texas & P. R. Co.* 46 La. Ann. 248, 49 Am. St. Rep. 321, 14 So. 513, it is held that a railroad company is not liable for killing a deaf man walking upon the track, though the locomotive engineer discovered him $\frac{1}{4}$ of a mile distant, but was not aware of his infirmity, and when within 100 yards blew the danger signal rapidly, "very vicious and quick for a number of times," and, upon coming within 30 or 40 feet of him, reversed the engine, and applied the air brakes, but it was then too late to avoid the accident.

Again, the knowledge of the conductor of a railroad train that a man, within the past five or ten minutes, has started to walk along the track to a neighboring town, and that he is partially deaf, has been held insufficient to charge the railroad company with gross negligence or wantonness in running over him, although the train could have been stopped within the space of from 125 to 150 feet, and no effort was made to avoid the injury beyond the blowing of the whistle. *Kennedy v. Denver, S. P. & P. R. Co.* 10 Colo. 493, 16 Pac. 210. (The weight of authority would seem to be on the side of the dissenting opinion of the chief justice in this case,—that there was sufficient evidence of wilful negligence to go to the jury.)

On the other hand, a railroad company has been held liable for injuries to a deaf man walking on the track, where he was not seen by the engineer, but a brakeman riding on the tender of the engine saw him, and hallooed to him, and attempted, but was unable to stop the engine because of defective brakes. *Houston & T. C. R. Co. v. Harvin* (Tex. Civ. App.) 54 S. W. 629.

But the measure of care due persons under such disabilities depends upon whether their disabilities are known (see divs. VI. and VIII. *infra*), and whether they are in a place in which they have a legal right to be (see div. VII. *infra*).

c. To persons in helpless situations.

1. Sleeping on railway track.

Going to sleep upon a railroad track is an act of such gross negligence that some feeling against one so culpable seems to have colored some of the decisions upon the question of liability for injury in such cases. These decisions refuse to apply the rule that a person's negligence is not an excuse for another person's subsequent act of negligence causing injury, and hold that a railroad company owes one in such situation no duty whatever, save to refrain from wilful or wanton injury.

The mere going to sleep on a railroad crossing is such great negligence and recklessness that no recovery can be had for the killing of such person through the negligence of employees in charge of a passing train, where it is provided by statute that plaintiff cannot recover if he could have avoided defendant's negligence by the exercise of ordinary care. *Raden v. Georgia R. Co.* 78 Ga. 47.

And in *New York, N. H. & H. R. Co. v. Kelly*, 35 C. C. A. 571, 93 Fed. 745, it is said that "a railroad company ought not to be held responsible for running over a trespasser, who, sober or drunk, has located himself between its tracks and gone to sleep, in the absence of wanton negligence in the management of the train on the part of the employees in charge." 69 L. R. A.

The engineer owes it to the passengers on the train, and to persons lawfully upon the track, to keep a lookout in order to prevent injury to them, but he owes no such duty to a trespasser. If, seeing him, and realizing that he will not probably remove himself from in front of the train in time to escape injury, the engineer then does what he reasonably can to avoid injuring him, he has done his full duty."

Sitting or lying down and going to sleep beside a railroad track, in such a position that a passing train must strike one, is an act of gross negligence, contributing to an injury subsequently inflicted by such train, and precludes the recovery of damages, unless the railroad company was guilty of some wanton or wilful act. *Sibley v. Ratliffe*, 50 Ark. 477, 8 S. W. 686; *St. Louis & S. F. R. Co. v. Townsend*. 69 Ark. 380, 63 S. W. 994; *Krenzer v. Pittsburgh, C. C. & St. L. R. Co.* 151 Ind. 587, 68 Am. St. Rep. 252, 43 N. E. 649, 52 N. E. 220; *Williams v. Southern P. R. Co.* (Cal.) 11 Pac. 849. The attempt of the court to distinguish the case last cited from that of *Meeks v. Southern P. R. Co.* 56 Cal. 513, 38 Am. Rep. 67, is not very successful, and, in its opinion upon a rehearing (72 Cal. 120, 13 Pac. 219), the above position is somewhat qualified. The court says: "Taking the admitted negligence of the plaintiff as premise,—4. *e.* as a circumstance,—in view of which the defendant is to be judged, did the defendant even then fail in some duty which it owed the plaintiff? This will depend upon two propositions: Did the engineer, as a matter of fact, see the plaintiff, helpless or unjudging, in a dangerous position in time to have stopped the train; and having so seen him, did he use ordinary diligence to stop the train?" However, there being no evidence whatever that the engineer saw the plaintiff, except the fact that the train was stopped about the time of the injury, and it appearing that as soon as the engineer saw him he used every effort to stop the train as quickly as possible, the court adhered to its former judgment.

As to the distinction between subsequent negligence and wilfulness, see div. III., *supra*.

Upon the other hand, a few authorities impose upon a railroad company the duty of using ordinary care to discover a person in such situation upon its track, and then require it to use every means at its command to stop the train in time to avoid injury.

In North Carolina it is now settled that a railroad company is liable in damages for running over a person asleep on its track, if he was discovered, or by the exercise of ordinary care might have been discovered, in time to avoid injury. *Deans v. Wilmington & W. R. Co.* 107 N. C. 686, 22 Am. St. Rep. 902, 12 S. E. 77; *Pickett v. Wilmington & W. R. Co.* 117 N. C. 616, 30 L. R. A. 257, 53 Am. St. Rep. 611, 23 S. E. 264; *Upton v. South Carolina & G. Extension R. Co.* 128 N. C. 173, 38 S. E. 736; *Carter v. Southern R. Co.* 135 N. C. 498, 47 S. E. 614. But no liability is incurred for the negligent killing of a drunken man, lying insensible upon the track, under similar circumstances, unless he was discovered by those in charge of the train in time to avoid the injury. In such case, it is held, the self-imposed disability of drunkenness is such contributory negligence as precludes the recovery of damages. *Smith v. Norfolk & S. R. Co.* 114 N. C. 728, 25 L. R. A. 287, 19 S. E. 863, 923. It is not altogether clear whether this holding is not intended to be qual-

ited in *Pickett v. Wilmington & W. R. Co.* 117 N. C. 616, 30 L. R. A. 257, 53 Am. St. Rep. 611, 23 S. E. 264, by imposing upon railroad companies the duty of discovering persons in an unconscious condition upon their tracks, although their condition be self-imposed.

When a boy slave asleep upon a railroad track was seen by those in charge of a locomotive $\frac{1}{4}$ of a mile distant, but was supposed to be the coat of a repair hand, yet, when his identity was discovered upon a nearer approach, no signal or alarm was given, nor any attempt made to check the speed of the train, the railroad company was held to an unconditional liability, although any effort to have stopped the train, after the object was discovered to be a boy, would have been ineffectual. *East Tennessee & G. R. Co. v. St. John*, 5 Sneed, 524, 73 Am. Dec. 149. To the same effect is *Meeks v. Southern P. R. Co.* 56 Cal. 513, 38 Am. Rep. 67, where a boy asleep on a railroad track could have been seen and recognized at a distance of from 300 to 350 yards, but he was not discovered, and no effort was made to stop the train until within 150 feet of the child, nor was any whistle blown, or bell rung.

As to whether any duty is imposed upon a railroad company to discover trespassers upon its tracks, see div. VII. subd. b, *infra*.

Between these two extremes is the generally accepted doctrine that a railroad company is liable for the result of mere negligence in such cases, but that the duty to exercise ordinary care to avoid injury arises only when the person's peril or disability is discovered. This liability is not affected by the fact that the subject of the injury is a child instead of an adult. The demand for the exercise of ordinary care to avoid injury is as imperative in the one case as in the other. A sleeping man is as helpless as a sleeping child, if he sleeps as soundly, and either one presents a condition of temporary helplessness calling for such care to avoid injury as the situation demands.

The fact that an intoxicated person lies down on a railroad track, and goes to sleep, does not justify a railroad company running a train over him, and taking his life. If he is seen in time by the company's employees, and they are aware of his danger, and by ordinary care can avoid injuring him, they are bound to do so. *Rozwadowskie v. International & G. N. R. Co.* 1 Tex. Civ. App. 487, 403, 20 S. W. 872; *Carter v. Southern R. Co.* 135 N. C. 498, 47 S. E. 614.

In *Garza v. Texas Mexican R. Co.* (Tex. Civ. App.) 41 S. W. 172, a boy lay down under a car standing on a side track and went to sleep. Subsequently the car was attached to an engine, and, when moved, caught the boy's sleeve, and dragged him with it. The boy began to scream, and was discovered by a brakeman, who gave the signal for the train to stop. Thereupon the engineer threw on the air brakes, and checked the train, but immediately withdrew the brakes, and started up again. The signal was repeated several times before it was sufficiently heeded by the engineer to remove the boy from his perilous situation, and not until his arm had been mangled. It appeared that the boy would not have been injured if the signal to stop the train had been at once heeded. It was held that if, after the boy was discovered, the train could have been stopped, and the injury averted, and the engineer negligently refused to obey the signal to stop the train, the railroad company was liable.

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It is not only a want of reasonable care, but reckless negligence, for employees in charge of a railroad train, in sight of an indistinguishable object on the track, to ignore the signal of men running toward the train, on either side of the track, and waving their hats at every step, until after the discovery, at a distance of 60 yards, that the object in question is a man, when it is too late to avoid injury. *Seaboard & R. R. Co. v. Joyner*, 92 Va. 354, 23 S. E. 773.

Generally, it is not the duty of a locomotive engineer to slow up or stop his train before he becomes aware that an object upon the track is a human being. He has the right to assume, in the first instance, that, if it is a man, he will leave the track. But when he discovers that the trespasser is not aware of the approach of the train, it is his duty, in good faith, to do all he reasonably can to avert a disaster. *Murch v. Western N. Y. & P. R. Co.* 78 Hun, 601, 29 N. Y. Supp. 490.

A railroad company cannot be held liable for the running over and killing of one lying asleep upon its track, where it discovered such person as soon as it could do so with reasonable care, and used all proper diligence to stop the train. *Gregory v. Southern P. R. Co.* 2 Tex. Civ. App. 279, 21 S. W. 417; *Smith v. International & G. N. R. Co.* (Tex. Civ. App.) 78 S. W. 556; *St. Louis S. W. R. Co. v. Shiflet*, 94 Tex. 131, 58 S. W. 945; *Williams v. Southern P. R. Co.* 72 Cal. 120, 11 Pac. 849; *Zumault v. Kansas City Suburban Belt R. Co.* 175 Mo. 288, 74 S. W. 1015.

The failure to stop a railroad train in time to avoid injury to a sleeping child on the track is not negligence, where the engineer saw the child in time to stop, but thought it was a bundle or a dog, and did not discover that it was a child until too late to avoid injury. *Louisville, N. O. & T. R. Co. v. Williams*, 69 Miss. 631, 12 So. 957; *Norfolk & W. R. Co. v. Dunaway*, 93 Va. 29, 24 S. E. 698; *Meeks v. Southern P. R. Co.* 52 Cal. 602. Upon a second appeal of the latter case, the railroad company was held liable upon evidence showing that at the place where the accident occurred, and for a considerable distance beyond, the road of the defendant was perfectly straight, and free from weeds or other like obstructions, that the day was very clear, and that at the time of the injury the child could have been seen and recognized as a boy on the track at a distance of from 300 to 350 yards. See 56 Cal. 513, 38 Am. Rep. 67.

And when the body of a man extending outward from the track between two projecting cross-ties, with his head resting on a cross-tie, close to the rail, was not seen by the fireman until the engine was at a distance of about 180 feet, and, notwithstanding immediate efforts to stop the train, the man was struck and injured, it was held that the railroad company was not liable. *Goodwin v. Central R. & Bkg. Co.* 96 Ala. 445, 11 So. 393.

The failure of a track walker to signal and stop an approaching train to prevent its running over a man found asleep upon the track is not negligence, where the track walker previously aroused and warned him of the coming of the train, and the person raised himself on his elbows, and signified his comprehension of the situation, and gave no indication of being disabled by intoxication or otherwise. *Virginia Midland R. Co. v. Boswell*, 82 Va. 932, 7 S. E. 388.

The preceding case is distinguished in *Cincinnati, N. O. & T. P. R. Co. v. Marrs*, 27 Ky. L. Rep. 388, 85 S. W. 188, wherein it is held that it is the duty of railroad employees, upon finding a drunken man lying asleep between tracks in the company's yard, either to lead him to a place of safety, or else be on the lookout for him in the operation of their trains. And if they simply arouse him, and start him walking in the direction of the road, and he is subsequently overcome, and is injured while asleep on the company's tracks, the railroad company is liable.

No liability arises for injury to a man who went under a standing freight train, and fell asleep, in the absence of knowledge of his situation at the time the train was moved, although he was seen by the company's employees sitting under a car smoking, a half hour before the train started. *Kendall v. Louisville & N. R. Co.* 25 Ky. L. Rep. 793, 76 S. W. 376.

In *Denman v. St. Paul & D. R. Co.* 26 Minn. 357, 4 N. W. 605, it is said that a railroad company owes a person asleep on its track no duty except that of exercising due diligence to avoid injuring him, after discovering his situation; and that, if he is not seen by those operating the train, no liability arises for running over him, although the track is level and straight where the man is lying, so that a man's hat can be seen for 400 or 500 yards distant.

And *O'Keefe v. Chicago, R. I. & P. R. Co.* 32 Iowa, 467, holds that an instruction, requested by defendant, that a railroad company is not liable for running over a man sleeping on the track, unless it had knowledge that he was thus lying in time to prevent the accident, should have been given without the qualification "or could have known with the exercise of ordinary caution."

2. Foot caught in railway track.

Here, again, we find the same conflict of authority as to the duty owing persons thus helplessly situated, with the preponderance in favor of the rule that the duty of exercising care to avoid injury arises as soon as such person's danger is discovered.

It is for the jury to say whether it was negligence not to stop a railroad train upon seeing a child upon the track, where, upon being ordered off the track by the employees, when the train was 163 feet distant, the child started to get off, and caught its foot between the rail and the planking at a private crossing; whereupon everything possible was done to avoid injuring it. *Pennsylvania R. Co. v. Morgan*, 82 Pa. 134.

Even where a person puts himself in a position of peril by inserting his foot in the space between two rails for an experiment, and it becomes fastened there, the railroad company must use reasonable care not to run over him. *McKinney v. Long Island R. Co.* 2 Silv. Sup. Ct. 543, 6 N. Y. Supp. 168. Affirmed in 119 N. Y. 631, 23 N. E. 1144.

Where a switch is moved by a brakeman so as to turn an engine onto a track where a boy has his foot caught between a rail and the guard rail, and the brakeman then attempts to extricate the foot before the approaching engine, but, failing in that, the engine runs over the foot and crushes it, the question of the railroad company's negligence should be left

to the jury. *Burnett v. Burlington & M. R. Co.* 16 Neb. 332, 20 N. W. 280.

Whether the failure of a yardmaster to go to the relief of a little girl, whose foot had become fastened between a rail and a guard rail, when he knew she was in danger from approaching cars; and whether a switchman whose duty it was to see that the track was clear, ought to have seen the child before giving the signal to back cars, and given alarm in time to avoid injury, or should have rescued her by his own efforts, are questions for the jury. *Townley v. Chicago, M. & St. P. R. Co.* 53 Wis. 626, 11 N. W. 55.

Because of the danger from an approaching train, a little girl went upon a railroad crossing to compel some children younger than herself to leave the track, and in so doing got her foot caught between the planking and the rail. At the distance of 854 feet the engineer of the train saw the child on the track, and that she was waving her hands in alarm, and not stepping aside. It was held that the engineer should have stopped the train at once upon discovering plaintiff, and that his failure to make an effort to do so until it was too late to avoid striking her raised a question of negligence for the jury. *Spooner v. Delaware, L. & W. R. Co.* 115 N. Y. 22, 21 N. E. 696.

It being the duty of a railroad company to use reasonable care and diligence to prevent accidents to persons crossing its tracks, it may become liable for injury to a person whose foot is caught in the track at a crossing, although his disability is not discovered. If a boy's foot was caught between a main rail and a guard rail, because of their worn condition, while he was crossing the track before slowly moving detached cars, and was run over, when the accident might have been prevented if the brakeman on the moving cars had been on the lookout, or if signals to stop the cars had been obeyed, the railroad company is liable on the ground of the defective condition of the track, and also for its failure to stop the cars after the boy's situation became known. *Goodrich v. Burlington, C. R. & N. R. Co.* 103 Iowa, 412, 72 N. W. 653; *Hughes v. Chicago, St. P. M. & O. R. Co.* 122 Wis. 258, 99 N. W. 897; *Illinois C. R. Co. v. Crockett*, 25 Ky. L. Rep. 1989, 79 S. W. 235.

But a railroad company does not owe the duty of keeping a lookout, to a boy trespasser on the track, although he has his foot caught in a frog or a cattle guard; and, if he is not discovered in time to stop the train before striking him, it is not liable for his death or injury from being run over by a train or backing engine. *Lake Shore & M. S. R. Co. v. Clark*, 41 Ill. App. 343; *Louisville & N. E. Co. v. Kellem*, 14 Ky. L. Rep. 734, 21 S. W. 230; *Sheehan v. St. Paul & D. R. Co.* 22 C. C. A. 221, 46 U. S. App. 498, 76 Fed. 201.

In *Smalley v. Southern R. Co.* 57 S. C. 243, 35 S. E. 489, it is held that the duty of exercising special care to avoid injury to a person found upon a railroad track, who from age or misfortune is apparently helpless, has no application to the case of a person whose foot is caught between the ties of a railroad trestle, but who to all appearances is simply squatting or sitting there, and is in the possession of all his faculties.

As in other cases affecting trespassers, it is held by a few authorities that the only duty

arising under such circumstances is to avoid wilful injury.

The sole duty which a railroad company owes to a trespasser whose foot is caught in the track is not wantonly or with reckless carelessness to injure him after his situation is perceived. *St. Louis, I. M. & S. R. Co. v. Monday*, 49 Ark. 257, 4 S. W. 782; *Louisville, N. A. & C. R. Co. v. Phillips*, 112 Ind. 59, 2 Am. St. Rep. 155, 13 N. E. 132.

See further, as to liability of a railroad company for injuries to persons in such situation, *note on Care, required of railroad companies to prevent injuring small children upon the track*, 25 L. R. A. 784.

3. Walking on railway trestle.

Where those in charge of a railroad train discover a person on a trestle, from which he cannot step off to a place of safety, it is their duty to stop the train, if possible. *Pelrice v. Walters*, 164 Ill. 560, 45 N. E. 1068, *Affirming* 63 Ill. App. 562; *Cook v. Central R. & Bkg. Co.* 67 Ala. 533.

And even if such person might save himself by a perilous jump of 11 feet to the ground, it is the duty of the engineer, upon discovering his peril, to resolve all doubt in favor of human life, and forthwith reverse his engine, and put on the brakes. *Clark v. Wilmington & W. R. Co.* 109 N. C. 430, 14 L. R. A. 749, 14 S. E. 43.

Persons operating a railroad train are not permitted to speculate, in such case, whether a trespasser will jump from the trestle, or lie down, or in some other way get out of harm's way, a moment after it becomes evident that he is insensible of the impending danger, or incapable of providing for his safety. The moment that a person goes upon such a bridge his peril is manifest and imminent, and the railroad employees, having this knowledge, are required to exercise reasonable care to avoid a collision. *Purcell v. Chicago & N. W. R. Co.* 109 Iowa, 628, 77 Am. St. Rep. 557, 80 N. W. 682; *Central R. & Bkg. Co. v. Vaughan*, 93 Ala. 209, 30 Am. St. Rep. 50, 9 So. 468.

In such case no presumption can arise that the person in peril will take care of himself, and it is the imperative duty of the engineer, upon discovering a person in such situation, to endeavor to stop his train immediately. But, although the trestle is between a blow post and a public crossing, the omission of the company to observe the statutory requirements as to signals and checking speed before persons on the trestle are discovered is not negligence. *Atlanta & C. Air-Line R. Co. v. Gravitt*, 93 Ga. 369, 26 L. R. A. 553, 44 Am. St. Rep. 145, 20 S. E. 550.

Even though the engineer of a train believes that a person will reach the end of the trestle in time to escape injury, he is deemed guilty of negligence if, having discovered the person's peril in time, he fails to stop the train or lessen its speed until too late to avoid a collision. *Vanarsdall v. Louisville & N. R. Co.* 23 Ky. L. Rep. 1666, 65 S. W. 858, 25 Ky. L. Rep. 1432, 77 S. W. 1108.

A railroad company is guilty of negligence in running down a child upon a trestle 4 or 5 feet high, where it is seen by those operating the train when from 800 to 1,000 feet distant, and the train runs about 250 feet thereafter before any effort is made to check its speed, and even then an emergency stop is not made. *St. Louis* 69 L. R. A.

S. W. R. Co. v. Bolton (Tex. Civ. App.) 81 S. W. 123.

In *Becker v. Louisville & N. R. Co.* 110 Ky. 474, 53 L. R. A. 267, 96 Am. St. Rep. 459, 61 S. W. 997, which was an action for injuries to a boy of fourteen on a railroad trestle, while he was in the act of assisting a companion who had fallen through the cross-ties, it is said: "If it be conceded that the plaintiff was a trespasser, and that defendant owed him no duty except to protect him after discovering his peril, it is clear that, when discovered upon the bridge, the defendant should have given him ample time to have escaped. If he had simply been on the railroad track in the open country, it might be said that defendant had a right to presume that he would step off the track, and get out of the way of the train; but if a party, having started to cross a bridge of as much length as the one under consideration, had no means of escape except to reach the termination of the bridge, common humanity demands that, even if a trespasser, he should not be wantonly run over, but should have a reasonable chance to cross the bridge in safety."

But, if a trespasser on a trestle is not seen until it is too late to stop the train before striking him, the railroad company is not liable for his injuries. *Tennenbrock v. Southern Pacific Coast R. Co.* 59 Cal. 269; *Anderson v. Chicago, St. P. M. & O. R. Co.* 87 Wis. 195, 23 L. R. A. 203, 58 N. W. 79; *Shaw v. Missouri P. R. Co.* 104 Mo. 656, 16 S. W. 832; *Camden, G. & W. R. Co. v. Young*, 60 N. J. L. 193, 37 Atl. 1013; *Atlanta & C. Air-Line R. Co. v. Gravitt*, 93 Ga. 369, 26 L. R. A. 553, 44 Am. St. Rep. 145, 20 S. E. 550.

If, however, the trestle has been in constant use as a walk way for years, with the knowledge of the railroad company and its employees, so that persons may reasonably be expected to be present there, it is the duty of the company to use reasonable care to discover a person walking thereon, whether he is a licensee or a trespasser. *Chesapeake & O. R. Co. v. Rodgers*, 100 Va. 324, 41 S. E. 732; *Cassida v. Oregon R. & Nav. Co.* 14 Or. 551, 13 Pac. 483.

Where an engineer, after seeing a man on a trestle, checked his train, and could have avoided a collision, but relieved the brakes, and made no further effort to stop, upon the man taking a position on a cap-sill, where others had escaped unhurt while a train was passing, the railroad was held not liable for an injury inflicted by reason of the man not holding his head back far enough to escape the train. *Little v. Carolina C. R. Co.* 118 N. C. 1072, 24 S. E. 514.

Opposed to the rule of the foregoing authorities that the situation of a person upon a railroad trestle constitutes in itself a condition of helplessness, demanding affirmative action by the servants of the railroad to avoid injury, there are a few cases holding that such duty does not arise until it becomes apparent that the person on the trestle will not get out of harm's way. *Smalley v. Southern R. Co.* 57 S. C. 243, 35 S. E. 489.

And in *Southern R. Co. v. Bush*, 122 Ala. 470, 26 So. 168, where the injured party saw the approaching train when at the further end of the trestle, and in time to get off to a place of safety, but, instead, started to run across in front of the train, it is held that it was the duty of the engineer to begin to stop the engine only from the moment that the trestle

passer's conduct made it reasonably manifest that he did not intend to get out of the way, or could not reasonably extricate himself from his peril.

In North Carolina, where the law imposes upon railroad companies the duty of maintaining a lookout for trespassers, a railroad company is liable for running down and injuring a person negligently walking on its trestle, and who is unable to save himself, if those in charge of the train discovered, or by the exercise of ordinary care might have discovered, the peril of the injured person, and might, by the exercise of such care, have avoided the accident. *Bogan v. Carolina C. R. Co.* 129 N. C. 154, 55 L. R. A. 418, 39 S. E. 808.

And in West Virginia, where the same duty is imposed in relation to trespassers, the failure to discover two children sitting astride the guard rail on a trestle is culpable negligence, where the evidence tends to show they had been there for some time before being struck by the train, on a bright June morning, and the engineer had a clear view of the trestle for $\frac{1}{2}$ mile. *Gunn v. Ohio River R. Co.* 42 W. Va. 676, 36 L. R. A. 575, 26 S. E. 546.

On the other hand, in Indiana, where no liability is recognized for an injury to a trespasser, unless it is wilfully inflicted, a railroad company was not liable for running down a person on a trestle, where the trespasser saw the train at a distance of 2,000 feet, and having started to retrace his steps to the end of the trestle 100 feet distant the engineer believed he would escape until it was too late to stop the train. *Ullrich v. Cleveland, C. C. & St. L. R. Co.* 151 Ind. 358, 51 N. E. 95. This harsh rule seems to obtain, likewise, in Kansas. *Mason v. Missouri P. R. Co.* 27 Kan. 83, 41 Am. Rep. 405.

4. *Falling on railway track.*

If a person on horseback is thrown from his horse upon a railroad track, in front of an approaching train, and is lying there in a stunned or insensible condition, it becomes the duty of those in charge of the train to use every means within their power to stop the train; and, if they fail to do so, and the jury are satisfied that such exertions, promptly employed, would have averted the injury, the railroad company is liable. *Tanner v. Louisville & N. R. Co.* 60 Ala. 621.

Where a woman fell twice upon a railroad track, in attempting to cross before an approaching train, and the employees in charge of the train saw her from the beginning to the end of the tragedy, and the evidence as to the distance of the train from her when she first stepped upon the track ranges from 6 to 500 feet, and that of the speed of the train from 6 to 20 miles an hour, the question whether the railroad company, in running over the woman, was guilty of negligence subsequent to her contributory negligence, is a question for the jury. *Sullivan v. Missouri P. R. Co.* 117 Mo. 214, 23 S. W. 149.

In *McKeon v. Steinway R. Co.* 20 App. Div. 401, 47 N. Y. Supp. 374, the plaintiff, by a collision occurring through his negligence, was thrown from his wagon onto the track of the defendant, and, while lying there in an unconscious condition, was struck by one of defendant's cars. The trial court charged the jury to the effect that, if any negligence of the plaintiff contributed to the collision which

caused him to be thrown upon the track, what followed was in like manner affected by that negligence, and he could not recover. Upon appeal, such instruction was held to be erroneous, the court saying: "It may, in view of the finding of the jury, be assumed that the negligence of the plaintiff placed him in the position where he is said to have been struck by the other car, and that, therefore, the injury there received by him was in some sense the consequence of his negligence. But it does not follow that this gave legal immunity to the defendant to run its car onto him. The negligence of a plaintiff which is effectual to relieve a defendant from liability for the consequences of his negligence must be proximate in such sense as to contribute concurrently to the result complained of. Although the injury may not have occurred but for the negligence of the former, his antecedent negligence may not be concurrent or simultaneous in such sense as to relieve the latter from the consequences of his negligence. In other words, when a plaintiff, by his negligence, has placed himself in a dangerous position, the defendant, advised of his situation, is not for that reason legally justified in failing to use reasonable care to not injure him."

Likewise, where a woman while crossing the street was knocked down by a cab, and thrown upon the street car track, and while in that situation she was run over by one of the defendant's cars, the jury was instructed that her presence upon the track under the circumstances gave the car driver no legal license to run over her, but that he was bound to exercise reasonable care to avoid doing her any further injury. *Mooney v. Third Ave. R. Co.* 2 N. Y. City Ct. Rep. 366.

If a boy is lying in a helpless condition upon a street car track, where the motorman of an approaching car, by the exercise of ordinary care, can discover him in time to avoid injuring him, but, instead, wantonly, recklessly, and negligently runs the car over him, the railroad company is liable, regardless of how the boy came to be on the track. *Chicago City R. Co. v. O'Donnell*, 207 Ill. 478, 69 N. E. 882.

A street railway company is chargeable with negligence in running over a child who has fallen upon its track, at such distance as to allow ample time for the stoppage of an approaching car before reaching him, but who is not discovered by the driver by reason of his being engaged in conversation with passengers, with his back toward the horses. Ordinary care is not sufficient under such circumstances. If a human being is seen by an engineer or by a driver lying upon a railroad track, it is his duty to exercise the very highest care, and to make the greatest effort to avoid his destruction. *Mentz v. Second Ave. R. Co.* 3 Abb. App. Dec. 274, Affirming 2 Robt. 356.

A contrary rule seems to be laid down, without apparent reason, in *McDonald v. Metropolitan Street R. Co.* 93 App. Div. 238, 87 N. Y. Supp. 689, where it is held that the falling of a boy upon a street car track 40 or 50 feet in advance of a car does not present a situation calling for the exercise of ordinary care to avoid injury, although the car might have been stopped within 10 feet. The attempt to show that the facts of this case present but a single situation not admitting of a subsequent act of negligence, which distinguishes it from *Weltzman v. Nassau Electric R. Co.* 33 App. Div. 585, 53 N. Y. Supp. 905, and makes the

rule of the latter case inapplicable, is difficult of appreciation. If, after the boy fell upon the track, he was seen by the car driver at a distance of 40 or 50 feet, and the car could have been stopped within 10 feet, it would seem that the omission to stop the car was a failure of duty for which the railway company would be liable under the doctrine of the cases above cited.

And where a boy, in crossing the street before an approaching car, stumbled and fell upon the track at such distance in front of the car as that, if traveling at the usual rate of speed, it would have reached him in about two seconds, and that was all the time the driver had to discover his peril, apply the brakes, and arrest the motion of the car before reaching him, and there was no evidence that by the exercise of vigilance the driver could have arrested the car in time to have avoided injuring him, the failure to stop the car before injury was held not to be negligence. *Fenton v. Second Ave. R. Co.* 126 N. Y. 625, 26 N. E. 967, Reversing 56 Hun, 99, 9 N. Y. Supp. 162.

No recovery can be had for an injury to a child from being struck by an electric street car where the child fell upon the track in an attempt to cross the street in front of the car, and the motorman had the car so well under control that he stopped it in the "briefest instant of time" after the child fell, and he had reason to believe, until she fell, the child would cross the track safely. *Stabenau v. Atlantic Ave. R. Co.* 155 N. Y. 511, 63 Am. St. Rep. 698, 50 N. E. 277.

In *Griswold v. Boston & M. R. Co.* 183 Mass. 434, 67 N. E. 354, where plaintiff was run over by an engine after falling upon a railroad track, and was unable to move, it does not appear whether those in charge of the engine discovered plaintiff's situation in time to have stopped before injuring her; but the court held that, being a trespasser, the defendant owed her no duty save that of refraining from willfully or wantonly running her down.

And no obligation rests upon a railroad company to stop its train to care for a trespasser who has fallen from another train to the space between tracks, where he is in such a position that he can be passed in safety, and injury only results by the trespasser making an imprudent movement, whereby a part of his body is thrust into danger, after a part of the train has passed. However, it is said by the court: "Had the deceased been lying on the track, where he must have been struck if he had not moved, the case would have been different." *McKenna v. New York C. & H. R. R. Co.* 9 Daly, 262.

The duty of a railroad company to avoid injuring a person thrown upon its track, outside the limits of the highway, arises only when the perilous position of such person is seen or known. *Western Maryland R. Co. v. Kehoe*, 83 Md. 434, 35 Atl. 90.

5. Driving frightened horse.

First. General rule as to duty under such circumstances.

The improved means of locomotion for the propulsion of vehicles using the public highway has materially increased the danger from accident to those using the highway for vehicles drawn by animal power. To this new sit

uation the courts have applied the common-law principle, that one must so use his own as not to injure another (*Hudson v. Louisville & N. R. Co.* 14 Bush, 303), and, while recognizing the right of the horseless vehicles to the use of the highway, have imposed upon their owners the duty of using ordinary care to avoid injury to those who are seen to be in peril from the operation of such vehicles. A horse seriously frightened is difficult to control, and is liable to become unmanageable; and, to the extent that he cannot be controlled, his driver is in a helpless situation, and a proper subject for that special care in avoidance of injury which the law requires as to other helpless persons.

Street railroads being granted very great privileges out of the public right, their treatment of the public must be reasonable in return; so that if a person or a team, "through accident or misjudgment, or for any cause, be caught in a position of any peril by coming in collision or close contact with the cars, it is the duty of those who are managing the cars to use all possible effort, by slackening the speed of a car or stopping it altogether, in order to avoid injury. If a horse driven by a traveler appears to be restive or refractory at the sight of a moving car the movement of the car should be managed in such a way as to relieve, if possible, the traveler in his dilemma." *Flewelling v. Lewiston & A. Horse R. Co.* 89 Me. 585, 36 Atl. 1056.

A motorman is supposed to know that his car is likely to frighten horses that are unaccustomed to the sight of such vehicles. Therefore, "it is his duty, if he sees a horse in the street before him that is greatly frightened at the car, so as to endanger his driver or other persons in the street, to do what he reasonably can in the management of his car to diminish the fright of the horse; and it is also his duty in running the car to look out and see whether, by frightening horses or otherwise, he is putting in peril other persons lawfully using the street on foot or with teams. In this way the convenience and safety of everybody can be promoted without serious detriment to anybody." *Ellis v. Lynn & B. R. Co.* 160 Mass. 341, 35 N. E. 1127; *Thompson v. Holyoke Street R. Co.* 170 Mass. 365, 49 N. E. 748; *Sunderland v. Pioneer Fire Proof Constr. Co.* 78 Ill. App. 102; *Ft. Scott Rapid-Transit R. Co. v. Page*, 10 Kan. App. 362, 59 Pac. 690; *Owensboro City R. Co. v. Lyddane*, 19 Ky. L. Rep. 698, 41 S. W. 578; *Lincoln Rapid Transit Co. v. Nichols*, 37 Neb. 332, 20 L. R. A. 853, 55 N. W. 872; *McClellan v. Ft. Wayne & B. I. R. Co.* 105 Mich. 101, 62 N. W. 1025; *Meyers v. Brantford Street R. Co.* 81 Ont. Rep. 309.

If persons in charge of a street car discover a man with a runaway horse on the track, and that he may be saved from injury by stopping the car, it is their duty to stop. *Thiel v. South Covington & C. Street R. Co.* 25 Ky. L. Rep. 1590, 78 S. W. 206.

A street railway company is liable for injuries resulting from one of its cars negligently striking a frightened horse and its rider, although the horse was not seen by the motorman, by reason of his attention being attracted to a bicycle that was keeping pace with his car. *Omaha Street R. Co. v. Duvall*, 40 Neb. 29, 58 N. W. 531.

"The sum of the adjudicated cases bearing upon the relative rights and duties of street

cars and citizens traveling in vehicles drawn by horses or other animals is, that both have a right to use the street, but that neither has an exclusive right. The operator of a street car is not necessarily obliged to stop the car every time a horse shies or scares at the approaching car; but, when the operator of the car sees that a horse is frightened at the car, it is his duty to manage his car in such manner as a man of ordinary prudence would do under the same circumstances; and it is always a question of fact for the jury whether such care in the running of the car has been observed. This duty may, or may not, lead to the necessity for bringing a car to a full stop. The duty of the company in this regard is just the same as the duty of one individual or citizen to another when they meet on the highway, and the horse of the one becomes frightened at the vehicle of the other, or at anything upon the vehicle of another." *Oates v. Metropolitan Street R. Co.* 188 Mo. 535, 58 L. R. A. 447, 68 S. W. 906.

This statement of the law is cited with approval in *Schafstette v. St. Louis & M. River R. Co.* 175 Mo. 142, 74 S. W. 826.

Where an electric car ran into a frightened horse, it was held that, "so long as the right of a common user of the tracks exists in the public, it is the duty of passenger railway companies to exercise such watchful care as will prevent accidents or injuries to persons who, without negligence on their own part, may not at the moment be able to get out of the way of a passing car. The degree of care to be exercised must necessarily vary with the circumstances, and therefore no unbending rule can be laid down." *Gibbons v. Wilkes-Barre & Suburban Street R. Co.* 155 Pa. 279, 26 Atl. 417.

A motorman running a car at the speed of 8 or 10 miles an hour is negligent in not slackening the speed of his car, where, by the exercise of reasonable care, he might have seen, by the aid of electric lights, a colt, attached to a vehicle, shying at the approach of his car when a block distant, and that, when the car approached within 25 feet, the colt turned suddenly, and attempted to cross the track in front of the car. *Marion Street R. Co. v. Carr*, 10 Ind. App. 200, 37 N. E. 952.

If, by checking the speed of his car upon first perceiving the fright of a horse, a motorman would have been able to stop his car after the horse jumped across the track, his failure to take such precaution, in view of the peril of those in the vehicle to which the horse was attached, is negligence. *Citizens' Street R. Co. v. Lowe*, 12 Ind. App. 47, 39 N. E. 165.

If a motorman in charge of a street car sees a horse frightened by its approach, and backing the wagon to which it is attached onto the track in front of the car, and that there is danger of a collision; and the car can be stopped in time to prevent a collision, the failure to stop is negligence. *Richter v. Cicero & P. Street R. Co.* 70 Ill. App. 196; *Lexington R. Co. v. Fain*, 25 Ky. L. Rep. 2243, 80 S. W. 463.

If the motorman of a street car sees that a horse being led in the highway has become unmanageable, and that its fright is due to the approach of his car, it is his duty to put his car under such control as to be able to stop it, and to take all necessary precautions to that end; and the failure to do so is negligence. 69 L. R. A.

Cameron v. Jersey City, H. & P. Street R. Co. 70 N. J. L. 633, 57 Atl. 417.

And the same duty is imposed upon those operating steam railroads where their operation is likely to result in injury to drivers of frightened animals.

If a locomotive engineer sees a man with a wagon and team between tracks at a railway crossing, and that the team is scared and unmanageable, and by the exercise of reasonable care and diligence he can stop the train in time to avoid a collision, his failure to do so is negligence, for which the railroad company is liable, even though he resorts to means which seem to him best to avoid the accident. *Pence v. Chicago, R. I. & P. R. Co.* 79 Iowa, 389, 44 N. W. 686.

Evidence that an engineer opened the steam cocks of his engine, and began to move the same, while plaintiff was trying to calm his frightened horse at a highway crossing, and thereby caused the horse to take greater fright, and to spring down an embankment, whereby plaintiff was injured, will support a verdict for plaintiff. *Inabnett v. St. Louis, I. M. & S. R. Co.* 69 Ark. 130, 61 S. W. 570; *Toledo, W. & W. R. Co. v. Harmon*, 47 Ill. 298, 95 Am. Dec. 489.

A railroad company has no right to continue blowing a locomotive whistle in a city, town or village, for the purpose of giving a signal of its approach to the station, after the engineer discovers that a blast of the whistle already given has frightened a horse drawing a vehicle along the public road, and that the horse will probably be more frightened by continuing to blow till the signal is completed; the driver seated in the vehicle being engaged in an effort to control the animal. *Akridge v. Atlanta & W. P. R. Co.* 90 Ga. 232, 16 S. E. 81; *Gulf, C. & S. F. R. Co. v. Spence* (Tex. Civ. App.) 32 S. W. 329; *Manchester South Junction & A. R. Co. v. Fullarton*, 14 C. B. N. S. 54.

Even though there is reason for the blowing of the whistle of an engine, still, if the engineer sees that a horse in the highway will be frightened, and its driver probably injured; and he can desist from blowing it consistently with his duties, and without damage to the railroad company, it is his duty to refrain from blowing it for a reasonable time. *St. Louis S. W. R. Co. v. Kilman* (Tex. Civ. App.) 86 S. W. 1050.

Second. Basis of duty in such cases.

It is not the danger of collision which is the basis of the duty in such cases, but the equality of right as between persons using the highway, and the obligation of each to use the same with a reasonable regard for the safety and convenience of others. This "reasonable regard" involves the exercise of ordinary care to prevent one's conduct or property becoming an instrument of injury to others lawfully using the highway; and, when such other persons have been rendered helpless, in a measure, through the fright of their animals, ordinary care as to them means such especial care as may reasonably be expected of one under the circumstances of the particular situation to prevent the threatened injury. *Ellis v. Lynn & B. R. Co.* 160 Mass. 341, 35 N. E. 1127; *Oates v. Metropolitan Street R. Co.* 188 Mo. 535, 58 L. R. A. 447, 68 S. W. 906.

Third. Manifestation of peril necessary to creation of duty.

Generally the mere fright of horses is insufficient to impose upon those causing the same the duty of this especial care. If the driver is a person apparently able to control his horse, notwithstanding its fright, the duty of increased care can hardly be said to arise. On the other hand, if the driver is a woman or young person, or if it is apparent that the horse, whoever the driver, has become unmanageable, then a situation is presented which demands the exercise of ordinary care, according to the necessities of the situation, to diminish the fright of the horse, and prevent any resulting damage. As a general rule, therefore, the fright of the horse must be accompanied by some manifestation of peril in order to create the duty. *Oates v. Metropolitan Street R. Co.* 168 Mo. 535, 58 L. R. A. 447, 68 S. W. 906; *East St. Louis & St. L. Electric Street R. Co. v. Wachtel*, 63 Ill. App. 181; *Lake Erie & W. R. Co. v. Juday*, 19 Ind. App. 436, 49 N. E. 843.

In *Hammond, W. & E. C. Electric R. Co. v. Eads*, 32 Ind. App. 249, 69 N. E. 555, it is held that a motorman is not required to stop his car immediately upon seeing a horse or team by the side of the track manifesting fright, unless the situation is such as would lead a reasonable man to believe that damage to persons or property cannot otherwise be avoided. But it is held to be culpable negligence not to stop a car, where the motorman sees a horse that has become unmanageable dragging its driver, and running near the track, and swerving from side to side.

Eastwood v. La Crosse City R. Co. 94 Wis. 163, 68 N. W. 651, holds that an inference of negligence is not justified from the facts that a motorman saw, or might have seen, at a distance of 175 feet, upon a well-traveled road, a gentle team, driven by a full-grown man, beginning to prance, but failed to put on the brakes and throw off the current until somewhere from 40 to 100 feet from the point where the team backed suddenly, and threw the corner of the sleigh to which it was attached against the car.

And in *Cornell v. Detroit Electric R. Co.* 82 Mich. 495, 46 N. W. 791, it is said that a street railway company fulfils its duty by commencing to run its car more slowly upon observing the fright of a colt with a man at his head, from 350 to 400 feet distant. The injury in this case occurred after the colt had been led into an adjacent field, when the car was yet 150 to 200 feet distant.

The sounding of a railroad whistle when within a few steps of a horse that has become frightened will not of itself give a right of action; but it must be shown that the circumstances attending its use are such that a prudent regard for the rights of others forbids it. *Hudson v. Louisville & N. R. Co.* 14 Bush, 303.

Whether the circumstances were such as to apprise a locomotive engineer, or to charge him with notice, of the peril attending the continued blowing of his whistle, where a horse had been frightened thereby, is a question for the jury. *Akridge v. Atlanta & W. P. R. Co.* 90 Ga. 232, 16 S. E. 81.
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Fourth. Causing fright, without subsequent negligence, will not create liability.

Since owners of vehicles run by motive power have the same right to use the highway as those using animal power, they are not responsible for injuries resulting from the fright of horses at the sight of such vehicles, unless they fail to use reasonable care to avoid injury, after they discover, or are negligent in not discovering, a situation demanding especial care on their part to prevent injury resulting from this exercise of their otherwise lawful right. *Kankakee Electric R. Co. v. Lade*, 56 Ill. App. 454; *Galesburg Electric Motor & P. Co. v. Manville*, 61 Ill. App. 490.

A motorman is not negligent, if, upon discovering the fright of a horse crossing the track, he turns off the motive power, applies the brake, and makes every proper effort to prevent a collision, and avoid further frightening the horse. *O'Brien v. Blue Hill Street R. Co.* 186 Mass. 446, 71 N. E. 951.

If a car approaches a frightened team on a bridge slowly until within 60 feet of the team, and then stops, the railway company cannot be held liable for injuries sustained by the driver of the team from the horses shying after they reach the car. *Kankakee Electric R. Co. v. Lade*, 56 Ill. App. 454.

A railway company is not liable for causing death, through the collision of one of its cars with a runaway horse, where the motorman at first sight of the horse threw off the current and checked the speed of the car, and had run only from 30 to 50 feet when the horse turned suddenly across the path of the car, and the vehicle to which it was attached was struck before the car could be stopped. *Bishop v. Belle City Street R. Co.* 92 Wis. 139, 65 N. W. 733.

Evidence that a horse shied when from 20 to 30 feet from an electric street car running at its usual speed, and that after the car had passed the horse made a sharp turn and upset the vehicle to which it was attached, thereby injuring its driver, does not show negligence on the part of the railway company. *Yingst v. Lebanon & A. Street R. Co.* 167 Pa. 438, 31 Atl. 687.

Where a street car company is doing the thing it has a right to do, no presumption of negligence arises from the fact of injury from the fright of a horse; and a claim that the company is negligent in not exercising its right in such a way as to minimize an impending danger which is apparent to the motorman must be supported by proof. *Atlanta R. & Power Co. v. Johnson*, 120 Ga. 908, 48 S. E. 389.

Fifth. Duty where fright caused by sounding gong.

A street railway company, in operating its cars along the street, has the right, when occasion requires, as a measure of precaution, to avert danger to its passengers and the traveling public, to ring a bell or sound a gong, and is required to sound it when approaching a public crossing. But this duty or privilege does not warrant the bell or gong being sounded when it appears that it is dangerous to those traveling along the street to do so. When the circumstances are such as reasonably to lead to the belief that to continue to do so will likely cause a horse or team to become unmanageable or run away, and thereby cause injury to the

person or property of someone, it is the duty of the company to cease ringing the bell or sounding the gong. *Citizens' R. Co. v. Hair* (Tex. Civ. App.) 82 S. W. 1050; *Galesburg Electric Motor & P. Co. v. Manville*, 61 Ill. App. 490.

A contrary view seems to be taken in *Steiner v. Philadelphia Traction Co.* 134 Pa. 199, 19 Atl. 491, where it is held that a motorman who brings his car to a stop alongside a restive horse may continue to sound his gong, although it is needlessly done. The opinion is very unsatisfactory in its reasoning, and seems to assume that the duty of sounding the gong as a signal on proper occasions to give warning and avoid collisions justifies its use where it will be attended with the very result in avoidance of which the duty is imposed, *vis.*, the infliction of injury.

The holding of the last-cited case is repudiated by the Federal circuit court for the eastern district of Pennsylvania, in *Lightcap v. Philadelphia Traction Co.* 60 Fed. 212, where the gripman of a cable car, seeing a horse near the track and very much frightened by the approach of the car, so sounded his gong as to cause the horse to jump upon the track, when a collision occurred, and the driver was injured. It was held that the gong might be so rung, and under such circumstances, as to amount to negligence, and whether it was so rung should be left to the jury. In commenting upon the Pennsylvania case, *Dallas, J.*, says: While the proper use of a gong by a street railway company is "rightful, it is no less true that it may be so used as to endanger the safety of those who, equally with the operators of street railways, are entitled, without encountering unnecessary peril to person or property, to the enjoyment of the public highways; and it is not, in my opinion, too much to insist that a device which may both avert and occasion casualties shall be used with that degree of care which, under the circumstances, a man of ordinary prudence would exercise as well to avoid causing accidents as for their prevention. I agree that the law not only permits, but requires, the proper use of the gong; but this does not sanction its wanton and needless use, nor relieve from liability for any harm resulting from unnecessarily, recklessly, and violently ringing it, where, by due prudence, such harm might be properly avoided. And I cannot yield my assent to the proposition that because it is, in general, the duty of the gripman to ring his gong with sufficient emphasis upon proper occasions, therefore he may ring it violently in the face of a frightened horse, and without any necessity whatever." This decision was affirmed on appeal in 10 C. C. A. 46, 17 U. S. App. 605, 61 Fed. 762.

"The true rule is, while the bell must ordinarily be sounded to give notice of the approach of the car, still, if the operator of the car sees that a horse is already frightened by the approach of the car, and that the citizen is in danger, it is his duty to cease sounding the bell, and to even stop, if necessary; and if, instead of doing so, he continues to sound the gong or ring the bell, and further frighten the horse, and cause him to run away, the company is liable for injuries inflicted in consequence thereof." *Oates v. Metropolitan Street R. Co.* 168 Mo. 535, 58 L. R. A. 447, 68 S. W. 906, 60 L. R. A.

Sixth. Care required is question for jury.

What ordinary care requires to avoid accident, after discovering the fright of a horse, is ordinarily a question for the jury to determine under all the circumstances of the case. *Kankakee Electric R. Co. v. Lade*, 56 Ill. App. 454; *East St. Louis & St. L. Electric Street R. Co. v. Wachtel*, 63 Ill. App. 181; *Oates v. Metropolitan Street R. Co.* 168 Mo. 535, 58 L. R. A. 447, 68 S. W. 906; *Kelly v. Pittsburg & B. Traction Co.* 10 Pa. Super. Ct. 644.

The question of a street railway company's negligence was properly left to the jury, where a horse driven by a woman became frightened at an approaching car as she was about to cross the track, and after she had turned to avoid a collision, and the horse was running parallel to the track, the company's car followed sounding its gong, and when alongside the plaintiff the gong was again sounded, causing the horse to spring to the side of the street, and throw plaintiff to the ground. *Benjamin v. Holyoke Street R. Co.* 160 Mass. 3, 39 Am. St. Rep. 446, 35 N. E. 95.

It is erroneous to instruct a jury, in an action for injuries caused by the negligent operation of defendant's cars after plaintiff's team had become unmanageable, "that defendant's motorman had the right, and it was his duty, if he saw a team ahead of him on the approach, although not on the railway track, but right alongside of it, to keep his car moving, whatever sound might attend its operation, and to sound the gong and give notice to the person in charge of such team that the car was approaching; and that such action on the part of the motorman is not and cannot by the jury be taken to be negligence, or want of ordinary care; and that a motorman, under such circumstances, had the right to assume that the sounding of the gong would not frighten a team ahead of him; and, even if the movement of the car or the sounding of the gong did frighten a team, and the motorman saw it, but the team was not evidently, and while the motorman could see it as his car moved along, so frightened as to be beyond the control of the driver, the motorman had still a right to proceed on his way with his car, and his doing so would not be negligence, nor could it be attributed to the want of ordinary care." Such instruction, it is said, not only invades the province of the jury, but it is not the law. *Wachtel v. East St. Louis & St. L. Electric R. Co.* 77 Ill. App. 465.

Seventh. Refraining from wilful or wanton injury not measure of duty.

There are a few cases holding that a street railway company is liable only for wilful or wanton injury to drivers of frightened horses; but it is not clear whether the opinions are based upon a misapprehension of the duty owing persons under such disability upon the public highway, or exhibit merely a want of discrimination in the use of terms.

For instance, in *Chapman v. Zanesville Street R. Co.* 27 Ohio L. J. 70 (a decision at nisi prius), it is said that one in charge of an electric car is not "bound to stop his car simply because a horse that is being driven on the same street has become frightened at the appearance and noise of the car. On the contrary, he may proceed at the usual speed, and

with the usual noise. In doing this he would not be negligent, and would not invade any right of the driver of the horse. But if the circumstances were such that failure to stop the car would show a wanton and wilful disregard for the safety of the driver of the horse, so that the continued movement of the car could be attributed only to wantonness or malice, and not to discharge of duty under his employment, he would then be negligent, and for such negligence there would be a liability of the company." All the cases cited in support of the opinion are actions for causing fright, which, of course, is a different question from that of the duty imposed by the situation created by such fright.

The case of *Terre Haute Electric R. Co. v. Yant*, 21 Ind. App. 486, 69 Am. St. Rep. 376, 51 N. E. 732, also holds that a street railway company is not required to stop its car upon seeing a horse frightened at its approach, and unmanageable, unless the motorman has reason to apprehend the accident that occurs, or, upon seeing the persons in the vehicle in imminent peril, acts in a manner attributable only to wanton disregard for their safety. The language of this decision seems to lay down the rule that no liability arises under such circumstances, unless the injury was wilfully or wantonly inflicted. If it is to be so construed, it is out of accord with other decisions of that state, and is without authority to support it. In *Muncie Street R. Co. v. Maynard*, 5 Ind. App. 372, 32 N. E. 343, a case of injury to property, the railway company was held liable upon the ground of mere negligence, the court saying: "We think the evidence shows that the engineer could have seen the helpless condition of appellee in time to have stopped his train and have avoided the injury. It was his duty to be constantly on the alert, and, if he discovered appellee's property so situated that injury must follow unless he stop his engine, it was his duty to make all reasonable effort to do so." And at the close of its opinion the court declares the railway company liable, because, though its servants did not see, they "could have seen," the plaintiff's danger in ample time to avoid the injury. Again, in *Lake Erie & W. R. Co. v. Juday*, 19 Ind. App. 436, 49 N. E. 843, the same court upheld the sufficiency of a complaint alleging defendants negligent failure to stop a hand car, at which plaintiff's horse had taken fright, upon the ground that after the first sudden fright, with a knowledge of the cause thereof, the servants continued the speed of the car, after observing the apparent danger to appellee, and without attempting to stop. These facts, as averred in the complaint, were acts of negligence. And the court declares it to be "sound doctrine, strongly intrenched by the authorities, that when one person sees another in danger or peril, from which he is unable to extricate himself with reasonable care and prudence, it is the highest duty of such person so to act as not to increase the peril, and, if he does act in a manner to increase the danger with a full knowledge of the facts, it is negligence, for which he may be required to respond in damages."

Finally, in the recent case of *Nichols v. Baltimore & O. S. W. R. Co.* (Ind. App.) 70 N. E. 183, the same judge who wrote the opinion in *Terre Haute Electric R. Co. v. Yant*, 21 Ind. App. 486, 69 Am. St. Rep. 376, 51 N. E. 732, approves an instruction that if, on 69 L. R. A.

the approach of a railroad train to a highway crossing, the engineer in charge of the engine observes a team near the crossing, evidently frightened, and becoming unmanageable, it is the duty of the engineer to refrain from giving signals or doing any act that tends to increase the fright of the team; and if, by reasonable exertion, he can avoid the accident by stopping the train, it is his duty to do so.

The theory that street railway companies are not liable for mere negligence, where horses are frightened by the operation of their cars, is expressly repudiated in *Oates v. Metropolitan Street R. Co.* 168 Mo. 535, 58 L. R. A. 447, 68 S. W. 906, the court saying: "Because a street car carries more people than any other kind of a conveyance, or because it is authorized to run more rapidly than a vehicle can ordinarily be legally driven, or because the rush and restlessness of the age make unreasonable demands for more and more rapid transit along the crowded thoroughfares of populous cities, it does not follow that a street car can be run in disregard of the rights of persons traveling by other means; nor that a street car company is exempt from the common-law duty of everyone to exercise ordinary care; nor that it is only liable where the agents act wantonly, maliciously, and heedlessly."

6. Instances of other helpless situations.

If a person is driving a cart at an unusually rapid pace, and drives over another, and kills him, he is guilty of manslaughter, though he calls to the deceased to get out of the way, and he might do so, if he were not drunk. *Rex v. Walker*, 1 Car. & P. 320.

Where one negligently attempting to pass through a small opening between freight cars at a crossing is caught, but not fatally injured, and notice of his perilous situation is given the railroad employees in time to reverse the motion of the cars, and prevent further injury, but no attention is given to such warning, and the person is killed by the cars coming together, the railroad company is responsible for the consequences, notwithstanding the negligence of the deceased. *Pannell v. Nashville, F. & S. R. Co.* 97 Ala. 298, 12 So. 236.

It is negligence, if not wantonness, for a street car company to run its car into a wagon on the track while the driver of the wagon is endeavoring to get up his horse, which has fallen, thereby throwing the driver to the ground and injuring him. The driver has a right, in such case, to act upon the supposition that, seeing the inextricable position which his wagon occupies, the motorman will apply the necessary means to stop his car. *Kansas City-Leavenworth R. Co. v. Langley* (Kan.) 78 Pac. 858.

Where a street-car motorman sees a small boy clinging to the lower step of the car, and crying "Let me off," and, instead of stopping, or attempting to stop, the car, he increases its speed, and so causes the boy to be thrown off and injured, he is guilty of wilful or wanton injury. And it is no defense that he does not actually intend the result. In such case "there is a constructive intention as to the consequences, which, entering into the wilful, intentional act, the law imputes to the offender, and in this way a charge which otherwise would be mere negligence becomes, by reason of a reckless disregard of probable consequences, a wilful wrong. That this constructive inten-

tion to do an injury in such cases will be imputed in the absence of an actual intent to harm a particular person is recognized as an elementary principle in criminal law. It is also recognized in civil actions for recklessly and wantonly injuring others by carelessness." *Aiken v. Holyoke Street R. Co.* 180 Mass. 8, 61 N. E. 557, 184 Mass. 269, 68 N. E. 238.

Where a street is bounded by a wall on one side, and there is no sidewalk on that side, it is negligence to drive a team rapidly within 3 feet of the wall, where a group of children have gathered, if the driver sees or ought to see them. And if a child four years of age attempts to save itself from the danger thus threatened by running in front of the horses to the opposite side of the street, and is thereby injured, she is not without remedy, though she might have been safe had she remained where she was, since the child's fright might reasonably be anticipated by the driver, and should admonish him of the necessity of slackening his speed, or driving to the opposite side of the street. *Barrett v. Smith*, 128 N. Y. 607, 28 N. E. 23.

Where a boy who had fallen upon a street car track was struck and knocked down by a coach when he was in the act of rising, and run over by its wheels, the negligence of the driver was properly left to the jury. *Cowan v. Snyder*, 1 Silv. Sup. Ct. 396, 5 N. Y. Supp. 340.

If a man riding a horse on a railroad track is seen by others in charge of a train in a deep cut or on a high embankment, which renders it doubtful if he can pass beyond them before the train overtakes him, they should at once take measures to avoid running him down. *Tanner v. Louisville & N. R. Co.* 60 Ala. 621, 642.

Where a child negligently runs in front of an electric car, and is caught up in its fender, from that moment a new relation exists between the parties, and any act or omission on the part of the railroad company amounting to the lack of the care demanded by the situation, and resulting in the child's death, is sufficient to charge the company with negligence. Such lack of care is shown in the fact that the child was carried on the fender from 32 to 150 feet before it rolled off, and was run over and killed. *Weltsman v. Nassau Electric R. Co.* 33 App. Div. 585, 53 N. Y. Supp. 905.

Evidence that, after a trespasser on a railroad track was knocked down by an engine, she was carried a distance of 30 feet under the engine before receiving serious injury, when the engine might have been stopped within 5 feet; and during the time she was carried such distance she was screaming, and others were giving the engineer warning of her peril, warrants the finding by a jury that the engineer discovered the perilous situation of deceased in time, by the exercise of due care and precaution in the use of means at his command, to stop the engine and prevent the fatal injury. *St. Louis, I. M. & S. R. Co. v. Hill* (Ark.) 86 S. W. 303.

But in Massachusetts, where the duty of using ordinary care to avoid injury to a trespasser is denied, even after his peril is discovered, it is held that a railroad company is not liable for the consequences of delay in releasing a trespasser who has been run over by an engine, since the company does not owe her the duty to render her such assistance. *Grissold v. Boston & M. R. Co.* 183 Mass. 434, 67 N. E. 354.
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V. Duty of persons inflicting injury to care for those injured.

a. Obligation to prevent aggravation of injury.

The facts presented in *UNION P. R. CO. v. CAPIER* really resolve themselves into the inquiry, whether one who has been a concurring cause of injury to another, though without fault, is under obligation, because of the helpless condition of the injured party, to give him such care as may be necessary to insure against aggravation of the injury from lack of proper care. That case answers this question in the negative in the following language: "We are unable, however, to approve the doctrine that when the acts of a trespasser himself result in his injury, where his own negligent conduct is alone the cause, those in charge of the instrument which inflicted the hurt, being innocent of wrongdoing, are, nevertheless, blamable in law, if they neglect to administer to the sufferings of him whose wounds we might say were self-imposed." From this, it will be seen that the court bases its decision upon two assumptions, the correctness of which is vital to the validity of its position: First, that the preceding negligence of the injured man was the proximate cause of the aggravation of his injuries; and second, that no duty to the injured man, from the party inflicting the injury, arose from the relation thus created, because the latter was free from fault. But both of these assumptions seem untenable in the light of the authorities cited in the preceding divisions of this note. If with the aid of surgical skill, promptly called, the life of the injured man could have been saved, then, clearly, the failure to summon such aid was the proximate cause of death; and if, by the exercise of ordinary diligence, surgical skill could have been procured in time, then the omission to procure it was negligence on the part of defendant's employees, provided they owed the injured man the duty to furnish such aid. The principle upon which this position is based is strongly supported by the following authorities: *Cooley, Torts*, 79; *Isbell v. New York & N. H. R. Co.* 27 Conn. 393, 71 Am. Dec. 78; *Weltsman v. Nassau Electric R. Co.* 33 App. Div. 585, 53 N. Y. Supp. 905; *St. Louis, I. M. & S. R. Co. v. Hill* (Ark.) 86 S. W. 303; *Pannell v. Nashville, F. & S. R. Co.* 97 Ala. 298, 12 So. 236; *Northern P. R. Co. v. Craft*, 16 C. C. A. 175, 29 U. S. App. 687, 69 Fed. 124.

This brings us to the second proposition upon which the court's decision is based, and which is not easy of solution, viz., whether the circumstances of the injury brought the parties into such relation as imposed upon the railroad company the duty of taking affirmative action to prevent aggravation of the injury. That the parties in such case cannot be regarded as mere strangers, owing no duty to each other, seems to have support in the moral consciousness of every society. Indeed, the existence of a relation, such as imposes a moral duty to prevent fatal consequences ensuing from injuries similarly inflicted, is so universally recognized, and so instinctively acted upon, that its performance is seldom omitted. The driver of a vehicle, who runs down a traveler negligently coming in his road on the highway, and who drives on in utter indifference to the sufferings of the victim of his wheels, is deemed of so gross a nature as to be made the subject of universal execration

And equally unworthy would be regarded the railroad company which, after running over a man, and cutting off his leg, left him upon the track to bleed to death, or to have his life finished by a subsequent train. Since, then, society imposes this duty, and so generally observes it, can it be said to be a mere moral obligation, and without legal foundation? Is it not because of the existence of a social relation, such as imposes upon a person inflicting an injury the obligation to prevent its aggravation through neglect of the person injured, that care is so generally given under such circumstances? And, if the relation be conceded, is there not safe ground for the position that a legal duty exists in such cases, although the injured person may, by his own negligence, have contributed to the injury? This view seems reasonable, and finds support in the authorities.

"Whenever a thing has become universally recognized to be a social duty, especially when it has become thus elevated into a usage, of a magnitude and importance sufficient to be within the law's cognizance, the doing of it is thereupon either legally required or legally permitted." Bishop, *Non-Contract Law*, § 124.

That the negligent contact of persons may create a new relation, imposing duties different from those existing without such contact, is well illustrated in *Weltzman v. Nassau Electric R. Co.* 33 App. Div. 585, 53 N. Y. Supp. 905, where a child attempting to cross a street in front of an electric car, upon being struck by the car, fell upon the fender, and was carried along for a distance of from 32 to 150 feet, when he rolled from the fender in front of the car, and was run over and killed. It was held that, "whatever the degree of negligence on the part of the individual in the original contact, that negligence culminated in the accident which landed him in the net of the fender. From that moment a new relation existed between the parties; and any act or omission on the part of the defendant amounting to a lack of the care demanded by the situation and resulting in the death of plaintiff's intestate is sufficient to charge the company with negligence."

See also authorities cited in preceding discussions of this note.

The leading authority upon the main question is that of *Northern C. R. Co. v. State*, 29 Md. 420, 96 Am. Dec. 545, where the deceased was struck by a railroad train, when upon the track a short distance from a crossing. Without notice to his family or other person interested, and without sending for a physician to ascertain his condition, he was taken by defendant's employees to its warehouse, and there laid on a plank across some barrels, and locked up alone all night, upon the supposition that he was dead. The next morning it was found that deceased had revived from his stunned condition, had moved some paces from the spot where he had been laid, but had died from hemorrhage of the arteries of his right leg, which had been crushed by the train. The railroad company was held liable for its negligent treatment and disposition of the deceased, the court saying: "From whatever cause the collision occurred, after the train was stopped the injured man was found upon the pilot of the defendant's engine in a helpless and insensible condition, and it thereupon at once became the duty of the agents in charge of the train to remove him, and to do so." 69 L. R. A.

it with a proper regard to his safety and the laws of humanity. And if in removing and locking up the unfortunate man, though apparently dead, negligence was committed whereby the death was caused, there is no principle of reason or justice upon which the defendant can be exonerated from responsibility. To contend that the agents were not acting in the course of their employment in so removing and disposing of the party is to contend that the duty of the defendant extended no farther than to have cast off by the wayside the helpless and apparently dead man, without taking care to ascertain whether he was dead or alive. or, if alive, whether his life could be saved by reasonable assistance timely rendered. For such a rule of restricted responsibility no authority has been produced, and we apprehend none can be found."

This case is cited, and the principle it enunciates approved, in *Baltimore & O. R. Co. v. State*, 41 Md. 268; and *Dyche v. Vicksburg, S. & P. R. Co.* 79 Miss. 361, 30 So. 711.

And in *Whitesides v. Southern R. Co.* 128 N. C. 229, 38 S. E. 878, it is held that, if one is knocked off a railroad trestle by a train, and the agents of the company, knowing what has been done, go on with the train, without stopping to give him care and attention, it is such negligence as renders the railroad company liable for the result.

The soundness of the doctrine announced in these cases is recognized by at least two text writers upon the subject of negligence:

"Under certain circumstances, the railroad may owe a duty to a trespasser after the injury. When a trespasser has been run down, it is the plain duty of the railway company to render whatever service is possible to mitigate the severity of the injury. The train that has occasioned the harm must be stopped, and the injured person looked after, and, when it seems necessary, removed to a place of safety, and carefully nursed, until other relief can be brought to the disabled person. This is not more a rule of law than a dictate of humanity." Beach, *Contrib. Neg.* § 215.

"Although a trespasser upon a railway track has been run over and injured, even as the result of his own folly and unlawful act, yet the railroad company thereafter, as a mere matter of social obligation which rests upon all men, owes him the duty of exercising in his behalf such reasonable care and attention as may be practicable under the circumstances, having regard to the necessity of prosecuting its public duties and the safety of others in its custody on board its train." 2 *Thomp. Neg.* § 1744.

In South Carolina every railroad corporation is required by statute to "cause immediate notice of any accident which may occur on its road, attended with injury to any person, to be given to a physician most accessible to the place of accident." But where a brakeman is merely missed from his train, and it is not known that any accident has occurred, the failure to summon medical aid before the body of the brakeman is found is not negligence, where there is no undue delay in prosecuting search for the body. *Adkins v. Atlanta & C. Airline R. Co.* 27 S. C. 71, 2 S. E. 849.

A contrary doctrine is laid down in *Griswold v. Boston & M. R. Co.* 183 Mass. 434, 67 N. E. 354, which aptly illustrates to what a cold-blooded and inhumane position one is logically led by the rule which denies the duty of exer-

claiming ordinary care to avoid injury to a trespasser after his peril is discovered. It is there held that where a woman lying prostrate and helpless upon the track has been run over, and lies screaming under an engine, the railroad company owes no legal duty to the person injured to assist her. "There is, of course," it is said "a moral duty, but in performing that duty the company is not liable if one of its servants does not use his best judgment in affording the necessary assistance." The court attempts to distinguish *Northern C. R. Co. v. State*, 29 Md. 420, 96 Am. Dec. 545, by saying that in that case "there was evidence of negligence on the part of the railroad company in striking a man at a highway crossing," and that, "this being so, the duty of taking proper care of him afterwards resulted from the legal wrong done." But the court evidently overlooked the fact that the question determined in the Maryland case was the correctness of an instruction to the jury, in accord with plaintiff's position, "that, conceding the deceased to have been wrongfully on the track of the railroad, and thus, by his own negligence, contributed to and brought about the collision, still, there was gross negligence in the subsequent conduct of the defendant's agents in providing for and disposing of the disabled and apparently dead man, and which was the proximate cause of his death." It was this proposition which the court sustained.

It will be seen that the situation of the injured party in the Massachusetts case is very similar to that in *Weltzman v. Nassau Electric R. Co.* 33 App. Div. 585, 53 N. Y. Supp. 905, *supra*; *St. Louis, I. M. & S. R. Co. v. Hill* (Ark.) 86 S. W. 303, *infra*; and *Pannell v. Nashville, F. & S. R. Co.* 97 Ala. 208, 12 So. 236, *infra*,—in all of which the railroad company was held liable for the failure to exercise ordinary care to prevent further injury, after discovering the perilous situation of the injured wrongdoer.

In *Kendall v. Louisville & N. R. Co.* 25 Ky. L. Rep. 793, 76 S. W. 376, it is said that a railroad company is under no legal obligation to give medical attention to a trespasser who is injured without its fault. But no authorities are referred to, and a determination of the question was unnecessary, as the injured man was in fact put in charge of competent and reputable physicians and surgeons.

Although involving somewhat different situations, the following cases seem clearly to support the principle of *Northern C. R. Co. v. State*, 29 Md. 420, 96 Am. Dec. 545, *supra*.

In *St. Louis, I. M. & S. R. Co. v. Hill* (Ark.) 86 S. W. 303, a woman trespassing upon a railroad track was knocked down and run over by a switch engine, but without receiving serious injury until she had been dragged under the engine a distance of 30 feet. It was conceded that the deceased was guilty of contributory negligence, and the only issue presented was whether the engineer, by the exercise of proper care and after discovering the perilous situation of the woman, could have avoided or mitigated the injury finally inflicted. The jury were instructed that, if they found in favor of the plaintiff upon such issue, the railroad company would be liable, and the instruction was upheld on appeal.

Directly in line with the last preceding authority is the case of *Pannell v. Nashville, F. & S. R. Co.* 97 Ala. 208, 12 So. 236. The plaintiff's intestate, by his own negligence, was

caught between the drawheads of two freight cars, but not fatally injured. Thereupon notice was given defendant's yard master in time for him to signal the engineer, and in time for the latter to reverse the motion of the cars, and prevent further injury. But the yard master paid no attention to the warning, and, the cars coming together, the man was killed by the second impact. In its opinion holding the railroad company liable under these circumstances the court says: "It is a well-settled principle that when one person, whether natural or artificial, is about to be the means or instrument of doing an injury to another, that other's negligence contributing proximately to it does not, *per se*, exonerate the actor from all further effort; does not, *per se*, relieve him or it from all responsibility for the consequences. Supine inaction, or stolid indifference to consequences, the law does not tolerate. The actor, no matter how free from fault, and no matter how negligent the one in peril may have been, must resort to every reasonable means, and employ every reasonable agency, to avert the catastrophe."

A saloon keeper who expels from his saloon, in an unconscious condition, and at a late hour of the night, a customer to whom he has sold liquor, with the result that the customer dies from cold and exposure, is liable for causing his death, although the deceased contributed to his death by drinking until he became drunk and unconscious. *Weymire v. Wolfe*, 52 Iowa, 533, 3 N. W. 541.

In the case of *Atchison, T. & S. F. R. Co. v. Weber*, 33 Kan. 543, 52 Am. Rep. 543, 6 Pac. 877, a contract relation existed, but it is instructive as a holding, by the same court as the principal case, that a state of helplessness imposes an obligation upon one coming into relation to a person thus situated to avoid doing him harm. It is there held that no liability attaches to a railroad company ejecting a passenger affected with delirium tremens, where he is put in charge of an overseer of the poor. The opinion intimates, however, that if there had been evidence to sustain the finding of the jury, that the passenger lay on the company's depot platform in an exposed condition for over an hour before he was taken charge of by the overseer, and that during that time he received injuries resulting in his death, the company would have been liable. The court says: "The duty of the railroad company, however, with respect to Weber, did not end with his removal from the train. He was unconscious, and unable to take care of himself. The company could not leave him upon the platform helpless, exposed, and without care or attention. It was its duty to exercise reasonable care and diligence to make temporary provision for his protection and comfort."

In *Langan v. Great Western R. Co.* 26 L. T. N. S. 577, one holding the office of inspector, and whose duty it was to take care of persons injured on defendant's railway, was held to have authority to pledge the credit of the railway company for the care of injured persons at an inn until their recovery. And Cockburn, Ch. J., said: "I cannot help thinking that where a man has, as incidental to his office, the duty of looking after persons who have been injured by railway accidents, it is competent for him to take them to some place of public entertainment, both for the sake of the sufferers, and also for the advantage of the company themselves, because, if after a railway casualty

happened persons injured thereby were left to take their chance of aid, or in such a condition as to make it impossible for them to get away from the place where the disaster befell them, unless there was someone authorized on the part of the railway officials to look after them, the injury caused by the accident would be aggravated to a far greater extent, and so as to render the company liable to much heavier damages."

Whether neglect to care for an injured person produced a subsequent condition which would not have existed but for such neglect is a question for the jury. *Vandenburgh v. Truax*, 4 Denio, 464, 47 Am. Dec. 268; *Pollett v. Long*, 58 N. Y. 200.

b. What is sufficient performance of obligation.

Whether the care of a sick, helpless, or injured person is undertaken pursuant to some legal obligation, or is voluntarily assumed, the service must be performed with such degree of care as is commensurate with the responsibility assumed. In such case the act is no longer one of mere nonfeasance, but misfeasance, or the doing improperly what he is under obligation to do with ordinary care. *Powers v. Massachusetts Homœopathic Hospital*, 65 L. R. A. 372, 379, 47 C. C. A. 122, 109 Fed. 294.

A railroad corporation assuming charge of one run over by one of its trains is charged with the duty of common humanity, and whether such duty is properly performed by summoning a physician, who neglects to perform a necessary surgical operation, thereby lessening the injured person's chances of life, and he dies when the operation is finally performed by other physicians, is a question for the jury. *Dyche v. Vicksburg, S. & P. R. Co.* 79 Miss. 361, 30 So. 711.

The same principle is applied in *Needham v. San Francisco & S. J. R. Co.* 37 Cal. 409, to the care of an animal trespassing upon a railroad track. The plaintiff's mare had escaped from his pasture, and strayed upon defendant's right of way. Upon a train whistle being sounded, the mare ran along the track until she came to a trestle 7 feet high, upon which she leaped, and fell in such a way as to be unable to extricate herself. In order to remove her from the track, the defendant's employees sawed off the ties of the trestle on which the mare was lying, and allowed her to fall to the creek below, and it was alleged that she was thereby injured. While it was held that the defendant was not negligent in making the removal, the court refused to approve of defendant's contention that, if the plaintiff was negligent in allowing his mare to escape, and the animal was a trespasser on the track, the defendant would not be liable for injuring the mare in effecting her removal, unless it was done through heedlessness and wantonness. The court says: "The Golden Rule is a corner stone of the law as well as of morals, and in the department of the former finds its expression in the maxim, *Sic utere tuo, ut alienum non lædas*. No more in law than in morals can one wrong be justified or excused by another. A wrongdoer is not an outlaw, against whom every man may lift his hand. Neither his life, limbs, nor property are held at the mercy of his adversary. On the contrary, the latter is bound to conduct himself with reasonable care and prudence, notwithstanding the fault of the former; and if, by so doing, he

can avoid injuring the person or property of the former, he is liable if he does not, if, by reason thereof, injury ensues."

In *Baltimore & O. R. Co. v. State*, 41 Md. 268, the rule of the *Price Case*, 29 Md. 420, 96 Am. Dec. 545, *supra*, is approved, but is held to extend only to proper care and treatment of the injured person until he is carried to a nearby station, and there placed in a hotel, and under the care of a physician. And that under such rule the railroad company could not be held liable for his subsequent death from hemorrhage occurring during his removal to another town where his relatives resided.

In *Griswold v. Boston & M. R. Co.* 183 Mass. 434, 67 N. E. 354, it is held that a slight delay in extricating an injured trespasser from her situation does not render the railroad company liable for the resulting aggravation of her injuries. The court refers to the case of *Dyche v. Vicksburg, S. & P. R. Co.* 79 Miss. 361, 30 So. 711, *supra*, but repudiates its authority, and attempts to distinguish *Northern C. R. Co. v. State*, 29 Md. 420, 96 Am. Dec. 545, *supra*, in a manner not warranted by the report of that case, as already pointed out.

VI. Knowledge of disability.

a. Actual knowledge generally necessary to creation of duty.

It has been seen that persons under disability are entitled to the care due to persons generally, and may recover for the consequences of the omission of such care as to them, although the consequences may have been aggravated by their previous physical condition, and could not have been foreseen by the negligent party. (See div. IV. subd. a, *supra*.) In such cases the negligent person's lack of knowledge of the previous disability of the injured party is not an excuse for the omission of ordinary care. *Brownback v. Fralley*, 78 Ill. App. 262.

The case of *Purcell v. St. Paul City R. Co.* 48 Minn. 134, 16 L. R. A. 203, 50 N. W. 1034, is one where a contract relation existed; but the court so clearly distinguishes the cases where liability for injury to a person under disability is not dependent upon previous knowledge of such disability, from those where liability is dependent upon such knowledge, that a quotation from the opinion is appropriate. A street car of the defendant, on which plaintiff was a passenger, came into such imminent danger of a collision with a car on a cross line that plaintiff received a nervous shock, was thrown into convulsions, and, being pregnant at the time, a miscarriage and illness followed. It was held that the defendant was liable for the consequences of its negligence, notwithstanding the absence of knowledge of plaintiff's condition, the court saying: "Certainly a woman in her condition has as good a right to be carried as anyone, and is entitled to at least as high a degree of care on the part of the carrier. It may be that where a passenger, without the knowledge of the carrier, is sick, feeble, or disabled, the latter does not owe to him a higher degree of care than he owes to passengers generally, and that the carrier would not be liable to him for any injury caused by an act or omission not negligent as to an ordinary passenger. But when the act or omission is negligence as to any and all passengers, well or ill, anyone injured by the negligence must be entitled to recover to the full extent of the

injury so caused, without regard to whether, owing to his previous condition of health, he is more or less liable to injury."

But ordinarily one is not chargeable with negligence for not guarding against a danger of which he has no knowledge. *Ilott v. Wilkes*, 3 Barn. & Ald. 304; *Worthington v. Mencer*, 96 Ala. 310, 315, 17 L. R. A. 407, 11 So. 72; *Dally v. Richmond & D. R. Co.* 106 N. C. 301, 11 S. E. 320; *Langan v. St. Louis, I. M. & S. R. Co.* 72 Mo. 392; *Jeffrey v. Keokuk & D. M. R. Co.* 56 Iowa, 346, 9 N. W. 884; *Kansas P. R. Co. v. Whipple*, 39 Kan. 531, 540, 18 Pac. 730; *Smithwick v. Hall & U. Co.* 59 Conn. 261, 12 L. R. A. 279, 21 Am. St. Rep. 104, 21 Atl. 924; *Philadelphia & R. R. Co. v. Hummell*, 44 Pa. 379, 84 Am. Dec. 457. This is especially true where the occasion for the exercise of care to avoid injuring another is the disability of the person to be affected, as distinguished from those circumstances calling for care as to persons generally. The law does not impose upon one the duty of giving to another the care due only to the deaf, blind, and unconscious, until he has notice that such person is suffering from one of those disabilities. And where a person's danger arises from the fact of his being where he ought not to be, or where the presence of people is not reasonably to be expected, no duty is owing him until he is discovered. *International & G. N. R. Co. v. Smith*, 62 Tex. 252; *Johnson v. Louisville & N. R. Co.* 91 Ky. 651, 25 S. W. 754; *Thomas v. Chicago, M. & St. P. R. Co.* 93 Iowa, 248, 61 N. W. 967, 114 Iowa, 169, 86 N. W. 259; *Cleveland, C. & C. R. Co. v. Terry*, 8 Ohio St. 570; *Lake Erie & W. R. Co. v. Juday*, 19 Ind. App. 436, 49 N. E. 843; *Kansas P. R. Co. v. Whipple*, 39 Kan. 531, 540, 18 Pac. 730.

When the mere negligence of another causes or contributes to the injury of a person so mentally incompetent as to be incapable of exercising care, "if the conduct of the injured person would have avoided his claim to relief if he had been capable of exercising care in his own behalf, the person inflicting the injury is not to be held to a liability which would not have been incurred under the same circumstances in favor of a person of ordinary capacity, unless he had notice of the injured person's mental deficiency, and of his consequent helplessness and peril in the circumstances in which he was placed. The duty of observing special precautions for the safety of another, because the latter, by reason of mental imbecility, cannot be influenced by the dictates of ordinary prudence, is not cast upon one who is not charged with notice of the other's peril and of his lack of sufficient intelligence to avoid it." *Worthington v. Mencer*, 96 Ala. 310, 17 L. R. A. 407, 11 So. 72.

Where one person negligently comes into a situation of peril, in which his liability to injury is increased by reason of some disability, before another can be held liable for an injury to him, it must appear either that the latter had knowledge of his situation in time to prevent the injury, and failed to use ordinary care to that end, or that the injurious act or omission, considering time and place, was such that its nature and probable consequence would be to produce serious hurt to someone. *Dally v. Richmond & D. R. Co.* 106 N. C. 301, 11 S. E. 320; *Cleveland, C. & C. R. Co. v. Terry*, 8 Ohio St. 570; *St. Louis, I. M. & S. R. Co. v. Monday*, 49 Ark. 257, 4 S. W. 782; *Birmingham R. & Electric Co. v. Bowers*, 69 L. R. A.

110 Ala. 328, 20 So. 345; *Louisville & N. R. Co. v. Kellem*, 14 Ky. L. Rep. 734, 21 S. W. 230; *Louisville, N. O. & T. R. Co. v. Williams*, 69 Miss. 631, 12 So. 957.

The presence of a man of advanced years, but strong and healthy, upon a railroad track, does not impose upon the railroad company the exercise of greater care than would be required in the case of an adult of less advanced years, unless its employees know, or have reason to believe, that such person, from some cause, is not possessed of the ordinary ability to care for himself. *Green v. Southern P. Co.* 122 Cal. 563, 55 Pac. 577.

If a man sleeping on a railroad track is not seen by persons operating a train, the railroad company is not liable for running over him, although the track at the place of the accident, and for a long distance on either side, is level and straight, so that an object no larger than a man's hat can be seen for 400 or 500 yards. A railroad company does not owe to trespassers the duty of keeping a lookout. *Denman v. St. Paul & D. R. Co.* 26 Minn. 357, 4 N. W. 605. And see cases under title, *Duty to discover another's peril or disability*, div. VII. subdiv. b. *infra*.

A railroad company cannot be held liable for mere negligence toward a person on its track, who is deaf or otherwise deficient in his faculties, so as to render him unconscious of the impending danger, unless the knowledge of such infirmity is brought home to those in charge of the train. *Johnson v. Louisville & N. R. Co.* 91 Ky. 651, 25 S. W. 754; *Dally v. Richmond & D. R. Co.* 106 N. C. 301, 11 S. E. 320; *Williams v. Southern P. R. Co. (Cal.)* 11 Pac. 849; *Tyler v. Sites*, 88 Va. 470, 13 S. E. 978.

Likewise, wilful and intentional wrong, a willingness to inflict injury, cannot be imputed to one who is without consciousness, from whatever cause, that his conduct will inevitably or probably lead to wrong or injury. It is only where the engineer of a railroad train becomes actually aware of the danger of a trespasser upon a trestle, that the failure to exercise preventive effort to avert an injury can constitute such gross negligence as amounts to wantonness and recklessness. *Southern R. Co. v. Bush*, 122 Ala. 470, 482, 26 So. 168; *Ulrich v. Cleveland, C. C. & St. L. R. Co.* 151 Ind. 358, 51 N. E. 95.

The failure to stop a train upon the sight of a man 10 or 12 feet from the track, and approaching with the apparent purpose of crossing it, is not wanton negligence, where the train is in full view of such person, and those in charge of the train are without knowledge that he is deaf. *Birmingham R. & Electric Co. v. Bowers*, 110 Ala. 328, 20 So. 345.

And the duty of active effort to prevent one's lawful action from resulting in injury to another arises, generally, not with knowledge of his presence in a place of possible danger, where ordinary care on his part will insure his safety, but only upon the discovery of his being in imminent peril from such action. This distinction is important in determining the question of liability for either negligent or wilful injuries. *Smalley v. Southern R. Co.* 57 S. C. 243, 250, 35 S. E. 489; *Gulf, C. & S. F. R. Co. v. Hill* (Tex. Civ. App.) 58 S. W. 255, 258 (opinion on rehearing); *Orr v. Cedar Rapids & M. C. R. Co.* 94 Iowa, 423, 62 N. W. 851; *Southern R. Co. v. Bush*, 122 Ala. 470, 26 So. 168; *Ulrich v. Cleveland, C. C. & St. L. R. Co.* 151 Ind. 358, 51 N. E. 95.

But the testimony of an engineer as to the time he discovered a person in peril on the track is not conclusive. Where the facts and circumstances proved justify a finding by the jury that the disability of the injured party was discovered by those on the train at a distance which would have enabled them, by the exercise of ordinary care, to avoid injury, a verdict based thereon will not be disturbed, although the engineer testified that he did not discover the person's peril until it was too late to stop the train. *St. Louis, I. M. & S. R. Co. v. Hill* (Ark.) 86 S. W. 303; *Farrell v. Chicago, R. I. & P. R. Co.* 123 Iowa, 690, 99 N. W. 578; *Orr v. Cedar Rapids & M. C. R. Co.* 94 Iowa, 423, 62 N. W. 851; *Purcell v. Chicago & N. W. R. Co.* 117 Iowa, 667, 671, 91 N. W. 933; *Smalley v. Southern R. Co.* 57 S. C. 243, 35 S. E. 489; *Gunn v. Ohio River R. Co.* 42 W. Va. 676, 36 L. R. A. 575, 581, 26 S. E. 546; *International & G. N. R. Co. v. Tabor*, 12 Tex. Civ. App. 283, 83 S. W. 894; *Hankerson v. Southwestern R. Co.* 59 Ga. 593, 61 Ga. 114, 72 Ga. 182; *Sibley v. Ratliffe*, 50 Ark. 477, 8 S. W. 686. And see dissenting opinion in *Williams v. Southern P. R. Co.* (Cal.) 11 Pac. 849.

Affirmative evidence that a child on a railroad track was seen by the engineer or fireman in time to stop the train and avoid the injury is not required. If it appears that the view was clear for 1,600 feet, and between the train and the child there was a public crossing, where it was the duty of the engineer to be on the alert, it is for the jury to say whether the child was seen by the engineer in time to stop the train. *Johnston v. Atchison, T. & S. F. R. Co.* 56 Kan. 263, 43 Pac. 228.

And a jury is not bound to accept the statement of a locomotive engineer that he did not discover that a woman was under his engine, nor receive warning of her perilous situation, in time to have avoided the injury inflicted, where there is evidence that the woman was screaming loudly, and that persons were running toward the engine and giving warning by gestures and loud screams. *St. Louis, I. M. & S. R. Co. v. Hill* (Ark.) 86 S. W. 303.

"While wantonness on the part of the engineer cannot be predicated on the mere fact that he ought to have seen deceased on the trestle, or on anything short of actual knowledge, yet this actual knowledge need not be positively and directly shown, but, like any other fact, may be proved by showing circumstances from which the fact of actual knowledge is a legitimate inference. Otherwise, in cases of this character, this fact could never be proved except by the testimony of the engineer himself. Certainly the facts that the road was straight for a long distance, the view of the track unobstructed, and the engineer was in his seat looking ahead along the track, and there was nothing to prevent him from seeing a person on the track a few hundred feet ahead, are relevant and admissible for the purpose of proving that he did see such person, and may properly be submitted to the jury on this issue; and, while no presumption arises from these facts that the engineer did see the person on the track, yet this may be inferred from these facts by the jury, whose province alone it is to decide the weight to be given to facts legally in evidence, and their effect on an issue which they are admitted to prove." *Southern R. Co. v. Bush*, 122 Ala. 470, 26 So. 168.

In *Becker v. Louisville & N. R. Co.* 110 Ky. 69 L. R. A.

474, 53 L. R. A. 267, 96 Am. St. Rep. 459, 61 S. W. 997. In finding that the jury were justified in finding that the engineer of a train saw some children upon a trestle in time to stop the train and prevent injury, the court says: "The evidence conduces to show that the engineer could see the whole bridge from a distance of 960 feet, and one standing on the track at the bluff can see the whole length of the bridge for 520 yards; that a man in the cab could see the bridge 120 feet further back. The proof also conduces to show that a man in the cab could see the bridge 120 feet further back than if on the ground. It is also evident from the proof that for a considerable distance from the bridge it is up grade in reaching the bridge in question. There is also some proof tending to show that someone on the engine was seen to put his head out, as if looking toward the bridge, at some distance from it. It seems to us, from the evidence, that the jury were authorized to believe and to have found that the defendant's agents and servants saw those children upon the bridge in ample time to have so slackened the speed of the train as to enable them to have escaped the danger. There is hardly room to doubt this, from the map and evidence filed in this action."

b. When mere belief sufficient to impose duty.

Where there are reasonable grounds to believe that a person in danger will not be able to help himself because of some mental or physical infirmity, or other disability, such belief, in the absence of actual knowledge, is sufficient to impose the duty of exercising ordinary care to avoid injuring such person. *Dally v. Richmond & D. R. Co.* 106 N. C. 301, 11 S. E. 320; *Clark v. Wilmington & W. R. Co.* 109 N. C. 430, 14 L. R. A. 749, 14 S. E. 43; *Tucker v. Norfolk & W. R. Co.* 92 Va. 549, 24 S. E. 229; *Blankenship v. Chesapeake & O. R. Co.* 94 Va. 449, 27 S. E. 20; *St. Louis, I. M. & S. R. Co. v. Wilkerson*, 46 Ark. 513; *Sibley v. Ratliffe*, 50 Ark. 477, 8 S. W. 686; *Anderson v. Hopkins*, 33 C. C. A. 346, 63 U. S. App. 533, 91 Fed. 77.

If the conduct of a person walking upon a railroad track is such as to create in the minds of those operating a train a doubt as to whether such person is in possession of all his faculties, and to give them reason to believe that an injury will occur unless the train is checked, they are bound to use greater caution, and to stop the train, if necessary, to insure his safety. *Louisville & N. R. Co. v. Cooper* (Ky.) 6 Am. & Eng. R. Cas. 5; *Lexington & C. C. Min. Co. v. Huffman*, 17 Ky. L. Rep. 775, 32 S. W. 611; *Pittsburgh, C. & S. T. L. R. Co. v. Judd*, 10 Ind. App. 213, 37 N. E. 775; *Campbell v. Kansas City, Ft. S. & M. R. Co.* 55 Kan. 536, 40 Pac. 997; *Texas & P. R. Co. v. Robinson*, 4 Tex. Civ. App. 121, 23 S. W. 433; *Galveston City R. Co. v. Hanna* (Tex. Civ. App.) 79 S. W. 639. But see *Green v. Los Angeles Terminal R. Co.* (Cal.) 76 Pac. 719; *Olson v. Northern P. R. Co.* 84 Minn. 258, 87 N. W. 843.

Likewise, if there are circumstances sufficient to give notice to the engineer of a train that the life of a human being is in danger, as where persons are running toward the train and excitedly waving their hands, it is his duty to stop the train, or materially check its speed, although he may not in fact see any person upon the track or in danger. *Donahoe v. Wabash*,

St. L. & P. R. Co. 83 Mo. 543; Seaboard & R. Co. v. Joyner, 92 Va. 334, 23 S. E. 773.

An engineer who sees a person on the track waving his hands, and not stepping aside, should check his train at once, though he may not know that such person's foot is caught in the track. *Spooner v. Delaware, L. & W. R. Co.* 115 N. Y. 22, 21 N. E. 696.

c. Negligent ignorance equivalent to knowledge.

When knowledge itself is a duty, as where there is a probability of the presence of persons liable to be affected by one's action, negligent ignorance is equivalent to knowledge. *Goodrich v. Burlington, C. R. & N. R. Co.* 103 Iowa, 412, 72 N. W. 653; *Chesapeake & O. R. Co. v. Rodgers*, 100 Va. 324, 41 S. E. 732; *Murphy v. Orr*, 96 N. Y. 14; *Kunz v. Troy*, 104 N. Y. 344, 10 N. E. 442; *Moebus v. Herrmann*, 108 N. Y. 349, 2 Am. St. Rep. 440, 15 N. E. 415; *Well v. Dry Dock, E. B. & B. R. Co.* 119 N. Y. 147, 23 N. E. 487; *McKeon v. Steinway R. Co.* 20 App. Div. 601, 47 N. Y. Supp. 374; *Levy v. Dry Dock, E. B. & B. R. Co.* 35 N. Y. S. R. 769, 12 N. Y. Supp. 485; *Thiel v. South-Covington & C. Street R. Co.* 25 Ky. L. Rep. 1590, 78 S. W. 206; *Galveston City R. Co. v. Hewitt*, 67 Tex. 479, 60 Am. Rep. 32, 3 S. W. 705; *Werner v. Citizens' R. Co.* 81 Mo. 368.

Where a man is stricken down in a fit at a private crossing, the railroad company cannot be relieved from liability for running over him, because of its failure to discover his presence upon the track in such condition. *Yoakum v. Mettash* (Tex. Civ. App.) 26 S. W. 129.

A railroad company is liable for running over a man having his foot caught in a frog at a city crossing, where, if not seen, he might have been seen, by the exercise of ordinary diligence, in time to avoid the injury. *Illinois C. R. Co. v. Crockett*, 25 Ky. L. Rep. 1989, 79 S. W. 235.

The failure of the motorman of an electric street car to see the peril of one driving a horse which has been frightened by his car, and become unmanageable, when he might have seen it by the exercise of ordinary care, is negligence; and it is proper in such case to submit to the jury the question whether the motorman ought to have seen the frightened condition of the horse. *Ellis v. Lynn & B. R. Co.* 160 Mass. 341, 35 N. E. 1127; *Lexington R. Co. v. Fain*, 25 Ky. L. Rep. 2243, 80 S. W. 463.

Where a motorman, because of his attention being drawn to a bicycle keeping pace with his car, failed to see a frightened horse that had sprung upon the track ahead of him, and in consequence the car struck the horse, and threw its rider to the pavement with such force as to render him insane, it was held that the court properly instructed the jury that, if the motorman could, in the exercise of reasonable care, have seen the plaintiff in time to check his car after plaintiff's horse sprang upon the track, and before the car collided with his horse, and the plaintiff was not himself guilty of negligence which contributed to his injury, then the defendant would be liable. *Omaha Street R. Co. v. Duvall*, 40 Neb. 29, 58 N. W. 531.

The misapplication of the principle of these cases to actions for injuries to trespassers has led to some conflict in the authorities. Against the holding of the authorities above cited, that knowledge of a person's peril or disability is necessary to the creation of a special duty toward such person, based upon his situation

or condition, it is contended by respectable authority that "discovery" is not a prerequisite to such duty to trespassers; that since the negligence which will defeat a plaintiff's recovery for an injury may be his failure, by the exercise of ordinary care, to discover and avoid a collision with an obstruction which the defendant had negligently placed in the highway (*Butterfield v. Forrester*, 11 East, 60), so, on the other hand, the defendant's failure to discover and avoid plaintiff's prior negligence may create a liability for an injury inflicted without actual knowledge of the presence or disability of the person injured. And this, it is alleged, was the true cause of action in *Davies v. Mann*, 10 Mees. & W. 546. See also cases cited in div. VII., subd. b, *infra*.

But it should be observed that in the situation presented in *Davies v. Mann*, 10 Mees. & W. 546, "knowledge itself was a duty," and it was for the breach of this duty that the defendant was held liable. He was upon the highway, where persons and animals were liable to be present, and it was his duty to be on the lookout for them; but, instead, he drove at a speed that prevented his discovery of the helpless donkey that lay in the road. It is only when this duty to know exists that a liability for an injury ignorantly inflicted can arise; and the duty to know exists, ordinarily, only when the duty of watchfulness is imposed; and the obligation to be on the lookout for persons arises only in places where they are reasonably to be expected. But, as persons are not reasonably to be expected where their presence makes them trespassers, the duty of watchfulness, and consequently the duty to know, does not exist as to persons in such places. Accordingly, those authorities holding that a railroad company may be liable for injury to a trespasser, although his presence and situation were not discovered, are forced to impose upon railroad companies the duty of maintaining a lookout for such persons. And it is for the breach of this unusual duty that these decisions hold railroad companies liable for injuries ignorantly inflicted. *Smith v. Norfolk & S. R. Co.* 114 N. C. 728, 25 L. R. A. 287, 19 S. E. 863, 923.

VII. Duty to discover another's peril or disability.

a. At places where people are likely to be present.

May one be relieved from responsibility for an injury done to a person under some disability, in the performance of an otherwise lawful act, upon the ground that he had no knowledge of the disability of such other person, when by the exercise of ordinary care the situation or condition of that person might have been discovered?

The general current of authority answers this question in the negative, where the duty of watchfulness against such result exists as to people generally. When this duty exists, its breach is negligence, for which a liability arises. And in those jurisdictions where the question of liability is determined by the application of the doctrine of proximate cause to the negligence of both parties it would make no difference that the injured party was himself negligent, if his negligence was not concurrent with that of the party inflicting the injury.

But, while the language of some of the authorities seems to impose upon railroad com-

panies in particular an increased obligation to be on the lookout at crossings where there is a probability of children and infirm persons being present, and entitled to their especial care in avoidance of injury, the duty, so far as the obligation to discover their presence is concerned, seems not to be different in kind from that owing to persons generally. The duty of increased care arises only when one knows, or is bound to know, of another's helplessness. And the question here is whether the law requires of one the exercise of ordinary care to discover such helplessness or disability, and thereby imposes the duty of such increased care toward persons thus situated, although actual knowledge of their situation or condition is wanting, if, by the exercise of ordinary care, it might be discovered. Some of the cases cited pertain to the duty owing to children, as to whom the same rule governs as is applied in cases of physical infirmity or other disability.

As to the duty of railroad companies to discover children upon their tracks, see *note* to *Bottoms v. Seaboard & R. R. Co.* 25 L. R. A. 784. And for authorities as to the duty of railroad companies to maintain a lookout from their trains for persons generally, whether at crossings or elsewhere, see *note* to *Smith v. Norfolk & S. R. Co.* 25 L. R. A. 287.

First, as to the duty to maintain a lookout along highways and at railroad crossings.

Drivers of vehicles are required not only to make a vigilant use of their senses to discover anyone exposed to danger, but so to control the movements of their teams as to avoid doing him injury, to the extent of their power, when discovered. Therefore, where the driver of a vehicle runs down an aged and lame pedestrian, who is seen by him when 15 feet distant, and probably could have been seen at a greater distance, the question of his negligence is for the jury. *Barker v. Savage*, 45 N. Y. 191, 6 Am. Rep. 66.

And where one who is unobservant drives over a child in the highway, when he might have avoided the injury if he had maintained a reasonable lookout, as it was his duty to do, he is liable for the damage inflicted. *Murphy v. Orr*, 96 N. Y. 14; *Birkett v. Knickerbocker Ice Co.* 110 N. Y. 504, 18 N. E. 108; *Barrett v. Smith*, 128 N. Y. 607, 28 N. E. 23; *Elze v. Baumann*, 2 Misc. 72, 81, 21 N. Y. Supp. 782; *Cowan v. Snyder*, 1 *Silv. Sup. Ct.* 396, 5 N. Y. Supp. 340; *Sykes v. Lawlor*, 49 Cal. 236; *Summers v. Bergner Brewing Co.* 143 Pa. 114, 24 Am. St. Rep. 518, 22 Atl. 707; *Stringer v. Frost*, 116 Ind. 477, 2 L. R. A. 614, 9 Am. St. Rep. 875, 19 N. E. 331; *Vaughn v. Scade*, 30 Mo. 600.

This is true, not only at cross walks, but elsewhere. The driver of a vehicle is bound to be watchful at all points, and, if he drives over a child, whom he does not see because he is looking backward, and conversing with another, he is guilty of negligence. *Moebus v. Herrmann*, 108 N. Y. 349, 2 Am. St. Rep. 440, 15 N. E. 415.

If the driver of a vehicle knows that a child, idiot, or lunatic, is in the highway, he is bound to a proportionate degree of watchfulness; and what would be ordinary neglect in regard to one supposed to be of full age and capacity would be gross neglect as to a child, or one known to be incapable of escaping danger. *Robinson v. Cone*, 22 Vt. 213, 54 Am. Dec. 67.

Where a driver, if he had been on the lookout, could have seen a child two years old leav-

ing the curb, when he was 25 or 30 feet distant, he was negligent in not seeing him: or, if he was looking, and saw the child, and recklessly kept on, regardless of its known ignorance and helplessness, he would likewise be liable. But if the child rushed suddenly from the curb in front of the horses he would not be negligent in not avoiding the injury. *Satinsky v. Mutual Brewing Co.* 187 Pa. 57, 40 Atl. 821.

The rights of a woman sixty-three years of age, feeble, and of defective eyesight, to walk across a public street, are not subordinate to the rights of one driving thereon. And there can be no urgent necessity which will justify one driving in such a careless and reckless manner as to endanger the persons or lives of those who are properly and lawfully upon the street, and who themselves are in the exercise of due care. *Eaton v. Cripps*, 94 Iowa, 176, 62 N. W. 687.

In view of the fact that persons may be expected to cross a street car track at any point on the line, and at any time, the law imposes upon motormen the duty of exercising ordinary care to discover persons and avoid injuring them. Persons operating street cars are bound to know that men, women, and children have an equal right to use the highway, and will be upon it. It is their duty, therefore, to be on the lookout, and to avoid injury to persons who, because of some disability, are liable to injury if the car is not stopped. *Thiel v. South Covington & C. Street R. Co.* 25 Ky. L. Rep. 1590, 78 S. W. 206; *Levy v. Dry Dock, E. B. & B. R. Co.* 35 N. Y. S. R. 769, 12 N. Y. Supp. 485.

To be on the watch is no more than ordinary care under such circumstances. If, therefore, by being on the lookout, the driver of a street car, by the exercise of ordinary care, can discover the presence of a child on the track in time to avoid injuring it, it is his duty to do so. *Passamanek v. Louisville R. Co.* 98 Ky. 195, 32 S. W. 620.

Street railways have no exclusive right "to the use of the part of a street covered by their track, but all persons have the right to use the street for the purposes for which streets are ordinarily used; and, from this fact, such companies may expect that other persons will use the street, as they have the right to do, and it is therefore incumbent upon them to ascertain whether the track be clear." Hence, though a child under two years of age suddenly enters upon the track but a short distance in front of a car, yet, if an injury to it may be avoided by the exercise of proper care after the driver sees it, the railway company will be liable. *Galveston City R. Co. v. Hewitt*, 67 Tex. 479, 60 Am. Dec. 32, 3 S. W. 705.

The driver of a street car, who sees an object on the track at sufficient distance ahead to enable him to stop his car to avoid injury, and can ascertain the same to be a human being by checking his horses and driving slowly, but who, supposing the object to be a bundle of hay or sack of oats, drives recklessly over it, which proves to be a drunken man, is guilty of wilful injury. *Werner v. Citizens' R. Co.* 81 Mo. 368.

It is culpable negligence for the motorman of a street car company to run over a man lying in an unconscious condition upon the track in the night time, where the headlight of the car enables the motorman to see 25 feet

ahead of him, and the accident can be avoided by the exercise of ordinary care. *McKeon v. Steinway R. Co.* 20 App. Div. 601, 47 N. Y. Supp. 374.

Where a gripman in charge of a car testified that he did not see the plaintiff, a cripple, until she was about 5 feet from his car, when it was too late to stop the car before a collision, yet, if he had seen her as soon as two witnesses who called to her, he might have stopped the car in time to avoid the injury, it was held that the evidence presented a fair question for the jury whether the gripman could not have seen the plaintiff sooner than he did if he had been as vigilant as he ought to have been; and the court quotes the following statement of the law as to the duty of watchfulness on the part of street car drivers: "In a large, populous city, where all descriptions of vehicles are constantly passing and repassing, as well as persons on foot, including the aged and infirm, as also children who are young and wanting in prudence and discretion, it is the duty of drivers of cars, not only to see that the railroad track is clear, but also to exercise a constant watchfulness for persons who may be approaching the track. Unless he does so, he does not exercise that ordinary care and prudence which the law imposes on him." *Baltimore Traction Co. v. Wallace*, 77 Md. 435, 26 Atl. 518.

If the motorman of a street car, by the exercise of ordinary care, can see that his car has frightened a horse, which thereby has become unmanageable, and that there is danger of a collision, the company will be liable if the car is not stopped in time to avoid injury. *Lexington R. Co. v. Fain*, 25 Ky. L. Rep. 2243, 80 S. W. 463; *Ellis v. Lynn & B. R. Co.* 160 Mass. 341, 35 N. E. 1127.

All railroad companies are under an imperative obligation, upon approaching a road crossing, to use due care and caution to avoid injury to others lawfully traversing the highway; and to the extent that they fail to employ that care and caution they are responsible for injuries resulting from such omissions. There is a failure of such duty where a train is backed up over a crossing in a populous locality, without a bell being rung or other signal being given, and in charge of a brakeman who is at the time on the platform between two cars, where he cannot see a child upon the track, or have notice so as to apply the brakes. *Byrne v. New York C. & H. R. R. Co.* 83 N. Y. 620, 104 N. Y. 362, 58 Am. Rep. 512, 10 N. E. 539; *Lortz v. New York C. & H. R. R. Co.* 7 App. Div. 515, 40 N. Y. Supp. 253.

If the presence of a person with his foot caught in a frog at a switch at a crossing might have been discovered, by the exercise of ordinary care, in time to avoid injury, the railroad company is liable. *Illinois C. R. Co. v. Crockett*, 25 Ky. L. Rep. 1989, 79 S. W. 235.

It is the duty of an engineer to see that persons at a crossing act on the notice given by the ringing of the bell, and if he runs his train backwards he is not excusable because he does not, or cannot, see a person on a trestle adjoining the crossing, whither she had run to escape the sudden movement of the train toward her while crossing the track. *Robinson v. Western P. R. Co.* 48 Cal. 409.

Railroads are required to exercise "a high degree of care for the protection and safety of travelers upon the highway at and in proximity to public crossings in cities. It is their positive

duty to keep a lookout for such travelers, and to use every reasonable precaution consistent with the proper operation and management of their trains to avoid injuring them." The negligence of an engineer with respect to persons in peril at such places is measured not by what he knew, but by what any reasonably prudent and careful engineer would or should have known and done under similar circumstances. Therefore, where an engineer opened the steam cocks of his engine, and began to move the same, while plaintiff was trying to calm a frightened horse near the crossing, and thereby the horse became more frightened, and sprang down an embankment, and plaintiff was thrown from his buggy and injured, it was held error to instruct the jury that the railroad company's liability depended upon whether the circumstances within the knowledge of the engineer admonished him of plaintiff's danger. *Inabnett v. St. Louis, I. M. & S. R. Co.* 69 Ark. 130, 61 S. W. 570.

An engine driver operating an engine along a public thoroughfare, where old and infirm persons, children, and drunken persons are liable at all times to be present, is required to exercise more diligence than at other portions of the road, although such persons be negligent. What might be justifiable at other places might be such gross negligence at a street crossing as to amount to wilful misconduct. *Illinois C. R. Co. v. Hutchinson*, 47 Ill. 408.

Whether a railroad company is required to maintain a lookout or not, it is its duty to use reasonable care and diligence to prevent accidents at intersections of its right of way with city streets; and where a person with his foot caught in the track could have been discovered if a lookout for danger to persons on the track had been maintained, and the cars could have been stopped in time to prevent the accident, the question of the company's negligence is for the jury. *Goodrich v. Burlington, C. R. & N. R. Co.* 103 Iowa, 412, 72 N. W. 653.

A woman, not in charge of a child, undertook to carry it across a railroad track, but stumbled and fell, and the child was thrown upon the track before an approaching train and injured. The train was backing on a public street in a closely built part of the city without a lookout being maintained, and those in charge of the train were in such position that they could not see any considerable distance in the direction of the motion. It was held that the evidence of the railroad company's negligence was sufficient to go to the jury. *North Pennsylvania R. Co. v. Mahoney*, 57 Pa. 187.

In *Yoakum v. Mettash* (Tex. Civ. App.) 26 S. W. 129, a man who had fallen in a fit upon the railway track at a crossing was run over and killed, and it was contended that the law does not impose upon railway companies the duty of keeping a reasonable lookout for persons "upon their tracks." But the court held that, the deceased having gone upon the track at a private crossing, where he had a right to be, the authorities all agree that those in charge of the train were required to exercise ordinary care, not only to protect him when discovered in a helpless condition upon the track, but also to ascertain whether or not he was upon the track in such condition.

A contrary rule seems to be laid down in *Western Maryland R. Co. v. Kehoe*, 83 Md. 434, 35 Atl. 90, where it is said that, while railroad companies are under an imperative obligation, upon approaching a road crossing, to use due

care and caution to avoid injury to others lawfully "traversing the highway," yet this duty is "only coextensive with the correlative right of the individual to use the highway for purposes of transit," and is not applicable to a person who has been thrown upon the track through negligent driving, and is lying there when run over by a train.

And in Indiana a boy who lies down at a railroad crossing, and goes to sleep, with his leg over one rail, and who is of sufficient age to appreciate the danger, although not a trespasser, is guilty of contributory negligence, and cannot recover for injuries from being run over by a passing train, if those in charge of the train do not discover him. Because the engineer did not see the boy, it is said, he was not chargeable with wilful or wanton injury, and the lad's contributory negligence was a complete answer to any charge of simple negligence. *Krenzer v. Pittsburg, C. C. & St. L. R. Co.* 151 Ind. 587, 68 Am. St. Rep. 252, 43 N. E. 649, 52 N. E. 220.

In the opinion upon a rehearing in the case last cited the doctrine of *Davies v. Mann*, 10 Mees. & W. 546, is, in terms, approved; but the court says: "In every case, one who has himself contributed to his own injury must suffer the consequences of his own want of due care, unless it should appear that the one injuring him knew of his condition in time to have avoided the injury, and could with ordinary care have avoided it." The duty of being on the lookout in places where persons may be reasonably expected to be present, to prevent an action, which imperils human life, resulting in injury to others, is thus repudiated, as a care that is not due to helpless persons if they have been guilty of negligence. The duty of care as to such persons, the court holds, arises only "with knowledge," and then only because the absence of such care would amount to "wilful injury;" for it is said, "In order to charge the company with responsibility, there must have been either wilfulness or wantonness on its part, or else negligence; and in the latter case the plaintiff must himself have been free from contributory negligence." It will be perceived that the doctrine of this case, like that of the preceding Maryland case, is directly opposite to that of *Davies v. Mann*, which both courts assume to approve. For both courts deny recovery to the plaintiff for doing substantially the same thing that the owner of the donkey did in the English case, viz., placing himself in a helpless condition in the highway, where he would be subject to injury, unless others, while exercising ordinary care, should observe and avoid him. It is true, in the Maryland case, that, in being thrown from his carriage, the man fell a few feet away from the highway; but the court bases its opinion upon the fact that he was "lying upon the track," instead of being in the act of passing over it, when the train struck him. The dissenting opinion of McCabe, J., in the Indiana case is more in line with the doctrine of *Davies v. Mann*, as interpreted by the preponderance of authority. He says: "Even though the child be held responsible and guilty of negligence in falling asleep upon the railroad track with one leg across the rail, yet that negligence is shown by the findings of the jury to have been antecedent and prior to the established negligence of appellee's engineer. For 300 feet before reaching the child thus sleeping on the track, the engineer had a clear, un-

obstructed view of the child's situation and peril, and, as the findings show, could, by the exercise of ordinary care, have avoided running his engine over and crushing his leg. That being the case, the plaintiff's negligence was not proximate, and not a proximate cause of his injury, and did not proximately contribute thereto, according to the long-established legal principles both in this country and in England." It is evident that if the child asleep at the crossing was in a place where persons might reasonably be expected to be present, then the exercise of ordinary care required that defendant be on the lookout for persons at such place; and if, with such lookout, the child might have been discovered, and his injury avoided, his negligence in going to sleep on the track was not the proximate cause of his death, but the subsequent negligence of the defendant was such cause. This is the very question which *Davies v. Mann*, 10 Mees. & W. 546, determines, and its position is supported by the greater weight of authority.

As is well said in one of the leading works on Negligence, "The rule that a plaintiff is, as matter of law, negligent if he fails to see what he was bound to look for and ought to have seen, is rigidly enforced; and the same rule must, in common justice, be applied to the defendant." 2 Shearm. & Redf. Neg. 5th ed. § 484.

And the testimony of those operating a train that they did keep a lookout, but did not discover a helpless person upon the track, is not conclusive, although it is not contradicted by other witnesses. If a man who is required to watch in order to see an object says he did watch, but did not see it, when the object was there to be seen, and visible, and there was no obstruction to sight, and plenty of light, the court or jury is not bound to find that he did keep a lookout, but did not discover the object. *Gunn v. Ohio River R. Co.* 42 W. Va. 676, 36 L. R. A. 575, 26 S. E. 546. See further, cases cited under div. VI., subd. a, *supra*.

Second, as to duty to maintain lookout at places where persons are likely to be present, other than the highway and at crossings.

"When there is reason to apprehend that the track may not be clear notwithstanding the right of the company to have it clear, persons operating a train cannot act upon the presumption that the track is clear, without being responsible for the consequences." Therefore, some vigilance is required of a railroad company to discover trespassers on its tracks between streets in a town or city; and if an injury to a little child on a railroad track, between crossings in a city, might have been avoided if the engineer, by the exercise of ordinary care, could have discovered it in time to stop the train, the company is liable. *Frick v. St. Louis, K. C. & N. R. Co.* 75 Mo. 595; *Bellefontaine & I. R. Co. v. Snyder*, 18 Ohio St. 309, 98 Am. Dec. 175; *Pennsylvania R. Co. v. Lewis*, 79 Pa. 33; *Kay v. Pennsylvania R. Co.* 65 Pa. 269, 3 Am. Rep. 628; *Taylor v. Delaware & H. Canal Co.* 113 Pa. 162, 57 Am. Rep. 446, 8 Atl. 43; *Barry v. New York C. & H. R. R. Co.* 92 N. Y. 289, 44 Am. Rep. 377; *Daley v. Norwich & W. R. Co.* 26 Conn. 591, 68 Am. Dec. 413; *Sloniker v. Great Northern R. Co.* 76 Minn. 306, 79 N. W. 168; *Townley v. Chicago, M. & St. P. R. Co.* 53 Wis. 626, 11 N. W. 55; *Whalen v. Chicago & N. W. R. Co.* 75 Wis. 654, 44 N. W. 849; *South & North Ala. R. Co. v. Donovan*, 84 Ala. 141, 4 So.

142; *Roth v. Union Depot Co.* 13 Wash. 525, 31 L. R. A. 855, 43 Pac. 641, 44 Pac. 253; *Crawford v. Southern R. Co.* 106 Ga. 870, 33 S. E. 826; *Felton v. Aubrey*, 20 C. C. A. 436, 43 U. S. App. 278, 74 Fed. 350, 356; *Garner v. Trumbull*, 36 C. C. A. 361, 94 Fed. 321.

In such case, it is said, by Justice Andrews, in *Barry v. New York C. & H. R. R. Co.* 92 N. Y. 289, 44 Am. Rep. 377, *supra*, that the railroad company "is an actor at the time in creating the circumstances which imperil human life," and, therefore, owes to the people crossing its tracks the duty of exercising care in the movement of its trains.

And in *Kay v. Pennsylvania R. Co.* 65 Pa. 269, 3 Am. Rep. 628, *supra*, Justice Agnew says: "Conceding the right of the railroad company to the exclusive use of its tracks over the lot, as the learned judge held, the true question is whether the circumstances created a different duty. . . . Duties grow out of circumstances, the authorities tell us, and that which in one case would be an ordinary and proper use of one's rights may, by a change of circumstances, become negligence and a want of due care. . . . In the present case the negligence charged consisted of a positive act of carelessness, in sending a car round a curve out of sight, on a descending grade, at a place where persons might be expected to be, from the permissive use suffered by the company. It was the duty of the court, therefore, to have submitted the facts to the jury for their determination whether there was negligence or not."

But according to some authorities, upon a similar state of facts, the railroad company is not liable, unless the injury was wilful, or was inflicted maliciously, as with gross and reckless carelessness. *Morrissey v. Eastern R. Co.* 126 Mass. 377, 30 Am. Rep. 686; *Wright v. Boston & A. R. Co.* 142 Mass. 296, 7 N. E. 866; *Byrnes v. Boston & M. R. Co.* 181 Mass. 322, 63 N. E. 897; *Griswold v. Boston & M. R. Co.* 183 Mass. 434, 67 N. E. 354; *Baltimore & O. R. Co. v. Allison (Md.)* 19 Am. & Eng. R. Cas. 83; *Glass v. Memphis & C. R. Co.* 94 Ala. 581, 10 So. 215, *Reversing*, in effect, *South & North Ala. R. Co. v. Donovan*, 84 Ala. 141, 4 So. 142.

"Where a number of children, ranging in age from six to fifteen years, are, with the knowledge and without the disapproval of the employees of a railroad company in charge of its trains, permitted to board and ride upon the trains while they are passing over a side track through a playground of the children to a point beyond, and while they are returning from such point to the main line of the road, the children alighting from the trains at the limits of the playground both going and returning; and this custom is a continuous one, engaged in whenever the trains enter the playground,—it is the duty of the employees of a train, who are aware of this custom, to anticipate that when the train enters the playground the children will attempt to ride upon it and alight from it at the point where they have been accustomed to do so; and they are under a further duty, consequent upon the first, to take proper measures to prevent injury to such children." *Ashworth v. Southern R. Co.* 116 Ga. 635, 59 L. R. A. 592, 43 S. E. 36.

The opinion in the last-cited case refers to the following cases in which railroad companies were held under similar circumstances to the exercise of care to discover persons on their tracks: *St. Louis S. W. R. Co. v. Abernathy*, 69 L. R. A.

28 Tex. Civ. App. 613, 68 S. W. 539; *Thompson v. Missouri, K. & T. R. Co.* 11 Tex. Civ. App. 307, 32 S. W. 191; *Louisville & N. R. Co. v. Popp*, 96 Ky. 99, 27 S. W. 992; *Tully v. Philadelphia, W. & B. R. Co.* 2 Penn. (Del.) 537, 82 Am. St. Rep. 425, 47 Atl. 1019.

Where a railroad trestle has been in constant and daily use as a walk-way for some years by a large number of persons in the vicinity, and such use is well known to the railroad company and its employees, it is the duty of the company to use reasonable care to discover, and not to injure, persons it may reasonably expect to be on its track at such point, whether they are trespassers or licensees, and although at each end of the trestle is placed, in conspicuous letters, the warning, "Caution. Keep off the bridge." *Chesapeake & O. R. Co. v. Rodgers*, 100 Va. 324, 41 S. E. 732; *Cassida v. Oregon R. & Nav. Co.* 14 Or. 551, 13 Atl. 438; *Patton v. East Tennessee, V. & G. R. Co.* 89 Tenn. 370, 12 L. R. A. 184, 15 S. W. 919; *Hooker v. Chicago, M. & St. P. R. Co.* 76 Wis. 542, 44 N. W. 1085.

A man of the age of seventy-seven years, and, feeble in mind, was found by one of defendant's employees walking between tracks in its tunnel. Upon the direction of the employee, he attempted to take a position close to the side of the tunnel, to get out of the way of an approaching car, and fell into a conduit. The employee then undertook to lift him out of his perilous position, but before he could do so the car came upon them, and, the man refusing to put his head down in the conduit while the car passed over him, he received injuries from which he died. There was evidence that, if the motorman had maintained a lookout ahead, he would have discovered the men in time to prevent the accident. It also appeared that, while defendant maintained the sign "No admittance" at the entrance of the tunnel, it was used by numbers of people daily to the knowledge of defendant's motormen. It was held that defendant was negligent in not discovering the perilous position of the men in time to stop the car. "Whenever the motorman or engineer, in the operation of its cars, before reaching a point along the line of its railway, has reasonable ground to expect or anticipate the presence of persons so near the railroad track as to endanger them, then the law, through its high regard for the preservation of human life, requires and demands such operatives to be on the alert, and to keep a lookout for the realization of the anticipation or expected presence of the person. . . . On the other hand, the operatives of a railway are entitled to the presumption that there is a clear track, and, while care and caution should be exercised in the operation of their trains, they are not responsible to trespassers for failure to be on the alert to discover them, in the absence of any reasonable grounds for the expectation or anticipation of their presence on the track." *Fearons v. Kansas City Elev. R. Co.* 180 Mo. 208, 79 S. W. 398.

b. *Whether duty exists as to trespassers.*

Upon the duty of railroad companies to maintain a lookout for persons generally, including trespassers, see notes, *Duty as to persons exposed to danger on railroad tracks*, 6 L. R. A. 243; *Railroad company; duty owed to intruders and trespassers*, 10 L. R. A. 139; *Railroad company; duty to avoid injury to tres-*

passers on its premises, 18 L. R. A. 248; and *Duty to maintain lookout on railroad train*, 25 L. R. A. 287.

If a trespasser is injured through the proper and usual use of premises, when the owner is without knowledge of his presence, the fault would seem to be his own, for the owner has not been guilty of any wrong in such use of his own property. But does the owner of property owe any duty to a trespasser to use ordinary care to discover his presence, and the fact that because of some disability he is unconscious of his peril, or unable to escape from it, and on that account to endeavor to avoid the infliction of injury, when the ordinary use of his property is calculated to have such result? The conclusive answer to this question would seem to be, that the owner has the right to presume that persons will not be found where they have no business to be, and to rely upon that presumption until he has actual knowledge of their presence. The authorities which deny the existence of a duty to discover the presence of trespassers reach that conclusion from three different standpoints or premises, while another line of authorities affirms the existence of such duty:

First. The rule approved by the preponderance of authority, is that the duty of exercising ordinary care to avoid injury to another is due to trespassers as well as to other persons, but that such duty does not arise as to trespassers until their presence or disability is discovered, and hence no duty exists to discover their presence. *Purcell v. Chicago & N. W. R. Co.* 109 Iowa, 628, 77 Am. St. Rep. 557, 80 N. W. 682, 117 Iowa, 667, 91 N. W. 933; *Thomas v. Chicago, M. & St. P. R. Co.* 93 Iowa, 248, 255, 61 N. W. 967; *Western Maryland R. Co. v. Kehoe*, 83 Md. 435, 35 Atl. 90; *Omaha & R. Valley R. Co. v. Cook*, 42 Neb. 577, 60 N. W. 899, *Opinion on rehearing*, 42 Neb. 905, 62 N. W. 235; *Donahoe v. Wabash, St. L. & P. R. Co.* 83 Mo. 543; *Barker v. Hannibal & St. J. R. Co.* 98 Mo. 50, 11 S. W. 254; *Zumault v. Kansas City Suburban Belt R. Co.* 175 Mo. 288, 74 S. W. 1015; *Carrier v. Missouri P. R. Co.* 175 Mo. 470, 74 S. W. 1002; *Central R. & Bkg. Co. v. Vaughan*, 93 Ala. 209, 30 Am. St. Rep. 50, 9 So. 468; *Pannell v. Nashville, F. & S. R. Co.* 97 Ala. 298, 12 So. 236; *Southern R. Co. v. Bush*, 122 Ala. 470, 26 So. 168; *St. Louis, I. M. & S. R. Co. v. Hill (Ark.)* 86 S. W. 303; *Esrey v. Southern P. R. Co.* 88 Cal. 399, 26 Pac. 211, 103 Cal. 541, 37 Pac. 500; *Becker v. Louisville & N. R. Co.* 110 Ky. 474, 53 L. R. A. 267, 96 Am. St. Rep. 459, 61 S. W. 997; *Vanarsdall v. Louisville & N. R. Co.* 23 Ky. L. Rep. 1666, 65 S. W. 858; *Anderson v. Chicago, St. P. M. & O. R. Co.* 87 Wis. 195, 23 L. R. A. 203, 58 N. W. 79; *New York, N. H. & H. R. Co. v. Kelley*, 35 C. C. A. 671, 93 Fed. 745.

In *Sheehan v. St. Paul & D. R. Co.* 22 C. C. A. 121, 46 U. S. App. 498, 76 Fed. 201, where recovery was denied to a boy injured by a railroad train running over him while his foot was caught in a cattle guard, it is held that, as to trespassers, the duty of a railroad company is not "pre-existing, but arises at the moment of discovery, and is negative in its nature,—a duty which is common to human conduct, to make all reasonable effort to avert injury to others from means which can be controlled. . . . It excludes all inquiry respecting the character of the roadbed, cattle

guard, locomotive, brake appliances, . . . or of the speed or manner of running the train up to the moment of notice, because no breach of positive duty is involved. It is confined to the evidence relating to the discovery, by the engineer and fireman of the plaintiff's peril, and to the efforts then made to avert the injury, and, out of that, to ascertain whether, in any view which may justly be taken, it is shown that these men or the engineer, in disregard of the duty which then confronted them, neglected to employ with reasonable promptness the means at hand for stopping the train."

Since a railroad company is not bound to watch for trespassers on its tracks, it is not chargeable with negligence in not discovering a boy trespasser blinded with smoke and cinders from a passing train, although he might have been discovered in time to avoid a collision. *Masser v. Chicago, R. I. & P. R. Co.* 68 Iowa, 602, 27 N. W. 776.

Nor for its failure to discover a girl, who has seated herself upon the track in the nighttime, and there fallen asleep, or been taken suddenly ill. *Parish v. Western & A. R. Co.* 102 Ga. 285, 40 L. R. A. 364, 29 S. E. 715.

The fact that a person walking on a railroad track is suddenly overcome by sickness, and then rendered helpless, does not impose upon the company any greater degree of care than it owes to persons in full vigor of mind and body, which is to guard against injury to them, after it is made aware of their peril. It is not bound to anticipate their presence on the track. *Louisville & N. R. Co. v. Thompson*, 14 Ky. L. Rep. 815.

Neither does the fact that a trespasser on the track is deaf alter the rule, if those in charge of the train causing the injury are not aware of his disability. *Louisville & N. R. Co. v. Cooper*, 7 Ky. L. Rep. 102; *Mobile & O. R. Co. v. Stroud*, 64 Miss. 784, 2 So. 171; *Carrier v. Missouri P. R. Co.* 175 Mo. 470, 74 S. W. 1002.

Though the engineer of a train is reading instead of being on the lookout, and in consequence runs over a man asleep on the track, the railroad company is not liable, although if the usual lookout had been kept the engineer would have discovered the trespasser, and could easily have prevented the accident. *Williams v. Southern P. R. Co.* 72 Cal. 120, 13 Pac. 219.

In *Newport News & M. Valley Co. v. Howe*, 3 C. C. A. 121, 6 U. S. App. 172, 52 Fed. 362, it is said that an engineer who fails to keep a sharp lookout upon the track is not wanting in due care with respect to a man asleep upon the track, because of the presumption, upon which the engineer has a right to rely, that no one would be so grossly negligent in courting death.

Neither is there any reason for anticipating the presence of an infant, more than of an adult, lying on a railroad track, at a point where he has no right to be. *Goodman v. Louisville & N. R. Co.* 63 L. R. A. 657, 25 Ky. L. Rep. 1086, 77 S. W. 174; *McMullen v. Pennsylvania R. Co.* 132 Pa. 107, 19 Am. St. Rep. 591, 19 Atl. 27.

In *Louisville & N. R. Co. v. Logsdon*, 26 Ky. L. Rep. 457, 81 S. W. 637, it is held that elsewhere than in towns and cities, or where for any reason the presence of persons on the track should be anticipated, a railroad is under no more obligation to keep a lookout for a child trespasser than for an adult, and is bound to

use all reasonable care to prevent injury only after the peril of either is discovered. And it is said: "If infants were made an exception to the rule, and railroad companies were required to keep a lookout for them at all places along their track, on account of their helplessness, the same principle would have to be applied to idiots, lunatics, epileptics, the deaf, the blind, and the like. This would destroy the rule and make it inconsistent with itself, for, if the presence of no persons is to be looked for on the track, the presence of persons infirm or unable to take care of themselves is not to be anticipated, and the defendant cannot be required to guard against a danger which is not to be anticipated by a person of ordinary prudence."

The fact that a man sixty years of age, decrepit, hard of hearing, and with defective sight, might have been discovered walking on a railroad trestle in time for the company's employees to stop the train which ran him down, if a proper lookout had been maintained, will not render the company liable, if the injured party was not in fact seen until too late to avoid injury. *Maloy v. Wabash, St. L. & P. R. Co.* 84 Mo. 270.

Neither is the company liable for an error of judgment on the part of the engineer, in failing to identify an object on the track as a sleeping man until it is too late to stop the train. *New York, N. H. & H. R. Co. v. Kelly*, 35 C. C. A. 571, 93 Fed. 745; *Murch v. Western N. Y. & P. R. Co.* 78 Hun, 601, 29 N. Y. Supp. 490.

Failure to stop a train upon first sight of an object, which the engineer then thought to be something other than a human being, but which, at length, was discovered to be a child, will not fix the liability of the railroad company. "The test of responsibility is, did the striking of the child by the train occur after the engineer had seen,—not might or ought to have seen,—that is, discerned or distinguished, the girl. Until the girl had been seen—discerned to be a human being—the engineer was under no obligation to the trespasser to check or stop his train, whatever may have been his obligation to the passengers who were being hauled by him." *Louisville, N. O. & T. R. Co. v. Williams*, 69 Miss. 640, 12 So. 957.

In an action for injuries received by a man who negligently sat down between two cross-ties of a railroad track, and went to sleep, with his head resting on his hand, and inclined toward the rail nearest him, evidence is not admissible to show that the track at the place of the accident, and for a long distance on either side of such place, is level and straight, so that an object on it no larger than a man's hat may be seen for 400 or 500 yards. *Denman v. St. Paul & D. R. Co.* 26 Minn. 357, 4 N. W. 605.

What appears to be a lucid and accurate statement of a railroad company's relation to trespassers upon its tracks is found in *Seaboard & R. R. Co. v. Joyner*, 92 Va. 354, 23 S. E. 773, where a man was lying on the track with his head in the hollow of his arm; and it is said that a railroad company has the exclusive right to the uninterrupted enjoyment of its roadbed, track, and other property. It owes no special duty to mere trespassers; but, when it is said that it owes to trespassers "only the duty of ordinary care, it is intended merely to say that trespassers are not entitled to that

provident circumspection which, as far as possible, foresees and forestalls danger. That high degree of duty is owed to passengers only,—but, where the danger of the trespasser is discovered, it then becomes the duty of the railroad company to avoid the infliction of injury, without regard to the fact that the trespasser was himself guilty of contributory negligence. It is then incumbent upon the company to do all that can be done, consistently with its higher duty to others, to save the trespasser from the consequences of his own improper act." This statement of the law is approved in *Tucker v. Norfolk & W. R. Co.* 92 Va. 549, 24 S. E. 229; *Norfolk & W. R. Co. v. Dunnaway*, 93 Va. 29, 38, 24 S. E. 698.

In *Blankenship v. Chesapeake & O. R. Co.* 94 Va. 449, 457, 27 S. E. 20, the rule making railroad companies liable for injury to a trespasser after his peril was discovered, "or by ordinary care and caution might have been discovered," which is supported by some authorities, is construed to mean, not that it is the duty of a railroad company to keep a lookout for trespassers, but that, where it has such notice or belief that someone may be in danger as ought to put a prudent man on the alert, it then becomes the duty of the company to be on the lookout. This case may be said, therefore, to overrule *Tyler v. Sites*, 88 Va. 470, 13 S. E. 978, 90 Va. 539, 19 S. E. 174, where it is said, without qualification, that "a railroad company is bound to keep a reasonable lookout for trespassers upon its track."

The distinction made in the *Blankenship* Case is important, though it is difficult to discover its application under the circumstances there presented. It is this,—that, while a railroad company does not owe to a trespasser the duty to discover his presence upon the track, yet, where the attention of those operating a train is arrested by seeing an indistinguishable object on the track, which may be a human being, it then becomes their duty to discover what that object is, and whether, because of some disability, if a human being, it will be necessary to stop the train to avoid injury. The point is not always so clearly made, but the principle finds general recognition in the decisions, which, in the language of Lord Denman in *Colchester v. Brooke*, 7 Q. B. 377, is that everyone in the conduct of that which may be harmful to others, if misconducted, is bound to use due care and skill, even as to a wrongdoer. See in support of the rule, cases cited under div. VI., b, *supra*, and div. VII., c, *infra*.

And further, if the disabled trespasser is in a place where the presence of persons may be reasonably expected, and by the exercise of ordinary care he might be discovered, and the infliction of injury avoided, then the failure to discover him is negligence. *Fearons v. Kansas City Elev. R. Co.* 180 Mo. 208, 79 S. W. 304. And see cases cited under the last preceding division of this note.

Second. The duty to discover a trespasser's disability is likewise denied in those jurisdictions which repudiate the doctrine that such care is due to one who has exposed himself to the risk of injury. In such jurisdictions the only duty owing a trespasser is to refrain from wilful or wanton injury. And this is true whether he happens to be suffering from some disability or not.

As to trespassers, the liability of a rail-

road company is measured by the conduct of its employees after they become aware of their presence upon the track. That liability, however, after such knowledge, cannot be fixed by the negligence of such employees, and this for the reason that, as to such negligence, the contributory negligence of appellee (trespasser) would defeat his right of recovery. No liability can arise, therefore, for the failure of a railroad company to discover a trespasser upon its right of way, though he is suffering from some disability. *Palmer v. Chicago, St. L. & P. R. Co.* 112 Ind. 250, 254, 14 N. E. 70.

A trespasser upon a switch track laid through a narrow archway in a mill, from which there is no means of escape from a train running thereon, cannot recover for injuries from collision with a train run through the arch at an excessive speed, although persons are in the habit of passing through the arch, since the railroad company is not required to anticipate their presence. *Parker v. Pennsylvania Co.* 134 Ind. 673, 23 L. R. A. 552, 34 N. E. 504.

A railroad company owes no duty to discover a trespasser who has his foot caught in its track, and it cannot be held liable for running over him in ignorance of his situation. It has the right to run its trains without reference to such intrusion, and, even after the trespasser is seen upon the track by those in charge of a train, they may act upon the presumption that he will step aside in time to avoid a collision, unless it is also obvious that, owing to his condition or circumstances over which he has no control, he cannot extricate himself from the danger which menaces him. *St. Louis, I. M. & S. R. Co. v. Monday*, 49 Ark. 257, 4 S. W. 782; *Louisville, N. A. & C. R. Co. v. Phillips*, 112 Ind. 59, 2 Am. St. Rep. 155, 13 N. E. 132.

Where it appears that the person injured by a railroad train was lying upon the track, the burden is upon the plaintiff, and not upon the defendant, to prove that the presence of the deceased might have been discovered in time to avoid injury, and that the railroad company willfully or recklessly killed him. *St. Louis & S. F. R. Co. v. Townsend*, 69 Ark. 380, 63 S. W. 994; *Parish v. Western & A. R. Co.* 102 Ga. 285, 40 L. R. A. 364, 29 S. E. 715.

Third. Another line of authorities recognizes the rule that the previous negligence of a party, exposing him to danger, is not an excuse for an injury through another's negligence, if by the exercise of ordinary care the injury might have been avoided, but holds that trespassers are not within the rule, because a party who infringes upon the rights of others absolves them from using ordinary care and diligence toward him. Hence, it is held, with the cases cited above, that the only duty owing a trespasser is to refrain from wilful or wanton injury. As in the cases above cited, the rule is applied without regard to the existence of any disability. *Mason v. Missouri P. R. Co.* 27 Kan. 83, 41 Am. Rep. 405; *Kansas P. R. Co. v. Whipple*, 39 Kan. 531, 18 Pac. 730; *Morrissey v. Eastern R. Co.* 126 Mass. 377, 30 Am. Rep. 686; *Grissold v. Boston & M. R. Co.* 183 Mass. 434, 67 N. E. 354; *Cleveland, C. C. & St. L. R. Co. v. Cline*, 111 Ill. App. 416; *Johnson v. Truesdale*, 46 Minn. 345, 48 N. W. 1136; *Philadelphia & R. R. Co. v. Hummell*, 44 Pa. 375, 84 Am. Dec. 457; *Cauley v. Pittsburgh, C. & St. L. R. Co.* 95 Pa. 398, 40 Am. Rep. 664; 60 L. R. A.

Brague v. Northern C. R. Co. 192 Pa. 242, 43 Atl. 987; *Smalley v. Southern R. Co.* 57 S. C. 243, 35 S. E. 489.

A child seven years of age, asleep upon a railroad track, being a trespasser, the engineer's duty is measured and covered by his abstention from wilful or wanton negligence. *Louisville, N. O. & T. R. Co. v. Williams*, 69 Miss 631, 12 So. 957.

This seems formerly to have been the rule in New York. For instance, in *Tonawanda R. Co. v. Munger*, 5 Denio, 255, 49 Am. Dec. 239, 4 N. Y. 349, 53 Am. Dec. 384, which was an action for killing an animal trespassing on defendant's track, it is said that "a man is under no obligation to be cautious and circumspect toward a wrongdoer." But it is further said that "injuries inflicted by design are not thus to be excused. A wrongdoer is not necessarily an outlaw, but may justly complain of wanton and malicious mischief."

A boy injured while lying on his back on a railroad track, between two coal cars, with his legs over one rail, cannot recover damages from the railroad company where his presence was not known until after the injury. *McMullen v. Pennsylvania R. Co.* 132 Pa. 107, 19 Am. St. Rep. 591, 19 Atl. 27.

In *Cleveland, C. C. & St. L. R. Co. v. Cline*, 111 Ill. App. 416, it is held that, although one is compelled to leave the highway in order to get around a freight train standing at the crossing, he is a trespasser; and, since the railroad company does not owe him the duty of ordinary care, it is not liable for backing a train upon him without a lookout, where his foot is caught in the track.

A strong dissent from the doctrine of the foregoing cases is pronounced by Chief Justice Agnew, though speaking for the court, in a case where a trespassing child was killed by a train running through a populous district at an excessive speed. He says: "Does no duty rest upon a railroad company because it is running upon its own track, unfenced and unguarded? Surely we must not disregard the habits, character, and condition of a people accustomed to run thoughtlessly and heedlessly into danger. We must take into account the feebleness of age and helpless infancy, the infirmity of mind and body of many living on a railroad track, their want of reflection and unthinking heedlessness, their want of apprehension of danger, and entire absence of injury they suppose they do to the hard, rough track of a railroad; the many motives they have to do an act which, though a trespass, is seemingly to them no cause of complaint. Surely the courts have not lost their power to declare what is ordinary prudence and care in the use of its track by a railroad company merely because the track is its own, and no one may rightfully trespass there. The circumstances which qualify this right must be taken into account and submitted to a jury under proper instructions." This authority, it will be seen, imposes upon railroad companies the reasonable duty of exercising ordinary care, even as to trespassers, in places where people are likely to be present. *Pennsylvania R. Co. v. Lewis*, 79 Pa. 33.

Fourth. In Maryland, North Carolina, Tennessee, Texas, and West Virginia the frequency with which railroad tracks are used as a highway, and the consequent reasonableness for expecting the presence of persons in such places, seem to have led the courts of those states to

hold that if, in the performance of the general duty of railroad companies to keep a vigilant lookout for animals or other obstacles upon their tracks, a trespasser may be discovered in time to avoid injury, then the failure so to discover him is negligence.

A man goes upon a railroad track at a time and place when no danger is nigh and while there, by some accident or providential cause, becomes insensible, and so remains perhaps, for hours, until the time for a train comes around. "Although he originally goes on the track wrongfully, it is under circumstances threatening no direct injury, nor, being on the track, does he do anything 'positive or negative to contribute to the immediate injury.' . . . If the engineer on the approaching train keeps that lookout which is required of him at all times, not only to secure the safety of the train, but to avoid injury to any animal or person on the track, this person lying there in open view must be discovered. Not to discover him is, under the circumstances, negligence, and that negligence is the proximate cause of the injury; whilst the negligence of the party in going on the track is only a remote cause." *Houston & T. C. R. Co. v. Symptkins*, 54 Tex. 620, 38 Am. Rep. 632.

In *Houston & T. C. R. Co. v. Harvin* (Tex. Civ. App.) 54 S. W. 629, where a man hard of hearing, who was walking on a railroad track, was run down by a train while the engineer and fireman were looking backward instead of forward, the court approved an instruction to the jury, "that it is the duty of the employees of a railway company operating its train to use reasonable care to discover and to avoid injuring persons who may be upon its track, the degree of such care being such as a person of ordinary prudence and caution would commonly exercise under like circumstances, and varying as the known probability of danger may vary along the different portions of the route over which trains are run; and a failure to use such care by its employees is negligence."

In later decisions the Texas courts have refused to extend the rule of the foregoing cases to persons going to sleep upon a railroad track, but just why the duty should be imposed as to one class of trespassers, and not to another, is not apparent. *St. Louis S. W. R. Co. v. Shiflet*, 94 Tex. 131, 53 S. W. 945; *Smith v. International & G. N. R. Co.* (Tex. Civ. App.) 78 S. W. 556.

Railroad companies being required to keep a lookout for live stock, and to use ordinary care to prevent injury to it, certainly the same care should be required so far as children, deaf and other disabled persons are concerned, if not as to others. While public interest and necessity demand that a railroad company have sole possession of its track, yet, since people live and move along the route, and do go upon the track, and children, in their thoughtlessness and indiscretion, will go upon it, and stock will wander upon it, sheer necessity demands that those in charge of a train shall, by keeping a reasonable lookout, use ordinary care to discover animals and persons on the track, to save both them and passengers from injury. *Gunn v. Ohio River R. Co.* 42 W. Va. 676, 36 L. R. A. 575, 26 S. E. 546.

Under a statute of Tennessee requiring railroad companies to keep a constant and vigilant lookout for objects on their tracks, the failure to discover and give warning to a sleeping

boy upon the track, where he could have been seen for $\frac{1}{4}$ of a mile distant, renders the railroad company liable for his injuries. *East Tennessee & G. R. Co. v. St. John*, 5 Sneed, 524, 73 Am. Dec. 149.

And, even under circumstances not within the statute, it is held, in *Patton v. East Tennessee, V. & G. R. Co.* 89 Tenn. 370, 12 L. R. A. 184, 15 S. W. 919, that where a person walking on a trestle was killed by being run down by a detached section of a freight train, the railroad company was negligent in not having some one on the lookout on the detached cars. "Where cars are being moved by gravitation, and therefore with comparatively little noise, we think the duty quite clear that a railway company should have someone on the lookout for the purpose of warning persons on the track. . . . At crossings and points where, by license, express or implied, the track is used as a walk way, the more imperative the duty. But the duty is not altogether relaxed by the fact that this injury probably occurred at a point where the public had no rights."

The adoption of the above rule in North Carolina has been in repudiation of the rule of the earlier cases in that state. In *Herring v. Wilmington & R. R. Co.* 32 N. C. (10 Ired. L.) 402, 51 Am. Dec. 395, it appeared that the engineer of a railroad train might have seen two little negroes lying on the track asleep at a distance of from 200 yards to $\frac{1}{2}$ mile, but did not actually discover them until within 25 or 30 yards of the place where they were lying, when it was too late to stop the train before running over them. It was held that the railroad company was not liable for the neglect to keep a lookout, whereby the children might have been discovered; nor was it responsible for the engineer's failure to use the appliances at his command to stop the train until he actually saw the children asleep on the track. And in *Manly v. Wilmington & W. R. Co.* 74 N. C. 655, it is held that running a train over a child of ten years, asleep upon the track, is not negligence, where the child's presence was not discovered by the engineer until 150 feet distant, and he then supposed it to be a hog, and blew the whistle, but, upon discovering it was a human being, reversed the engine, and endeavored to stop the train, but without avail.

But in *Deans v. Wilmington & W. R. Co.* 107 N. C. 686, 22 Am. St. Rep. 902, 12 S. E. 77, the court repudiates the rule of the above cases, and holds that it is the duty of an engineer to keep a careful lookout along the track to discover obstructions, whether at a crossing or elsewhere, and that if thereby the engineer, in the exercise of due diligence, might have discovered a drunken man lying apparently helpless upon the track, in time to stop the train before it reached him, and failed, through negligence, to make such discovery the railroad company was liable for the damage sustained.

The doctrine of the case last cited is reaffirmed in *Pickett v. Wilmington & W. R. Co.* 117 N. C. 616, 30 L. R. A. 257, 53 Am. St. Rep. 611, 23 S. E. 264, which directly raises the question whether a railroad company is liable for the death of a man who deliberately lies down upon its track, and either carelessly or intentionally falls asleep there, unless the engineer of the train running over him actually sees him lying there in time to stop the train by the reasonable use of appliances at his com-

mand. In a well-considered opinion, the court expressly repudiates the doctrine that the duty of a railroad company to keep a vigilant lookout before its trains does not exist as to trespassers on its track, and holds that if a person thus asleep is injured through the failure to maintain such lookout, when otherwise he could have been discovered, and the catastrophe avoided, the railroad company is liable. The position of the court is well stated in the following language of the opinion: "When this court declared it the duty of an engineer to exercise reasonable care in looking out for animals on the track, it became equally a duty as to all those classes of persons who, if actually seen by him, would be entitled to demand that he use all the means at his command to avert injury to them. . . . As we hold that the duty on the part of the engineer of watchfulness to protect life is an ever-present one, attending him everywhere, and extending to the people in the remote country as well as in the towns, it necessarily follows that the opportunities that grow out of duty performed are coextensive with the duty prescribed, and may arise wherever it exists. We are of opinion that when, by the exercise of ordinary care, an engineer can see that a human being is lying apparently helpless, from any cause, on the track in front of his engine, in time to stop the train by the use of the appliances at his command, and without peril to the safety of persons on the train, the company is liable for any injury resulting from his failure to perform his duty." To the same effect are *Smith v. Norfolk & S. R. Co.* 114 N. C. 755, 25 L. R. A. 287, 19 S. E. 863, 923; *Norwood v. Raleigh & G. R. Co.* 111 N. C. 240, 16 S. E. 4; *Upton v. South Carolina & G. Extension R. Co.* 128 N. C. 173, 38 S. E. 736; *Carter v. Southern R. Co.* 135 N. C. 498, 47 S. E. 614.

An idiot may recover for injuries sustained from being run over by a railroad train, if the engineer saw him, or by the exercise of ordinary care could have seen him, and had actual knowledge, or reasonable ground for the belief, that, on account of some mental or physical infirmity, he could not assume that the idiot would step off the track in time to avoid injury. *Daily v. Richmond & D. R. Co.* 106 N. C. 301, 11 S. E. 320.

In Maryland, likewise, the decisions upon the question are conflicting. In *Baltimore & O. R. Co. v. State*, 33 Md. 542, it is held that a public notice at the entrance of a railroad viaduct, for persons to keep off, does not relieve the railroad company from the duty to exercise ordinary care to keep a lookout from its trains, and to give the usual warning to one trespassing on the track, and about to enter the viaduct. But in *Western Maryland R. Co. v. Kehoe*, 83 Md. 434, 452, 35 Atl. 90, it is said that, "until the employees are made aware of the peril arising from an act of negligence on the part of the plaintiff, they are under no obligation to assume that he will be negligent, or will be in a dangerous place which he has no right to occupy; and consequently they owe him no duty to anticipate that he will be where he ought not to be, or to guard in advance against the possible, or even probable, results of his unknown wrongful occupancy of the tracks." Therefore a railroad company is not negligent in not discovering a person lying beyond the limits of the highway, with his leg across a rail of its track, whither

he has been thrown from his buggy, as a result of his reckless driving. Finally, in *Baltimore Consol. R. Co. v. Armstrong*, 92 Md. 554, 54 L. R. A. 424, 48 Atl. 1047, it is said: "The difference between the modification of the general principle recognized as proper in *Maryland C. R. Co. v. Neubaur*, 62 Md. 391, and that sanctioned by this court in the recent cases, is simply that in the former case the defendant was held liable if he could, by the exercise of reasonable care after he became aware of the plaintiff's peril, have averted the accident, and in the latter cases he was held liable if he could have prevented it after he became, or ought to have become, aware of the peril. There is no difference in principle between these two forms of instruction to the jury, for it cannot be seriously contended that when the defendant is in a position from which he ought to see, or by the exercise of reasonable care could see, the plaintiff's peril, he may avert his face or close his eyes and not see it, and then escape liability for an injury resulting from such conduct on his part."

c. *What is sufficient notice of peril or disability.*

The notice which imposes the duty of using precautionary means to avoid injury to a person in peril need not amount to positive knowledge. The duty may arise before the presence of the person is discovered, where there are circumstances indicating the probability of danger to human life, such as would induce action by a person of ordinary prudence. It has been so held where a locomotive engineer sees persons running toward the track, and signaling him to stop, though a person on the track is not seen by him. Upon the same principle, it would seem that, when a person is seen in a place where he is liable to be injured by another's action, ordinary care requires that a watch be kept of his movements; and if thereby it becomes apparent that the person is under some disability, which prevents him caring for his own safety, due effort must be made to avoid injury. And the same is true where an object in the path of danger is discovered, but doubt exists as to whether it is animate or inanimate. But, as to the sufficiency of the notice in such cases to require a resort to precautionary measures, the authorities are not agreed, even in those jurisdictions imposing the duty of ordinary care to avoid the consequences of another's negligence. And no such obligation exists, of course, toward trespassers, in those states which hold that the only duty owing such persons is not wilful or wantonly to injure them. In any event the notice must be in time to allow a resort to preventive effort.

When persons in charge of a railroad train discover the peril of a person on the track, "or are in a position where they ought to have discovered it,—a position in which the circumstances, movements, or condition of the person injured would manifest to a vigilant observer that such person is unaware of his peril, or, if aware of it, is unable to extricate himself,—a culpable omission to use the means in hand to prevent an accident, when a prompt resort thereto might have prevented it, without endangering the freight or passengers being transported on the train, will be regarded as reckless or intentional negligence. On the other hand, the rule does not apply where the manifestation of the peril and the catastrophe are

so close in point of time as to leave no room for preventive effort." *Fraser v. South & North Ala. R. Co.* 81 Ala. 185, 60 Am. Rep. 145, 1 So. 85; *Louisville & N. R. Co. v. Coleman*, 86 Ky. 556, 6 S. W. 438, 8 S. W. 875; *Robbins v. Springfield Street R. Co.* 165 Mass. 30, 42 N. E. 334.

In an action against a railroad company for running over a deaf-mute on its track, the question is not whether the man was bereft of any of his faculties, but whether there was enough in his appearance to indicate any such infirmity on his part to the engineer of the train. *Tyler v. Sites*, 90 Va. 539, 19 S. E. 174.

If there is anything disclosed in the conduct or appearance of a person on a railroad track which raises a suspicion that he is deaf, or blind, or helpless, then the obligation on the part of the trainmen immediately arises to use all necessary and proper care to avoid injuring him, and to stop the train if necessary. *Cincinnati, H. & D. R. Co. v. Murphy*, 17 Ohio C. C. 223; *Mobile & O. R. Co. v. Stroud*, 64 Miss. 784, 2 So. 171; *Omaha & R. Valley R. Co. v. Cook*, 42 Neb. 577, 60 N. W. 899.

"It makes no difference how short an interval occurs between the negligent act of the plaintiff, in going upon the trestle and that of the defendant, if the latter has time to discover the danger and avert it by the exercise of ordinary care." *Clark v. Wilmington & W. R. Co.* 109 N. C. 430, 14 L. R. A. 749, 14 S. E. 43; *Missouri P. R. Co. v. Weisen*, 65 Tex. 443.

The moment that an aged man is seen upon a railroad trestle over 8 feet in height his peril is manifest and imminent, a warning that he is taking no heed for his own safety, and the railroad employees in charge of a train are required to exercise reasonable care to avoid a collision. They are not permitted to speculate whether he will jump from the bridge, or lie down, or in some other way get out of harm's way. *Purcell v. Chicago & N. W. R. Co.* 109 Iowa, 628, 77 Am. St. Rep. 557, 80 N. W. 682, 117 Iowa, 687, 91 N. W. 933; *Central R. & Bkg. Co. v. Vaughan*, 93 Ala. 209, 30 Am. St. Rep. 50, 9 So. 468.

An engineer's discovery of a woman running toward a train and waving her hands excitedly, at a distance of 1,000 feet ahead, after having previously seen children playing near the track, is sufficient notice that the life of a human being is in danger, and that the train should be stopped, or its speed materially checked, although the presence of a child actually on the track is not discovered until too late to avoid injury. *Donahoe v. Wabash, St. L. & P. R. Co.* 83 Mo. 543.

Where an engineer sees an object upon the track in sufficient time to stop the train, but mistakes it for an abandoned cross-tie, and disregards the signals of two men running on either side of the track toward the engine, and waving their hats, he not only fails to exercise reasonable care, but is guilty of reckless negligence, in not acting promptly upon the evidences of danger forced upon his attention, which a reasonably prudent man would have acted upon. *Seaboard & R. R. Co. v. Joyner*, 92 Va. 354, 23 S. E. 773.

Whether an outcry made by several persons upon a boy getting his foot caught in a railroad track at a crossing, and a signal given to

the engineer to stop, are sufficient to give notice of the danger, and to render the railroad company negligent in not stopping the cars in time to avoid injury, is a question for the jury. *Goodrich v. Burlington, C. R. & N. R. Co.* 103 Iowa, 412, 72 N. W. 653.

"The true test of the [locomotive] engineer's duty is involved in the question whether he has reasonable ground to believe, with all the knowledge of the surroundings which due diligence requires of him, that the life of a fellow man is in peril, and that the danger to his person can only be averted by stopping or reducing the speed of the train. When an engineer sees a man persistently putting himself in peril on a trestle or bridge, so that he can no more get off the track than one who is lying on it in an apparent stupor, except by exposing himself to danger, why is it not reasonable in him to act instantly on the natural inference that one whose conduct is so extraordinary is either drunk or bereft of reason from sudden terror?" *Clark v. Wilmington & W. R. Co.* 109 N. C. 430, 445, 14 L. R. A. 749, 14 S. E. 43.

Where the motorman of a street car sees a boy approaching the track with the apparent intention of crossing in front of the car, and observes that the boy is unconscious of the approach of the car, notwithstanding his efforts to attract his attention, and that it is likely to hit him, it is not enough that he uses every effort to prevent injury when the boy gets upon the track, and he realizes that danger is imminent, but he should act as soon as he sees that an injury is probable, although not aware that the boy is deaf. When it is seen that a person in such situation pays no attention to the warnings given, ordinary care requires that the speed of the car be checked. *Galveston City R. Co. v. Hanna* (Tex. Civ. App.) 79 S. W. 639; *Slonker v. Great Northern R. Co.* 76 Minn. 806, 79 N. W. 168.

But in *Stubenau v. Atlantic Ave. R. Co.* 155 N. Y. 511, 63 Am. St. Rep. 698, 50 N. E. 277, it is held that the motorman of a street car was not negligent in not checking the speed of his car upon seeing little girls near the track start to run across it, nor until one of them fell before the car, where they had time to get across, if they had not fallen. To the same effect is *Fenton v. Second Ave. R. Co.* 126 N. Y. 625, 26 N. E. 967.

And in *Louisville & N. R. Co. v. Black*, 89 Ala. 313, 8 So. 246, the engineer of a train discovered a man walking upon the track half a mile distant, but no signal was given until within about 200 yards, when the bell was rung, and within 100 yards the whistle was sounded. It then being discovered that the man did not get off the track, nor look around, the engineer concluded something must be the matter with him, and endeavored to stop the train, but it was too late to avoid a collision. It was held that the railroad company's liability dated not from the time the intestate was discovered upon the track, but from the time its employees learned he was ignorant of the approaching train. "If, after decedent's ignorance of his peril was brought to their knowledge, actual knowledge, for they owed the intestate no duty to find it out, they failed to apply all the instrumentalities at their command to stop the train and save him, then, and only in that event, is plaintiff entitled to a verdict." This case apparently conflicts to some extent with

that of *Frazer v. South & North Ala. R. Co.* 81 Ala. 185, 60 Am. Rep. 145, 1 So. 85.

When persons in charge of a railroad train discover an object upon the track which there is reason to believe may be a human being, what is their duty?

A railroad company is liable for injuries sustained from running over a child six or seven years of age, who was lying on the railway track asleep, where the engineer and fireman saw him in time to stop the train, but neglected to do so because they supposed him to be a bunch of weeds. The evidence in this case showed that plaintiff could have been seen and recognized as a boy on the track at a distance of from 300 to 350 yards. *Meeks v. Southern P. R. Co.* 56 Cal. 513, 38 Am. Rep. 67.

A man lying insensible upon a railroad track, near a crossing, was discovered by those in charge of an approaching train at a distance of 400 yards, but thought to be an inanimate object. When, however, within 125 or 150 yards, it became apparent that the object was a man, the engineer did all that could be done to stop the train, but without avail. If the speed of the train had been checked, and the brakes put on at the "blow post," as a statute of the state required, the train could have been stopped in time to avoid the injury. It was held that, under these circumstances, it was a question for the jury as to when the engineer became aware, or might, by proper diligence, have become aware, that the object on the track was a man. *Hankerson v. Southwestern R. Co.* 59 Ga. 593, 61 Ga. 114, 72 Ga. 182.

Where a child upon a railroad track was seen by those in charge of a train in time to stop and save the child's life, but the engineer and fireman mistook it for an inanimate object, and debated what it really was until it was too late, and by exercising ordinary skill and caution they could have discovered the object to be a child, and have stopped the train in time to avoid an injury, the railroad company was held liable for the result. *Isabel v. Hannibal & St. J. R. Co.* 60 Mo. 475.

If a locomotive engineer has sufficient notice or belief to put a prudent man on the alert, and he does not take such precautions as a prudent man would take under similar notice or belief, he is guilty of negligence. But the fact that the engineer sees what he supposes to be an inanimate object lying in the ditch at the side of the track is not alone sufficient to impose upon him the duty of taking steps to stop his train. *Seaboard & R. R. Co. v. Joyner*, 92 Va. 354, 365, 23 S. E. 773; *Tucker v. Norfolk & W. R. Co.* 92 Va. 540, 24 S. E. 229; *Murch v. Western N. Y. & P. R. Co.* 78 Hun, 601, 29 N. Y. Supp. 490.

In *Norfolk & W. R. Co. v. Dunnaway*, 93 Va. 29, 24 S. E. 698, a sleeping boy on the railroad right of way, with his head upon the track, was seen by an engineer in time to stop his train, but was thought to be a dog, and no signals were given, nor any attempt made to stop the train, until within 160 feet of him, when his identity was discovered, but it was then too late to prevent injury. It was held that, under the rule that the duty of a railroad company to avoid infliction of injury to a trespasser arises only "when the danger of the trespasser is discovered, or by ordinary care

and caution might be discovered," the defendant was not liable.

As to trespassers, to whom a railroad company does not owe the duty of keeping a lookout, negligence cannot be predicated upon an engineer's error of judgment in taking a sleeping man upon the track, seen $\frac{1}{4}$ of a mile distant, to be a coat, until within 150 feet of the object, when it is too late to stop the train. *New York, N. H. & H. R. Co. v. Kelly*, 35 C. C. A. 571, 93 Fed. 745. And see *Murch v. Western N. Y. & P. R. Co.* 78 Hun, 601, 29 N. Y. Supp. 490.

When an object on a railroad track is thought by the engineer of a train to be a dog or a bundle, he is not under obligation to stop his train to make sure what the object is; and if he fails to identify the object as a child until too late to stop the train, the railroad company is not liable for the result. *Louisville, N. O. & T. R. Co. v. Williams*, 69 Miss. 631, 12 So. 957.

VIII. Presumptions in absence of knowledge of disability.

a. Right to presume person in peril will help himself.

One has a right to presume, in the absence of knowledge to the contrary, that a person in peril is in the full possession of his faculties, and that, acting upon the natural instinct of self-preservation, he will get out of harm's way when he becomes conscious of the danger impending. To warrant such presumption, however, the circumstances must give support to the belief that such person's situation is known to him, and that he is able to extricate himself from his perilous position. Hence, there arise certain limitations upon the exercise of this presumption, which are considered in the next succeeding division of this note.

"In the absence of knowledge to the contrary, or some fact which ought to arouse suspicion that this is not true, employees operating a railway train may assume that a man seen at a public crossing, or elsewhere on the track, is in possession of all his senses, and that care for his own safety will induce him to use them, and to act on the warnings conveyed through them." *International & G. N. R. Co. v. Garcia*, 75 Tex. 589, 13 S. W. 223; *Artus v. Missouri P. R. Co.* 73 Tex. 191, 11 S. W. 177; *Frazer v. South & North Ala. R. Co.* 81 Ala. 185, 60 Am. Rep. 145, 1 So. 85; *Southern R. Co. v. Bush*, 122 Ala. 470, 26 So. 168; *Dally v. Richmond & D. R. Co.* 106 N. C. 301, 11 S. E. 320; *Deans v. Wilmington & W. R. Co.* 107 N. C. 686, 22 Am. St. Rep. 902, 12 S. E. 77; *Clark v. Wilmington & W. R. Co.* 109 N. C. 430, 143, 14 L. R. A. 740, 14 S. E. 43; *Syme v. Richmond & D. R. Co.* 113 N. C. 558, 18 S. E. 114; *Maloy v. Wabash, St. L. & P. R. Co.* 84 Mo. 270; *Candee v. Kansas City & I. Rapid Transit R. Co.* 130 Mo. 142, 31 S. W. 1029; *Jackson v. Kansas City, Ft. S. & M. R. Co.* 157 Mo. 621, 645, 80 Am. St. Rep. 650, 58 S. W. 32; *Louisville & N. K. Co. v. Cooper* (Ky.) 6 Am. & Eng. R. Cas. 5; *Illinois C. R. Co. v. Hocker*, 21 Ky. L. Rep. 1398, 55 S. W. 438; *Florida C. & P. R. Co. v. Williams*, 37 Fla. 406, 20 So. 558; *Green v. Southern P. Co.* 122 Cal. 563, 55 Pac. 577; *Murch v. Western N. Y. & P. R. Co.* 78 Hun, 601, 29 N. Y. Supp. 490; *Sims v. Macon & W. R. Co.* 28 Ga. 93; *Cogswell v. Oregon & C. R. Co.* 6 Or. 417; *Campbell v. Kansas City, Ft. S. & M. R. Co.* 55 Kan. 536,

40 Pac. 997; Omaha & R. Valley R. Co. v. Cook, 42 Neb. 577, 905, 60 N. W. 899; Raines v. Chesapeake & O. R. Co. 39 W. Va. 50, 24 L. R. A. 226, 19 S. E. 565; Smalley v. Southern R. Co. 57 S. C. 243, 254, 35 S. E. 489; Gulf, C. & S. F. R. Co. v. Hill (Tex. Civ. App.) 58 S. W. 255; Bump v. New York, N. H. & H. R. Co. 38 App. Div. 60, 55 N. Y. Supp. 962; Cleveland, C. C. & St. L. R. Co. v. Miller, 149 Ind. 490, 49 N. E. 445; Ullrich v. Cleveland, C. C. & St. L. R. Co. 151 Ind. 358, 51 N. E. 95.

It is only when those in charge of a railroad train have reasonable ground to believe that a person on the track will not get off in time to avoid injury to himself, that they are bound to stop the train. Gulf, C. & S. F. R. Co. v. Hill (Tex. Civ. App.) 58 S. W. 255; Chamberlain v. Missouri P. R. Co. 133 Mo. 587, 33 S. W. 437, 34 S. W. 842; Teel v. Ohio River R. Co. 49 W. Va. 85, 38 S. E. 518.

"If, however, the person on the track be deaf, and unable to hear the noise of the train, he cannot be expected to provide for his own safety so promptly and certainly as one in full possession of all his senses. This fact should, of course, make him the more careful to avoid being placed in a situation likely to render him liable to an injury from which others would be exempt. But what are the duties and responsibilities of the railroad company in such a case? If unaware of the person's infirmity, they cannot be expected to treat him differently from other like trespassers upon their track. They may presume that he will step off in time to prevent being struck by the train, and they would be required to give him only such warning as would reasonably alarm his fears and cause him to leave the track. But if the employees in charge of the train know that the party is deaf, and not able to hear the ordinary noise of the train, their duty becomes entirely different." International & G. N. R. Co. v. Smith, 62 Tex. 254; Tyler v. Sites, 88 Va. 470, 13 S. E. 978; Johnson v. Louisville & N. R. Co. 91 Ky. 651, 25 S. W. 754.

In Texas & P. R. Co. v. Roberts, 2 Tex. Civ. App. 111, 20 S. W. 960, the correctness of an instruction to the jury, that train operatives, upon ringing the bell and sounding the whistle, may presume that a person on the track will leave it in time to escape injury, is doubted; and it is said, whether such presumption is warranted depends upon the facts of each particular case.

If railroad employees in charge of a train see a man on the track at a distance sufficient to enable him to get out of the way before the train reaches him, and are not aware that he is deaf or insane, or from some other cause insensible of the danger, or unable to get out of the way, they have a right to presume that he will act on the motive of self-preservation, and get out of the way, and to go on without checking the speed of the train until they see he is not likely to get out of the way, when it would become their duty to give extra alarm by bell or whistle, and, if that is not heeded, then, as a last resort, to check its speed, or stop the train, if possible, in time to avoid disaster. St. Louis, I. M. & S. R. Co. v. Wilkerson, 46 Ark. 513; Sibley v. Ratliffe, 50 Ark. 477, 8 S. W. 686.

In Omaha & R. Valley R. Co. v. Cook, 42 Neb. 905, 62 N. W. 235, affirming on rehearing 42 Neb. 577, 60 N. W. 899, it is said that it is not "in every case" the duty of a locomotive

engineer to stop his train, or even to lessen its speed, on the discovery of a trespasser upon the track; and the court approves the following rule from Wharton on Negligence, § 389a: "An engineer who sees before him on the track a person apparently capable of taking care of himself has a right to presume that such person, on due notice, will leave the track if there be opportunity to do so; and the engineer will not in such cases be chargeable with negligence if, in consequence of such person not leaving the track, the train cannot be checked in time to avoid striking him. But it is otherwise with persons apparently not capable of taking care of themselves, such as very young children and persons lying helpless on the track."

Where a man sleeping on a railroad track, upon being aroused by the track walker, and warned of an approaching train, got partly up, leaned on his elbow, and assented to the suggestion in such a way as to indicate he understood the warning, and gave no appearance of being intoxicated or otherwise disabled, the track walker had the right to presume that he would take such measures to protect himself from injury as would be taken by any reasonable person under like circumstances. Virginia Midland R. Co. v. Boswell, 82 Va. 932, 7 S. E. 383.

Acting upon such presumption, a locomotive engineer is not required to check the speed of his train, merely because an apparently and presumably reasonable human being, though in fact deaf, is crossing at a point far enough in his front to enable him to stop it, if he chooses, before reaching such person. Dally v. Richmond & D. R. Co. 106 N. C. 301, 11 S. E. 320; Birmingham R. & Electric Co. v. Bowers, 110 Ala. 328, 20 So. 345; Johnson v. Louisville & N. R. Co. 91 Ky. 651, 25 S. W. 754.

A street car driver has the right to presume that a woman seen approaching the track, and not known by him to be deaf, will exercise her senses, and stop in time to avoid accident. Schulte v. New Orleans City & L. R. Co. 44 La. Ann. 509, 10 So. 811.

And the operators of a hand car and a flag-man at a crossing are not negligent in assuming that a person approaching the crossing is able to hear a warning shouted from the car, in the absence of knowledge of his deafness. Pliskowski v. Detroit, G. H. & M. R. Co. 121 Mich. 498, 80 Am. St. Rep. 518, 80 N. W. 241.

In Robbins v. Springfield Street R. Co. 165 Mass. 30, 42 N. E. 334, which was an action for injuries sustained by a man of nearly eighty years, partially deaf, and blind in one eye, through a street car running into his horse and wagon while he was attempting to cross the track, the following instruction to the jury was approved upon appeal: "A motorman—a man in charge of an electric car—has a right, as a general principle, to act upon the presumption that persons whom he sees before him in the street, with teams or on foot, are in the enjoyment of their senses and their faculties, because that is the ordinary experience with men. It is what is ordinarily true; and so he has a right to act upon this assumption of what is ordinarily true, and govern himself properly upon that assumption. But it does not follow from that, that in no case is he required to qualify his conduct in any way.

The motorman here handling this car would have a right to assume that the plaintiff

was a man in the possession of all his ordinary faculties, if he did not know to the contrary, unless there was something in the conduct and management of the plaintiff which, with reasonable attention on the part of the motorman, would have informed him that there was some imperfection in regard to the plaintiff's condition."

The duty to avoid injury to a trespasser seen upon a railroad trestle, it has been held, arises not at the moment he is seen on the trestle by persons in charge of a train, but only when the peril of his position becomes known to them. If at the time the engineer first discovers a trespasser on a trestle, the latter's position is such that he can readily, and without risk of injury, step off to a place of safety, the engineer has the right to presume that he will do so, and to act on the presumption until it becomes apparent to him that the trespasser is ignorant of his danger. *Southern R. Co. v. Bush*, 122 Ala. 470, 26 So. 168; *Ullrich v. Cleveland, C. C. & St. L. R. Co.* 151 Ind. 353, 51 N. E. 95.

But generally no presumption can arise that a person upon a railroad trestle will be able to help himself; and it is the duty of those operating a train, upon discovering a person in such situation, to stop the train immediately. *Clark v. Wilmington & W. R. Co.* 109 N. C. 430, 14 L. R. A. 749, 14 S. E. 43; *Atlanta & C. Air Line R. Co. v. Gravitt*, 93 Ga. 369, 26 L. R. A. 553, 44 Am. St. Rep. 145, 20 S. E. 550; *Cook v. Central R. & Bkg. Co.* 67 Ala. 533; *Central R. & Bkg. Co. v. Vaughan*, 93 Ala. 209, 30 Am. St. Rep. 50, 9 So. 468; *Peirce v. Walters*, 164 Ill. 560, 45 N. E. 1068, *Affirming* 63 Ill. App. 562; *Purcell v. Chicago & N. W. R. Co.* 109 Iowa, 628, 77 Am. St. Rep. 557, 80 N. W. 682; *Vanarsdall v. Louisville & N. R. Co.* 23 Ky. L. Rep. 1666, 65 S. W. 858, 25 Ky. L. Rep. 1432, 77 S. W. 1103; *St. Louis S. W. R. Co. v. Bolton* (Tex. Civ. App.) 81 S. W. 123.

b. *Limitations upon exercise of such presumption.*

1. *Warning of danger generally necessary as basis for presumption.*

The right to indulge the presumption that one will seek a place of safety from impending danger necessarily fails where the situation or conduct of the party in peril indicates that he is either unconscious of his danger, or is unable to save himself because of his helpless condition. In either of these situations, there is nothing upon which to base the presumption until proper effort is made to inform the subject of his danger. Therefore, if a person upon a railroad track appears unconscious of an approaching train, as that he is standing or walking with his back to it, or is lying upon the track, and he is discovered in time, it is the duty of the railroad company to sound the usual warning signals in sufficient time for such person to act upon them, and for the railway employees to observe their effect. *International & G. N. R. Co. v. Smith*, 62 Tex. 254; *Houston & T. C. R. Co. v. Harvin* (Tex. Civ. App.) 54 S. W. 629; *Schlerhold v. North Beach & M. R. Co.* 40 Cal. 447; *Tennenbrock v. South Pacific C. R. Co.* 59 Cal. 269, 272; *Louisville & N. R. Co. v. Cooper* (Ky.) 6 Am. & Eng. R. Cas. 5; *Poole v. North Carolina R. Co.* 53 N. C. (8 Jones, L.) 340; *Chicago, B. & Q. R. Co. v. Triplett*, 38 Ill. 69 L. R. A.

482; *Masser v. Chicago, R. I. & P. R. Co.* 68 Iowa, 602, 27 N. W. 776; *Louisville & N. R. Co. v. Tinkham*, 19 Ky. L. Rep. 1784, 44 S. W. 439; *Illinois C. R. Co. v. Hocker*, 21 Ky. L. Rep. 1398, 55 S. W. 438; *Teel v. Ohio River R. Co.* 49 W. Va. 85, 38 S. E. 518; *Finlayson v. Chicago, B. & Q. R. Co.* 1 Dill. 579, Fed. Cas. No. 4,793. But see *Texas & P. R. Co. v. Roberts*, 2 Tex. Civ. App. 111, 20 S. W. 960.

A railroad company cannot speculate upon the chances of its warning signals being heard by persons on its tracks, and excuse its omission to give them upon the ground that they would have been ineffectual. *East Tennessee & G. R. Co. v. St. John*, 5 Sneed, 524, 73 Am. Dec. 149.

The omission of such warning, however, cannot be deemed the cause of injury to a deaf man who knows before going upon the track of the approach of the train which injures him. *McDonald v. International & G. N. R. Co.* 86 Tex. 1, 40 Am. St. Rep. 803, 22 S. W. 939.

And the failure to give warning signals, or to check the speed of the train, will not render a railroad company liable for injury to a trespasser upon a trestle, where his presence was not discovered until the train was almost upon him. *Tennenbrock v. South Pacific Coast R. Co.* 59 Cal. 269.

And in *Sibley v. Ratliffe*, 50 Ark. 478, 8 S. W. 686, the court appears to approve an instruction that the omission to sound the whistle or ring the bell to give warning to a sleeping trespasser on the track must have been wilful and reckless to warrant a recovery.

While no exact rule can be laid down as to the precise distance at which it becomes the duty of a railroad company to give the usual danger signals when a person is discovered upon its track, the warning must be timely. *Central R. & Bkg. Co. v. Denson*, 84 Ga. 774, 11 S. E. 1039; *Wren v. Louisville, St. L. & T. R. Co.* 14 Ky. L. Rep. 324, 20 S. W. 215.

It will be observed that the warning required by the above authorities is not that of the statutory signals which the law requires at crossings, but is included in the obligation to exercise ordinary care to avoid injury to persons in dangerous situations, when their peril is discovered. As to the duty of railroad companies in general to give statutory signals of the approach of trains at crossings, see *notes, Giving the statutory signals as the measure of trainmen's duty at highway crossings*, 15 L. R. A. 426; *For whose benefit signals by approaching trains are required by statute at railway crossings*, 17 L. R. A. 254; and *Failure to signal for crossings*, 21 L. R. A. 723.

2. *Presumption may be repelled by circumstances.*

If the person in peril, although not known to be deaf, gives no heed to the usual signals, in other words, acts directly contrary to the instinct of self-preservation; or if his situation otherwise indicates that he cannot, or will not, avoid the impending danger, any presumption that he will escape from his perilous situation is wholly unwarranted; and it becomes the duty of those coming into relation to him, if they perceive his conduct or situation in sufficient time, to make every reasonable effort to avoid injuring him. *Bump v. New York, N. H. & H. R. Co.* 38 App. Div. 60, 55 N. Y. Supp. 962; *Georgia Midland & G. R.*

Co. v. Evans, 87 Ga. 673, 13 S. E. 580; Gunn v. Ohio River R. Co. 42 W. Va. 676, 36 L. R. A. 575, 26 S. E. 546; Wren v. Louisville, St. L. & T. B. Co. 14 Ky. L. Rep. 324, 20 S. W. 215; Robbins v. Springfield Street R. Co. 165 Mass. 30, 42 N. E. 334.

These limitations upon the exercise of the presumption in question obtain in those jurisdictions holding that the only duty due a person guilty of negligence is not wilfully to injure him, as well as in those where such negligence is held to be no excuse for an injury subsequently inflicted by another's negligence; and there seems to be no reason for any distinction between them in this regard.

If a person seen upon a railroad track is known to those in charge of a train to be, or from his appearance gives them good reason to believe that he is, insane, or badly intoxicated, or otherwise insensible of danger, or unable to avoid it, they have no right to assume that he will get out of the way, but should act upon the hypothesis that he may not or will not, and should use a proper degree of care to avoid injuring or killing him. St. Louis, I. M. & S. R. Co. v. Wilkerson, 46 Ark. 513; Sibley v. Ratliffe, 50 Ark. 477, 8 S. W. 686; Anderson v. Hopkins, 33 C. C. A. 346, 63 U. S. App. 533, 91 Fed. 77.

The case of Anderson v. Hopkins seems to make a distinction between trespassers having the power to care for themselves and those suffering from some disability; and it is said that the rule that a trespasser is without relief for an injury received, unless it was wilfully or maliciously inflicted, does not apply where the person injured was perceived to be in a position of peril, from which, by reason of inability or inattention, he was not likely to extricate himself; and that a failure to exercise reasonable diligence to avoid injury to one perceived to be so situated is an actionable wrong, if harm results.

If persons in charge of a train are in doubt as to the condition or situation of a person on the track, it is their duty to resolve all reasonable doubts in favor of saving life. Clark v. Wilmington & W. R. Co. 109 N. C. 430, 14 L. R. A. 749, 14 S. E. 43; Little v. Carolina C. R. Co. 118 N. C. 1072, 1077, 24 S. E. 514; Seaboard & R. R. Co. v. Joyner, 92 Va. 354, 365, 36 S. E. 773; Central R. & Bkg. Co. v. Vaughan, 93 Ala. 209, 30 Am. St. Rep. 50, 9 So. 468; Purcell v. Chicago & N. W. R. Co. 109 Iowa, 628, 77 Am. St. Rep. 557, 80 N. W. 682.

The ordinary rule of all railroad companies is said to be, "In all cases of doubt take the side of safety." Dent, J., in Raines v. Chesapeake & O. R. Co. 39 W. Va. 50, 24 L. R. A. 226, 19 S. E. 565.

But this rule does not impose upon an engineer the duty of providing against what he has no reasonable ground to believe will happen. "The legal obligation is to take proper precaution to guard against what is the usual or justly expected consequence of one's acts; not against unexpected, unusual, or extraordinary results." Therefore, where an engineer checked the speed of his train upon discovering a man on a trestle, but resumed his course upon seeing him take a position which others had occupied with safety from passing trains, and the man was injured because he failed to hold his head back far enough, it was held that the railroad 69 L. R. A.

company was not liable. Little v. Carolina C. R. Co. 118 N. C. 1072, 1077, 24 S. E. 514.

The circumstances which may be deemed sufficient to repel the presumption, and impose the duty of active effort to avoid injury, where the person's disability is not previously known, may be classified as follows:

First. Those which make it apparent that the person in peril is unconscious of danger. Tanner v. Louisville & N. R. Co. 60 Ala. 621, 640; Frazer v. South & North Ala. R. Co. 81 Ala. 185, 60 Am. Rep. 145, 1 So. 85; Mobile & O. R. Co. v. Stroud, 64 Miss. 784, 2 So. 171; Murch v. Western N. Y. & P. R. Co. 78 Hun, 601, 29 N. Y. Supp. 490.

The engineer of a train cannot rely upon the presumption that a trespasser will save himself, after he has been in any manner advised, or he sees, that such person is unconscious of his peril, or so disabled that he cannot protect himself and avoid injury. Pittsburgh, C. C. & St. L. R. Co. v. Judd, 10 Ind. App. 213, 37 N. E. 775.

The presumption that a person upon a street railway track will leave it before an approaching car reaches him cannot be indulged as to an infant of tender years; and, if its presence is discovered by the driver, it is his duty to exercise all the diligence then possible to avoid injury to it. Galveston City R. Co. v. Hewitt, 67 Tex. 473, 60 Am. Rep. 32, 3 S. W. 705; Omaha & R. Valley R. Co. v. Cook, 42 Neb. 577, 60 N. W. 899, 42 Neb. 905, 62 N. W. 235, 37 Neb. 435, 55 N. W. 943.

Neither is there any presumption that a child on a railroad track will heed signals of danger; and a locomotive engineer is bound to stop his train if he sees the child making no attempt to leave the track. Indianapolis, P. & C. R. Co. v. Pitzer, 108 Ind. 179, 58 Am. Rep. 387, 6 N. E. 310, 10 N. E. 70.

And in Campbell v. Kansas City, Ft. S. & M. R. Co. 55 Kan. 536, 40 Pac. 997, it is said that, if a man is lying or sitting upon a railroad track, apparently intoxicated or asleep, it is the duty of those in charge of a train to make an earlier effort to stop than would be required if the person were walking.

Although railway employees are unaware that a person walking upon the track is deaf, yet if, as ordinary, prudent men, they have reason to believe that an injury will occur unless the train is checked, it should be stopped at once. Louisville & N. R. Co. v. Cooper (Ky.) 6 Am. & Eng. R. Cas. 5; Lexington & C. C. Min. Co. v. Huffman, 17 Ky. L. Rep. 775, 32 S. W. 611; Louisville & N. R. Co. v. Tinkham, 19 Ky. L. Rep. 1784, 44 S. W. 439.

While, as a general rule, a locomotive engineer may assume that a person walking upon the track is in possession of ordinary sight and hearing, yet, where the conduct of the traveler is such as to excite a doubt of this, the engineer is bound to use greater caution and to stop the train, if necessary to secure his safety. Clark v. Wilmington & W. R. Co. 109 N. C. 430, 444, 14 L. R. A. 749, 14 S. E. 43.

The negligence of an intoxicated person in walking upon a railroad track will not excuse the subsequent negligence of the railroad company in running him down, where its employees discovered him on the track when the train was 900 feet distant, and at the distance of 200 feet the engineer noticed something unusual in his manner, but made no effort to check the

speed of the train. *Texas & P. R. Co. v. Robinson*, 4 Tex. Civ. App. 121, 23 S. W. 433.

Likewise, the motorman of an electric car is required to qualify his conduct toward persons generally, if he perceives a very aged man attempting to drive across the track on the near approach of his car, and after the gong has been sounded. *Robbins v. Springfield Street R. Co.* 165 Mass. 30, 42 N. E. 334.

When the motorman of a street car sees that his efforts to attract the attention of a person approaching the track, by sounding the gong and hallooing to him, are unavailing, and that no attention is paid to the warnings, ordinary care requires that he at least lessen the speed of his car, and not attempt to run by such person, until satisfied that he is aware of the approach of the car, although not aware that he is deaf. *Galveston City R. Co. v. Hanna* (Tex. Civ. App.) 79 S. W. 639.

The driver of a vehicle is not warranted in continuing his course after shouting a warning to a pedestrian in the highway, where he sees his warning is not heeded, although he is not aware that the person in the highway is deaf. *Smith v. Browne*, Ir. L. R. 28 C. L. 1.

If an engineer sees two men on the track in front of his train, and one of them risks his safety in an effort to signal the foremost man to leave the track, the engineer will be guilty of a wilful wrong if he does not use ordinary care to stop the train, although without knowledge that the foremost man is deaf. *Palmer v. Chicago, St. L. & P. R. Co.* 112 Ind. 250, 14 N. E. 70.

Second. Circumstances which indicate a situation that may prevent the party in peril from extricating himself in time to avoid danger.

The presumption that persons upon the track, and apparently able to take care of themselves, will leave it upon the approach of a train, is not applicable where a girl having her foot caught between the rail and planking at a crossing is facing the train, and waving her hands wildly in an endeavor to signal the engineer to stop the train. While the engineer, in such case, may not be able to see the foot fast in the crossing, the facts that the person does not leave the track, and that her conduct indicates that something unusual has happened, require him to act on the instant; and his failure to stop the train in time to avoid injury, if it can be done, is negligence. Whether the engineer acted with reasonable promptness under the circumstances is a question of fact for the jury. *Spooner v. Delaware, L. & W. R. Co.* 115 N. Y. 22, 21 N. E. 696.

Where a trespasser on a railroad track was on a bridge of considerable elevation, and could not, therefore, step out of danger, it was held proper to refuse to instruct the jury that an engineer is not bound to stop his train the moment he sees a person on the track, but has the right to presume that such person will leave the track in time to escape danger, and, without being negligent, may continue to run the train until he discovers that such person is heedless of danger. *Peirce v. Walters*, 164 Ill. 560, 45 N. E. 1068, Affirming 63 Ill. App. 562. That it cannot be presumed that a person in such a situation will escape to a place of safety, see div. IV., c. 3, *supra*; div. VIII. a, *supra*.

"Where it is apparent to an engineer, who is keeping a proper outlook, that a man is

lying prone upon the track, or his team is delayed in moving a wagon over a crossing, it has been declared that the engineer, having reason to believe that life or property will be imperiled by going on without diminishing his speed, is negligent if he fails to use all the means at his command, consistent with the safety of the passengers and property in his charge, to stop his train and avoid coming in contact with the person so exposed. *Deans v. Wilmington & W. R. Co.* 107 N. C. 686, 22 Am. St. Rep. 902, 12 S. E. 77; *Bullock v. Wilmington & W. R. Co.* 105 N. C. 180, 10 S. E. 988. The same rule prevails where the engineer knows, or ought to know, that a human being has passed a milepost which marks the end of a trestle nearest to him, and can see that the person, despite his signal, persists in running along the track from which he cannot step aside, and from which he can escape instantly only by a perilous jump or unusual activity. The law expects him, when he sees a man still lying motionless, after he has given the alarm signal, to take precaution against the possibility of his being drunk, or, where one does not move his team at a crossing under similar circumstances, to act upon the idea that the wagon is fastened in some way." *Clark v. Wilmington & W. R. Co.* 109 N. C. 443, 444, 14 L. R. A. 749, 14 S. E. 43.

Omaha & R. Valley R. Co. v. Cook, 42 Neb. 905, 62 N. W. 235, affirming on rehearing 42 Neb. 577, 60 N. W. 899, approves the following statement of the rule as to the duty of railroad employees to helpless persons discovered upon the track in time to stop the train, taken from *Beach, Contributory Negligence*, 203: "Nor is the company liable for a failure on the part of its employees to stop the train, on seeing a person walking on the track, even though there was time enough to do so, provided the proper signals of warning were given. The company may presume that the trespasser is in full possession of his senses, and that he will appreciate his danger and act with discretion. But an engineer who sees a helpless person incapable of moving, on the track, is guilty of negligence if he fails to make all prudent efforts to avoid the collision, and this without reference to the cause of the person's disability."

3. "Last moment" to which presumption may be indulged.

How long may the presumption that a person in peril will escape to a place of safety be indulged, in the light of countervailing circumstances?

According to some authorities, if a person discovered upon a railroad track is apparently in the possession of all his faculties, and not suffering from any disability, and is given warning of the approach of a train, the engineer has the right to act upon the presumption that he will get off the track, "until the last moment," and until it is too late to avoid contact. *Indianapolis & V. R. Co. v. McClaren*, 62 Ind. 572; *Campbell v. Kansas City, Ft. S. & M. R. Co.* 55 Kan. 536, 40 Pac. 997; *Schexnaydre v. Texas & P. R. Co.* 46 La. Ann. 248, 40 Am. St. Rep. 321, 14 So. 513; *Nichols v. Louisville & N. R. Co.* (Ky.) 6 S. W. 339; *Poole v. North Carolina R. Co.* 53 N. C. (8 Jones, L.) 340; *Herring v. Wilmington & R. R. Co.* 32 N. C. (10 Fred. L.) 402, 51 Am. Dec. 395; *Norwood*

v. Raleigh & G. R. Co. 111 N. C. 236, 16 S. E. 4; Birmingham R. & Electric Co. v. Bowers, 110 Ala. 328, 20 So. 345; Raines v. Chesapeake & O. R. Co. 39 W. Va. 50, 24 L. R. A. 226, 19 S. E. 565; Pittsburgh, C. C. & St. L. R. Co. v. Judd, 10 Ind. App. 213, 37 N. E. 775; Cleveland, C. C. & St. L. R. Co. v. Miller, 149 Ind. 490, 49 N. E. 445.

This seems a harsh rule, and cannot be said to meet the requirement that ordinary care must be used to avoid the consequences of another's negligence. Indeed, it comes perilously near to authorizing the wanton killing of persons discovered upon a railroad track, whether at crossings or elsewhere. Accordingly, the concurring opinion of Martin, Ch. J., in the case of Campbell v. Kansas City, Ft. S. & M. R. Co. 55 Kan. 536, 40 Pac. 997, *supra*, construes the "last moment" to mean "the last moment in which it would, or ought to, seem practicable to stop the train" before collision; and that for a slight error of judgment on the part of the engineer, the railroad company ought not to be held responsible. Thus qualified, the rule seems both reasonable and humane, and is supported by authority. Georgia R. & Bkg. Co. v. Daniel, 89 Ga. 463, 15 S. E. 538; Savannah, T. & I. of H. R. Co. v. Bryan, 94 Ga. 632, 21 S. E. 57; St. Louis, I. M. & S. R. Co. v. Wilkerson, 46 Ark. 513; Sibley v. Ratliffe, 50 Ark. 477, 8 S. W. 686; Clark v. Wilmington & W. R. Co. 109 N. C. 430, 14 L. R. A. 749, 14 S. E. 48; Callaway v. Walters, 63 Ill. App. 562, Affirmed in 164 Ill. 560, 45 N. E. 1068; Orr v. Cedar Rapids & M. C. R. Co. 94 Iowa, 423, 431, 62 N. W. 851; Purcell v. Chicago & N. W. R. Co. 109 Iowa, 628, 631, 77 Am. St. Rep. 557, 80 N. W. 682; Omaha & R. Valley R. Co. v. Cook, 42 Neb. 577, 60 N. W. 899, 37 Neb. 435, 55 N. W. 943; Heddies v. Chicago & N. W. R. Co. 77 Wis. 228, 20 Am. St. Rep. 106, 46 N. W. 115.

The qualification of the rule is aptly expressed in Galveston City R. Co. v. Hewitt, 67 Tex. 473, 480, 60 Am. Rep. 32, 3 S. W. 705, where it is said that the presumption may be indulged "so long as danger does not become imminent, but no longer."

And, as applied to cases where such disability is not previously known, "the last moment" to which the presumption can be indulged is when, from all the circumstances, there is such an indication of bodily infirmity, or of disabled condition, or of imminent peril, that to a person of ordinary prudence the infliction of injury seems probable, if proper effort is not made to avoid it. Shearn & Redf. Neg. 4th ed. § 99; St. Louis, I. M. & S. R. Co. v. Wilkerson, 46 Ark. 513; Mobile & O. R. Co. v. Stroud, 64 Miss. 784, 2 So. 171; Cincinnati, H. & D. R. Co. v. Murphy, 17 Ohio C. C. 223; Heddies v. Chicago & N. W. R. Co. 77 Wis. 228, 20 Am. St. Rep. 106, 46 N. W. 115; Murch v. Western N. Y. & P. R. Co. 78 Hun. 601, 29 N. Y. Supp. 490; Meeks v. Southern P. R. Co. 56 Cal. 513, 38 Am. Rep. 67; Seaboard & R. R. Co. v. Joyner, 92 Va. 354, 23 S. E. 773; East Tennessee & G. R. Co. v. St. John, 5 Sneed, 524, 73 Am. Dec. 149; Gulf, C. & S. F. R. Co. v. Hill (Tex. Civ. App.) 58 S. W. 255; Bump v. New York, N. H. & H. R. Co. 38 App. Div. 60, 55 N. Y. Supp. 962.

While a locomotive engineer, seeing a child approaching the track in broad daylight with the apparent purpose of crossing it, has the right to presume that he will stop in a place

of safety, and not attempt to pass in front of the train, "he cannot rest on such an assumption so long as to allow his engine to reach a point where it will become impossible for him to control his train or give warning in time to prevent injury to the traveler, supposing the traveler to continue in his course." Heddies v. Chicago & N. W. R. Co. 77 Wis. 228, 20 Am. St. Rep. 106, 46 N. W. 115.

Likewise, persons operating an engine are not permitted to speculate as to the identity of an object on the track until it is too late to stop the train, when by the exercise of ordinary care they might discover that it is a child. Isabel v. Hannibal & St. J. R. Co. 60 Mo. 475.

"Upon discovering one upon the track, the engineer should give the proper alarm; and if, in a reasonable time after doing so, the person does not leave the track, and the engineer has reasonable ground to think he is not going to do so, then, if he can by the use of all reasonable means stop the train and save the man, he must do so." Wren v. Louisville, St. L. & T. R. Co. 14 Ky. L. Rep. 324, 20 S. W. 215.

When it is discovered that an aged man walking on a railroad track, and making every effort to get out of the way of an approaching train, will not effect his escape in time to avoid injury, it is the duty of the engineer to stop, or sufficiently slacken the speed of the train, so as to give him more time to get entirely out of danger. Missouri P. R. Co. v. Welsen, 65 Tex. 443.

Where a boy trespasser, blinded by the smoke and cinders from a passing train, is discovered backing upon a railroad track before an approaching train, it is the duty of those in charge of the train to give warning, and to stop the train as soon as possible. If, however, such person is not discovered in time to stop the train before a collision, the railroad company is not liable for his injury. Masser v. Chicago, R. I. & P. R. Co. 68 Iowa, 602, 27 N. W. 776.

But it is apparent that the "last moment" rule can have no application where the person in danger is obviously lacking in capacity to care for his own safety, or is known to be suffering from some disability, or is in a situation, which prevents him from hearing the warnings given him, or disables him from acting upon them if heard. Such a situation demands immediate resort to the means at hand to avoid injury, and the omission of such effort is culpable negligence, if not wilful wrongdoing. International & G. N. R. Co. v. Smith, 62 Tex. 254; Deans v. Wilmington & W. R. Co. 107 N. C. 686, 22 Am. St. Rep. 902, 12 S. E. 77; Smith v. Norfolk & S. R. Co. 114 N. C. 728, 25 L. R. A. 287, 19 S. E. 863, 923; Pickett v. Wilmington & W. R. Co. 117 N. C. 616, 30 L. R. A. 257, 53 Am. St. Rep. 611, 23 S. E. 264; Omaha & R. Valley R. Co. v. Cook, 42 Neb. 577, 905, 60 N. W. 899; St. Louis, I. M. & S. R. Co. v. Wilkerson, 46 Ark. 513; Donahoe v. Wabash, St. L. & P. R. Co. 83 Mo. 543; Kenyon v. New York C. & H. R. R. Co. 5 Hun, 479.

If a person seen lying on the track is asleep or drunk, or known to be insane, or otherwise insensible to danger, or unable to avoid it, it is the duty of the engineer of a train to resolve all doubts in favor of the preservation of life, and immediately use every available means, short of imperiling the lives of passengers on his train, to stop. Deans v. Wilmington & W.

R. Co. 107 N. C. 686, 22 Am. St. Rep. 902, 12 S. E. 77; Clark v. Wilmington & W. R. Co. 109 N. C. 430, 14 L. R. A. 749, 14 S. E. 43; Seaboard & R. R. Co. v. Joyner, 92 Va. 354, 365, 23 S. E. 773; Campbell v. Kansas City, Ft. S. & M. R. Co. 55 Kan. 536, 40 Pac. 997; Garsa v. Texas Mexican R. Co. (Tex. Civ. App.) 41 S. W. 172; Norfolk & W. R. Co. v. Dunnaway, 93 Va. 29, 24 S. E. 698; Wren v. Louisville, St. L. & T. R. Co. 14 Ky. L. Rep. 324, 20 S. W. 215.

It is the imperative duty of a locomotive engineer to endeavor to stop his train upon discovering a person upon a high trestle from which it is obviously out of his power to escape except by going forward to the end. Such a situation does not warrant the presumption that the person will be able to take care of himself. *Atlanta & C. Air-Line R. Co. v. Gravit*, 93 Ga. 369, 408, 26 L. R. A. 553, 44 Am. St. Rep. 145, 20 S. E. 550; *Peirce v. Walters*, 164 Ill. 560, 45 N. E. 1068, *Affirming* 63 Ill. App. 562; *St. Louis S. W. R. Co. v. Bolton* (Tex. Civ. App.) 81 S. W. 123.

A locomotive engineer who discovers a trespasser upon a trestle in front of his train is not permitted to speculate as to such person's chances of reaching the end before the train does, or whether he will jump, or lie down, or in some other manner get out of harm's way, a moment after it becomes evident that he is insensible of his danger, or incapable of providing for his safety. *Central R. & Bkg. Co. v. Vaughan*, 93 Ala. 209, 30 Am. St. Rep. 50, 9 So. 468; *Purcell v. Chicago & N. W. R. Co.* 109 Iowa, 628, 77 Am. St. Rep. 557, 80 N. W. 682.

"The true test of the engineer's duty is involved in the question whether he has reasonable ground to believe, with all the knowledge of the surroundings which due diligence requires of him, that the life of a fellow-man is in peril, and that the danger to his person can only be averted by stopping, or reducing the speed of, the train." When an engineer sees a man on a trestle or bridge, so that he can no more get off the track than one who is lying on it in an apparent stupor, except by exposing himself to danger, he is not warranted in making a hurried calculation as to the relative speed of the man and the train, and in omitting to check the speed of the train, in the belief that the man will reach the end of the bridge before he is overtaken. *Clark v. Wilmington & W. R. Co.* 109 N. C. 430, 14 L. R. A. 749, 14 S. E. 43.

Even though the railroad employees believe that a person seen on a trestle will be able to make his escape, and for that reason fail to

take precautions to avoid injury that subsequent developments show to have been necessary, the railroad company will be liable for its failure to stop the train until too late to avoid injury. *Louisville & N. R. Co. v. Varnarsdell*, 25 Ky. L. Rep. 1432, 77 S. W. 1103.

Naturally, a directly opposite view to the last cited case is taken by those authorities holding that the only duty owing a trespasser is to refrain from wilful or wanton injury. Accordingly, in Indiana, where that rule obtains, it is held that a complaint alleging that defendant's employees saw the person injured on a trestle 15 feet high, and 100 feet from the end, and trying to effect his escape, at a distance of 2,000 feet, and in sufficient time to stop the train, and avoid injury, but failed to stop until after running such person down and killing him, does not state a cause of action, since the engineer had the right to presume that such person would get off the trestle, and the right to continue that presumption until the point making it perilous to continue was reached; and the complaint failed to state at what point the peril became reasonably manifest, or that at such point the engineer failed to make every possible effort to stop the train. And the court says: "If the engineer acted on the presumption that the deceased could and would get to a point of safety, and so acted until it became too late, by the use of the means within his control, to avoid running upon him, such reliance could not be considered wilfulness." *Ullrich v. Cleveland, C. C. & St. L. R. Co.* 151 Ind. 358, 51 N. E. 95.

And where a man on a railroad trestle had knowledge of the approach of a train, and was so near the end that he could, if he chose, step off to a place of safety, but, after starting back, turned and attempted to run across in the face of the train, and the engineer thereupon did all he could to stop the train,—it was held, that "if, at the time the actual circumstances, brought to the knowledge of the engineer, made it apparent to him that the deceased did not intend to leave the trestle, it was then too late to apply successfully the preventive means at hand to avoid the injury, wilfulness and wantonness, equivalent to an intention or willingness to inflict injury, cannot be imputed from a failure to stop the engine." And it is said that proof of such gross negligence as amounts to wantonness and recklessness is necessary to overcome the effect of the contributory negligence of the injured party, and authorize a recovery. *Southern R. Co. v. Bush*, 122 Ala. 470, 26 So. 168.

N. B. R.

CALIFORNIA SUPREME COURT.

Frank FRENCH *et al.*

v.

SENATE of the State of California.

(.....Cal.....)

1. The court cannot supervise the ex-

NOTE.—As to power of house of representatives to remove its speaker from office, see, in this series, *Re Speakership*, 11 L. R. A. 241. 69 L. R. A.

ercise by the legislature of its constitutional power to expel a member.

2. Allegations in a petition by persons expelled from a state legislature to secure reinstatement, that they were expelled without hearing or opportunity for defense, will not be taken as true, even against a demurrer, where the record of the proceedings, of which the court takes judicial notice, shows that charges were preferred, referred to a committee which reported an

investigation, and that the charges were true, and that the report was taken up and considered by the body, at which time petitioners had an opportunity to be heard in their own behalf.

3. The state legislature has power to adopt any procedure for the expulsion of members, and to change it at pleasure.
4. A member of the legislature has, in the absence of constitutional provision, no right to a trial and opportunity to be heard upon charges made, before being expelled therefrom.
5. A member of the state legislature is not protected by the Federal Constitution from the exercise by that body of its constitutional right to remove him therefrom.
6. The title to a public office is held subject to the constitutional provision giving the right of removal.
7. The constitutional power of the state legislature to expel a member is not restricted by the further provision that a member who accepts a bribe is guilty of felony, upon conviction of which he shall be forever disqualified from holding any office or public trust; and therefore conviction is not a prerequisite to his expulsion from the legislative body.
8. A resolution expelling a member from the legislature is not a bill of attainder forbidden by the Constitution.

(April 28, 1905.)

PETITION for a writ of mandamus to compel the Senate of the State of California to restore petitioners to membership therein. *Denied.*

The facts are stated in the opinion.

Messrs. **George D. Collins, H. V. Morehouse, J. E. Alexander, F. C. Jacobs,** and **William F. James** for petitioners.

Mr. U. S. Webb, Attorney General, for respondent:

The supreme court of the state of California has no jurisdiction to issue a writ of mandamus in this proceeding. The jurisdiction of the supreme court over the subject-matter of the action is to be determined by express statutory enactment. And jurisdiction goes no further than the wording of the statute or Constitution allows.

People v. Stoll, 143 Cal. 692, 77 Pac. 818; *People ex rel. Broderick v. Morton*, 156 N. Y. 136, 41 L. R. A. 231, 66 Am. St. Rep. 547, 50 N. E. 791.

Mandamus will not lie from one branch of the government to a co-ordinate branch, for neither is inferior to the other, and such proceeding would amount to the sovereign issuing a mandamus to himself.

Re Dennett, 32 Me. 508, 54 Am. Dec. 602; *Com. ex rel. M'Laughlin v. Philadelphia Dist. Judges*, 5 Watts & S. 275; *Marbury v. Madison*, 1 Cranch, 137, 2 L. ed. 60; 69 L. R. A.

Gaines v. Thompson, 7 Wall. 347, 19 L. ed. 62; *The Secretary v. McGarrahan (Cox v. United States)* 9 Wall. 298, 19 L. ed. 579; *United States ex rel. Dunlap v. Black*, 128 U. S. 40, 32 L. ed. 354, 9 Sup. Ct. Rep. 12; *United States ex rel. Redfield v. Windom*, 137 U. S. 636, 34 L. ed. 811, 11 Sup. Ct. Rep. 197; *United States ex rel. Boynton v. Blaine*, 139 U. S. 306, 35 L. ed. 183, 11 Sup. Ct. Rep. 607; *Berryman v. Perkins*, 55 Cal. 483; *Smith v. Myers*, 109 Ind. 7, 58 Am. Rep. 380, 9 N. E. 692.

This court will not interfere with either of the co-ordinate departments of the government in the legitimate exercise of their jurisdiction and powers.

Ex parte Echols, 39 Ala. 698, 88 Am. Dec. 749; *State ex rel. Davison v. Bolte*, 151 Mo. 362, 74 Am. St. Rep. 542, 52 S. W. 262; *Mayor v. Morgan*, 18 Am. Dec. 238, note, 7 Mart. N. S. 1; *Kimball v. Union Water Co.* 44 Cal. 173, 13 Am. Rep. 157; *People ex rel. Cooley v. Fitzgerald*, 41 Mich. 2, 2 N. W. 179.

Where, by the Constitution, the legislative, judicial, and executive departments are made distinct and independent, neither is responsible to the other for the performance of its duties, and neither can enforce such performance by the other.

Des Moines Gas Co. v. Des Moines, 44 Iowa, 505, 24 Am. Rep. 756.

Mandamus will not issue where it is not effectual and beneficial.

People v. Chicago, 106 Ill. App. 72; *State ex rel. Collins v. Lewis*, 111 La. 693. 35 So. 816; *People ex rel. Billings v. Bissell*, 19 Ill. 229, 68 Am. Dec. 594; *Michigan City v. Roberts*, 34 Ind. 471; *Harpending v. Haight*, 39 Cal. 208, 2 Am. Rep. 432.

A writ of mandamus will never issue to control the discretion of the lawmaking branch of the government.

People ex rel. McDonald v. Keeler, 99 N. Y. 477, 52 Am. Rep. 49, 2 N. E. 615; *People ex rel. Drake v. Mahaney*, 13 Mich. 481.

The senate of the state of California has certain powers and privileges which are necessary to its legislative functions; and these powers and privileges will never be interfered with by the courts in a direct proceeding.

Crosby's Case, 3 Wis. 199; *Ex parte McCarthy*, 29 Cal. 404.

The senate of the state of California has full power to preserve its own honor, dignity, purity and efficiency by the expulsion of an unworthy, or the discharge of an incompetent, member; and this court will not review that act of expulsion.

Ex parte McCarthy, 29 Cal. 404; *Franklin v. State Examiners*, 23 Cal. 173; *People ex rel. McCullough v. Pacheco*, 27 Cal. 223;

Hiss v. Bartlett, 3 Gray, 468, 63 Am. Dec. 768; *Hovey v. Foster*, 118 Ind. 508, 21 N. E. 39; *Re Falvey*, 7 Wis. 630; *State ex rel. Werts v. Rogers*, 56 N. J. L. 480, 23 L. R. A. 354, 28 Atl. 726, 29 Atl. 173; *State v. Gilmore*, 20 Kan. 554, 27 Am. Rep. 189; *Auditor General v. Menominee County*, 89 Mich. 567, 51 N. W. 483; *People ex rel. Drake v. Mahaney*, 13 Mich. 481; *Re Gunn*, 50 Kan. 155, 19 L. R. A. 519, 32 Pac. 470, 948; *Lusher v. Scites*, 4 W. Va. 17.

The words "due process of law" refer to that law of the land in each state which derives its authority from the inherent and reserve powers of the state, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.

Hurtado v. California, 110 U. S. 516, 28 L. ed. 232, 4 Sup. Ct. Rep. 111, 292; *Re Kemmler*, 136 U. S. 448, 34 L. ed. 524, 10 Sup. Ct. Rep. 930.

Const. art. 4, § 9, gives to the senate the power of expulsion, and this power is in part judicial, and the manner of its exercise is to be determined by the senate. In the manner of exercise of this constitutional power the senate is beyond the control of the judiciary.

People ex rel. Broderick v. Morton, 156 N. Y. 136, 41 L. R. A. 231, 66 Am. St. Rep. 547, 50 N. E. 791; *Re Dennett*, 32 Me. 508, 54 Am. Dec. 602; *Com. ex rel. M'Laughlin v. Philadelphia Dist. Judges*, 5 Watts & S. 275; *Marbury v. Madison*, 1 Cranch, 137, 2 L. ed. 60; *Gaines v. Thompson*, 7 Wall. 347, 19 L. ed. 62; *The Secretary v. McGarrahan (Cox v. United States)*, 9 Wall. 298, 19 L. ed. 579; *United States ex rel. Dunlap v. Black*, 126 U. S. 40, 32 L. ed. 354, 9 Sup. Ct. Rep. 12; *United States ex rel. Redfield v. Windom*, 137 U. S. 636, 34 L. ed. 811, 11 Sup. Ct. Rep. 197; *United States ex rel. Boynton v. Blaine*, 139 U. S. 306, 35 L. ed. 183, 11 Sup. Ct. Rep. 607.

Shaw, J., delivered the opinion of the court:

This is an original proceeding in mandamus to compel the senate of the state of California to admit the petitioners as members thereof. The case was submitted to this court upon a general demurrer to the petition, and the writ denied.

The petitioners were duly elected senators of the state from the respective districts which they represent, and each duly qualified and acted as a member of the senate at the thirty-sixth regular session until the 27th day of February, 1905, when they were by the senate expelled therefrom for malfeasance in office, consisting of taking a bribe to influence their conduct as senators. 69 L. R. A.

Since then they have not been allowed to sit as members of the senate nor to participate in its proceedings. It is alleged in the petition that in the proceedings expelling the petitioners the senate did not give them a hearing, nor afford them a trial upon the charges made, nor permit them to make any defense thereto; that the charges of bribery upon which they were expelled are false; and that neither of them has been convicted of such crime.

Even if we should give these allegations their fullest force in favor of the pleader, they do not make a case justifying the interposition of this court. Under our form of government the judicial department has no power to revise even the most arbitrary and unfair action of the legislative department, or of either house thereof, taken in pursuance of the power committed exclusively to that department by the Constitution. It has been held by high authority that, even in the absence of an express provision conferring the power, every legislative body in which is vested the general legislative power of the state has the implied power to expel a member for any cause which it may deem sufficient. In *Hiss v. Bartlett*, 3 Gray, 473, 63 Am. Dec. 768, the supreme court of Massachusetts says, in substance, that this power is inherent in every legislative body; that it is necessary to enable the body "to perform its high functions, and is necessary to the safety of the state;" that it is a power of self-protection, and that the legislative body "must necessarily be the sole judge of the exigency which may justify and require its exercise." In this state the power does not depend on implication; it is expressly given; or, as the power would exist without the express grant, perhaps it is more accurate to say that it is expressly recognized and limited. The Constitution provides that the senate "shall determine the rule of its proceeding, and may, with the concurrence of two thirds of all the members elected, expel a member." Article 4, § 9. If this provision were omitted, and there were no other constitutional limitations on the power, the power would nevertheless exist, and could be exercised by a majority. The only effect of the provision is to make the concurrence of two thirds of the members elected necessary to its exercise. In all other respects it is absolute. The legislature is a co-ordinate department of the state government. By article 3 of the Constitution it is provided that one department of the state shall not exercise the functions of either of the other departments, except as in that instrument expressly directed and permitted. There is no provision authorizing courts to con-

trol, direct, supervise, or forbid the exercise by either house of the power to expel a member. These powers are functions of the legislative department, and, therefore, in the exercise of the power thus committed to it, the senate is supreme. An attempt by this court to direct or control the legislature, or either house thereof, in the exercise of the power, would be an attempt to exercise legislative functions, which it is expressly forbidden to do.

Even if the court should attempt to usurp this legislative function, there is no means whereby it could carry its judgment into effect and give the relief demanded. The thirty-sixth session of the legislature has adjourned *sine die*; it is a thing past, and cannot be reconvened upon the mandate of the judicial power. Const. art. 3. The senate could not reinstate the petitioners as members of that session except when lawfully in session. Nor can the body which composed the thirty-sixth session be again called together except in special session and at the behest of the governor. Const. art. 4, § 2, art. 5, § 9. The next regular session of the senate will be composed of different persons and will be a different body from that now supposed to be before the court. The court is without power to issue its final process against a body not lawfully served with its original process, and which has not submitted itself to its jurisdiction. Moreover, before the next session convenes, the terms of all the petitioners except Wright will have expired. The court cannot issue any effective mandate to reinstate the petitioners as members of the senate.

We think it is proper to say further, out of respect to a co-ordinate department of the government, that, notwithstanding the arbitrary action apparently charged against the senate by the language of the petition, we cannot give the statements therein contained their full force. Ordinarily, when a case is submitted on a demurrer, all the facts stated in the pleadings demurred to are taken as true. To this rule there are some exceptions, one of which is important here. Only those facts are admitted by a demurrer which it is necessary to allege in the pleading. It is not necessary to allege facts of which the court will take judicial notice. Such facts will be considered by the court although not pleaded. 12 Enc. Pl. & Pr. p. 1; 1 Chitty, Pl. 215, 217, 218; *People ex rel. Drake v. Mahaney*, 13 Mich. 481; *Mullan v. State*, 114 Cal. 581, 34 L. R. A. 262, 46 Pac. 670; Bliss, Code Pl. 177, 194. Those allegations of a pleading which are not necessary, and which are contrary to the facts of which judicial notice is taken, are not admitted by a demur-

rer, but are to be treated as a nullity. 12 Enc. Pl. & Pr. p. 1; 1 Chitty, Pl. 215; *Mullan v. State*, 114 Cal. 581, 34 L. R. A. 262, 46 Pac. 670; *Ohm v. San Francisco*, 92 Cal. 449, 28 Pac. 580. The courts take judicial notice of the public and private official acts of the legislative department of the state. Code Civ. Proc. § 1875, subd. 3; *Mullan v. State*, 114 Cal. 581, 34 L. R. A. 262, 46 Pac. 670; *Davis v. Whidden*, 117 Cal. 623, 49 Pac. 766. Among these official acts are included the proceedings by which the petitioners were expelled and which are entered upon the journal of the senate. We are therefore bound to take notice that charges were preferred against the petitioners in the senate, and were referred by it to a committee for investigation; that the committee reported that it had made the investigation, and that the charges were true, and recommended that the petitioners be expelled; that this report was taken up and considered by the senate; that the petitioners, being then members, had upon such consideration an opportunity to present, or have presented arguments in their behalf; and that the resolution expelling them was regularly offered and adopted by the senate. There being no direct allegation to the contrary, we must presume that the petitioners had notice of these proceedings, and that they were allowed as members to participate therein. In view of these facts, we cannot consider the allegations of the petition as imputing to the senate the arbitrary and unfair treatment of the petitioners which might be inferred from the language used, but will rather consider them as a statement of the conclusion of the pleaders that the proceedings taken, of which we take judicial notice, did not constitute a trial or hearing, and did not give them the opportunity to be heard in their own behalf, which they believe they were entitled to have.

There is no averment that the manner of the proceeding was contrary to the rules established. And even if it were as abrupt as the interpretation of the pleading most favorable to the petitioners would imply, the matter would be immaterial. The senate has power to adopt any procedure, and to change it at any time and without notice. It cannot tie its own hands by establishing rules which, as a matter of power purely, it cannot at any time change and disregard. Its action in any given case is the only criterion by which to determine the rule of proceeding adopted for that case. There is no constitutional provision giving to the petitioners the right to have a trial and opportunity to be heard upon the charges made against them in the senate other than that which they have received.

The 14th Amendment to the Constitution of the United States does not affect the case, nor have its provisions been violated by the action of the senate. While it is true that, so far as private persons are concerned, the right to hold a public office duly conferred upon an individual has many of the attributes of private property, and is protected by the law of the land, yet, as between the office holder and the sovereign power, such right is not violated when the proper governmental authority, acting in pursuance of a power expressly given to it by the fundamental law, has removed such person from the office. *Re Carter*, 141 Cal. 319, 74 Pac. 997. The sovereign power which created the office can also fix the terms upon which it is held, and can delegate the power of removal. The title is held subject to the conditions thus imposed. The relations between the body politic and its officers are not in this particular essentially different from those existing between a private person and his servants. Although there may be a difference as to the liability for damages for a dismissal without cause, the right or power to dismiss always exists. The senate having expelled the petitioners in the manner prescribed by the Constitution, in the exercise of the power therein given, it is not true that they have been deprived of the right to the office without due process of law.

With respect to the possible abuse of such power, the case is analogous to that of the President of the United States with respect to officers of the United States subject to arbitrary removal by him. In regard to this the Supreme Court of the United States says that the only restraint upon the abuse of the power "must consist in the responsibility of the President, under his oath of office, to so act as shall be for the general benefit and welfare." *Shurtleff v. United States*, 189 U. S. 317, 47 L. ed. 832, 23 Sup. Ct. Rep. 535. The same is true of the power of the senate here under consideration. The oath of each individual member of the senate, and his duty under it to act conscientiously for the general good, is the only safeguard to the fellow members against an unjust and causeless expulsion. This is the only practical rule that can be adopted as to those unrestricted governmental powers which are necessary to the exercise of governmental functions, and which must be lodged somewhere. Each department of the state is necessarily vested with some power which is beyond the supervision of any other department; and in such cases the only protection against abuse is the conscience of the individual in whom the power is vested. The decisions holding that, where a power

is given to remove an officer "for cause" without requiring any previous notice or any hearing, such notice must nevertheless be given and a hearing had, have been disapproved in this state. *Re Carter*, 141 Cal. 319, 74 Pac. 997. But, in any event, they clearly have no application to the present case, where the power to remove is, as we have seen, inherent and necessary to the exercise of the functions of the body possessing it, and are given without limitation or restriction.

It is claimed that the power to expel for bribery is, by § 35, art. 4, limited to those cases in which the member has been convicted of the crime defined in that section. The section provides that any member of the legislature who is influenced in his official action by any reward or promise thereof is guilty of a felony, and that upon conviction he shall be forever disqualified from holding any office or public trust. It is obvious that this section was not intended to have any effect whatever upon the power to expel members of the legislature given by § 9 of the same article. The two provisions are entirely independent, and are made for different objects and purposes. The power to expel is given to enable the legislative body to protect itself against participation in its proceedings by persons whom it judges unworthy to be members thereof, and affects only the rights of such persons to continue to act as members. The provision of § 35 defines a certain crime, and prescribes the effect of a judgment of conviction thereof upon the subsequent status as a citizen of the person found guilty. A resolution of the senate expelling a member, whether for bribery or for some other offense, or improper conduct, is not the equivalent of the conviction of the person of the crime set forth in the charges against him.

The proposition that a resolution or other action of the senate resulting in the expulsion of a member is in substance a bill of attainder, and therefore a violation of § 16, art. 1, of the state Constitution, and of § 10, art. 1, of the Constitution of the United States, is scarcely worthy of notice. The charges upon which a member is expelled may or may not constitute a charge of crime, but the resolution expelling him has not the force of law, and it cannot by any stretch of construction be denominated a bill of attainder. At common law "a bill of attainder was a legislative conviction for an alleged crime, followed by a prescribed punishment therefor, with judgment of death." And, even where a milder punishment was inflicted, its effect was an extinction of civil and political rights and capacities. *Cooley*, Const. Lim. 7th ed. 363.

The resolution of expulsion has no effect upon the rights of the member expelled further than to terminate his right to sit as a member of the legislative body, and it bears no just resemblance to a bill of attainder.

We find no ground upon which the appli-

cation of the petitioners can be supported, and we are of the opinion that *the writ was properly denied*.

We concur: **Beatty, Ch. J.; Van Dyke, J.; Henshaw, J.; Angellotti, J.; Lorigan, J.**

CONNECTICUT SUPREME COURT OF ERRORS.

Sarah L. STANLEY *et al.*

v.

Howard M. STEELE, *Appt.*

(77 Conn. 688.)

1. Livery-stable keepers are not within the rule that common carriers of passengers are bound to exercise extraordinary care for the safety of their passengers.
2. Whether or not a livery-stable keeper is liable to a patron for an injury due to a defect in the neck yoke of the carriage furnished by him depends upon whether it was discoverable by the exercise of such care as is usually exercised by persons of ordinary prudence in the conduct of such business.

(April 20, 1905.)

A PPEAL by defendant from a judgment of the Superior Court for Hartford County in plaintiffs' favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Reversed*.

The facts are stated in the opinion.

Messrs. William F. Henney and Henry C. Gussman for appellant.

Messrs. John H. Kirkham and James E. Cooper, for appellees:

In any business involving the personal safety and lives of others what is due care,—reasonable diligence? Clearly nothing less than the most watchful care and the most active diligence. Anything short of this is negligence and carelessness, and would furnish clear ground of liability if an injury was thereby sustained.

Hadley v. Cross, 34 Vt. 586, 80 Am. Dec. 699; *Ingalls v. Bills*, 9 Met. 1, 43 Am. Dec. 346; *Erickson v. Barber Bros.* 83 Iowa, 372, 49 N. W. 838; *Horne v. Meakin*, 115 Mass. 331; *Ray*, Negligence of Imposed Duties, p. 22; *Grand Rapids & I. R. Co. v. Huntley*, 31 Am. Rep. 324, note, 38 Mich. 537; *Copeland v. Draper*, 157 Mass. 558, 19 L. R. A. 283, note, 34 Am. St. Rep. 314, 32 N. E. 944.

NOTE.—As to warranty of horse or vehicle kept for hire, see also, in this series, note to *Copeland v. Draper*, 19 L. R. A. 283.
69 L. R. A.

Reasonable care is care proportioned to the danger.

Deater v. McOready, 54 Conn. 172, 5 Atl. 855; *Knowles v. Crampton*, 55 Conn. 344, 11 Atl. 593; 19 Am. & Eng. Enc. Law, 2d ed. pp. 433, 434.

This defendant cannot rely, for his defense here, on his dealer or manufacturer.

Where the negligence of two or more persons, acting independently, concurrently results in injury to a third, the latter may maintain his action for the entire loss against any one or all of the negligent parties.

21 Am. & Eng. Enc. Law, 2d ed. p. 496, and note; *Perham v. Portland General Electric Co.* 33 Or. 451, 40 L. R. A. 804, 72 Am. St. Rep. 730, 53 Pac. 14; *Carterville v. Cook*, 129 Ill. 152, 4 L. R. A. 721, 16 Am. St. Rep. 248, 22 N. E. 14; 9 Cyc. Law & Proc. pp. 618, 619; 5 Am. & Eng. Enc. Law, 2d ed. p. 527.

Hall, J., delivered the opinion of the court:

This is an appeal by the defendant from a judgment in favor of the plaintiffs for \$750 for injuries received by the plaintiff Sarah L. Stanley from the overturning of a carriage hired of the defendant. The amended complaint alleges that the defendant was a livery-stable keeper; that he let to the plaintiffs a carriage and a pair of horses, with a driver; that the carriage and its appliances were defective, in that the pole, neck yoke, and pole straps were of insufficient strength and out of repair, and that the driver was incompetent; that the neck yoke became detached from the collar of one of the horses, and the driver lost control of the team, and the pole broke, and the carriage was overturned; that the accident was caused by the unskillful handling of the horses, and by the failure of the defendant to exercise due and proper diligence in furnishing a safe driver and safe harnesses and appliances.

The facts showing the cause of the accident are these: A part of the harness or appliances furnished by the defendant was a neck yoke, consisting of a wooden bar

about 3 feet long, which, by a leather loop at the middle, is attached at right angles to the end of the carriage pole. Fitted to each end of the neck yoke is a metal cap or thimble, through a slot or opening on the surface of which a strap passes around the neck yoke and is connected with the horse collar, and by this attachment to the pole the carriage is held back and turned. On the underside of each of said thimbles is a small hole, countersunk for a screw to go through into the neck yoke, to prevent the thimble from slipping off. The head of the screw upon the right-hand thimble was too small for the countersink, so that, when screwed down, the top of the screw head was below the outer surface of the thimble, and only the outer edge of the screw head held the thimble. While driving down a slight grade a part of this screw head broke off, and the thimble slipped over the broken screw head and off the neck yoke, and the pole was thereby let down; and the carriage, coming against the horses, frightened them and they ran away, throwing the plaintiff from the carriage and seriously injuring her.

It is claimed, among the reasons of appeal, that the trial court, in deciding that the defendant was negligent in not having discovered the defect in the neck yoke which was the cause of the accident, erred in holding him to too high a degree of care, and also erred in finding and in refusing to find certain facts. A statement of the evidence and rulings in the case is made a part of the record, as provided by § 797 of the General Statutes of 1902.

Concerning this defect from the smallness of the screw head in the thimble, the trial judge says in the finding: "A casual observer might not have seen it, but a person whose duty it was to exercise due care to see that the harness and carriage were in a safe condition, so that the security of his passengers might be preserved, would have seen it, and ought to have seen it. Said defect was not hidden, but it was plain to be seen by the eye, and could have been seen by the defendant, who was present when said team was furnished the plaintiff, if he had used ordinary care in examining the equipment." The finding states that "the defendant testified that, had he noticed the screw, he never would have used the yoke, while his foreman testified the screw was so small a blind man could see that." As to the degree of care required of the defendant, the trial judge says in his finding: "*Hadley v. Cross*, 34 Vt. 586, 80 Am. Dec. 699, states the rule which I adopt: 'In any business involving the personal safety and lives of others, what is due care,—reasonable diligence? Clearly, 69 L. R. A.

nothing less than the most watchful care and the most active diligence; anything short of this is negligence and carelessness, and would furnish clear ground of liability if an injury was thereby sustained.' "

An examination of the evidence shows that the plaintiffs endeavored to prove at the trial that the defect in the neck yoke was that the thimble which came off had not been fastened to the neck yoke at all, and that the plaintiffs' witnesses who examined the neck yoke after the accident testified that there was no screw in the end of the neck yoke where the thimble had come off. After the neck yoke and thimble had been produced in court, showing the screw still in it, and the broken screw head, the court says that it had "grave doubts" whether that was really the yoke in question. It having been proved to be the yoke in use at the time of the accident, the case evidently turned upon the question of whether due care upon the part of the defendant required him to so carefully inspect the neck yoke as to discover that the head of the screw through the underside of the thimble was so small as to be insufficient to hold the thimble on, and that the screw head was liable to break, and allow the thimble to slip over it and off the yoke. The defendant endeavored to prove that the pole and neck yoke were new, were purchased by him from a reputable dealer, were examined by him in the usual and proper manner, and that such a slipping of the thimble from the neck yoke was very unusual, and to prove by several witnesses, among whom was the defendant's foreman, that the defect in the fastening of the thimble was not discoverable upon an ordinary inspection of the neck yoke. From the evidence before us upon this apparently controlling question in the case, the trial judge, in deciding it, evidently gave considerable weight to what he in effect says in the finding was the testimony of the defendant's foreman, namely, that the screw in the thimble was so small that any person who could see would have discovered the defect. It is conceded by the plaintiff's counsel, and it appears from the evidence before us, that the defendant's foreman did not so testify. On the contrary, it appears that he testified that the defect was not apparent upon inspection of the pole and yoke. The only witness who used language at all similar to that ascribed in the finding to the defendant's foreman was one Dunbar. He was called by the defendant to identify the neck yoke produced in court as the one which he brought back to the stable after the accident. His remark on cross-examination, after he had identified the yoke by the screw which was in it, "A blind man can see that," was evidently his statement of

how readily anyone could see the screw in the yoke after the accident, and contradicted the plaintiffs' witnesses that there was no screw to be seen in the yoke when they examined it after the accident. When testifying as to the appearance of the yoke when it was put onto the carriage, this witness said there was nothing to indicate the defect that the screw head was too small for the countersink, and that it would not be seen. The trial court therefore erred in considering as evidence, in deciding a material question in the case, testimony which was not in fact given.

We are also of opinion that by the rule adopted the trial court held the defendant to too high a degree of care upon the question of whether he ought to have discovered the defect in the fastening of the thimble to the neck yoke. In the case of common carriers of passengers, the highest degree of care which a reasonable and prudent man would use in that business is required. As to a common carrier of passengers by stage-coach, this rule "applies alike to the character of the vehicle, the horses and harness, the skill and sobriety of the driver, and to the manner of conducting the stage under every emergency or difficulty," and the stage owner is held liable "for the smallest negligence in himself or his driver." *Derwort v. Loomer*, 21 Conn. 245, 253; *Stokes v. Saltonstall*, 13 Pet. 181, 10 L. ed. 115. *Hadley v. Cross*, 34 Vt. 586, 80 Am. Dec. 699, referred to by the trial court as laying down the correct rule as to the degree of care required of the defendant, was an action against a livery-stable keeper for an injury caused by a defect in a wagon hired of the defendant; but the rule of diligence adopted in that case was that applicable to common carriers of passengers. The opinion states that it was conceded that the rule of duty and diligence to be applied was that applicable "to coach owners or other passenger carriers" who furnished drivers as well as teams; the plaintiff claiming that the defendant was liable for a defect which was not visible, and could not be discovered by the most careful examination, and the defendant that he was only liable for the want of due care. The court points out the difference between the liability of common carriers of passengers and of goods, and says that the former is only liable for the want of due care, but that that term, when applied to carriers of passengers, means the same as the terms "extraordinary care" and "the highest diligence," and cites as settling the law on the subject the case of *Ingalls v. Bills*, 9 Met. 1, 43 Am. Dec. 346, which was an action against a common carrier of passengers. But public carriers owe to their passengers a degree of care and 60 L. R. A.

protection which is not exacted of those who do not hold themselves out as serving the public in that capacity. 6 Cyc. Law & Proc. p. 534; *Seaver v. Bradley*, 179 Mass. 329, 88 Am. St. Rep. 384, 60 N. E. 795. And while the proprietors of stage-coaches, hacks, and omnibuses, who hold themselves out to the public as general conveyers of passengers from place to place for hire with their own drivers, may be included in the class known as public or common carriers of passengers, livery-stable keepers, whose business it is to care for the horses and carriages of others, and to let their own horses and carriages either with or without drivers, are not common carriers of passengers, within the legal meaning of that term. *Cooley, Torts*, § 638; *Payne v. Halstead*, 44 Ill. App. 97; *Siegrist v. Arnot*, 86 Mo. 200, 56 Am. Rep. 424; *Erickson v. Barber Bros.* 83 Iowa, 367, 49 N. W. 838; *Copeland v. Draper*, 157 Mass. 558, 19 L. R. A. 283, 34 Am. St. Rep. 314, 32 N. E. 944. By merely carrying on such a livery-stable business the proprietors of it do not hold themselves out as undertaking, for hire, to carry indiscriminately any persons who may apply, either to certain places, or to such places as they may desire to be carried to. Furthermore, those who hire carriages from livery-stable keepers are not necessarily conveyed by the vehicles, horses, and drivers chosen by the proprietor, but may, in a measure, protect themselves by selecting the particular carriage, horse, and driver they wish to hire. The rule of law which requires "the strictest and highest degree of diligence of a public carrier of passengers" is not applicable to a mere livery-stable keeper. "Such livery-stable keeper," says the court in *Payne v. Halstead*, 44 Ill. App. 97, "is not a common carrier, . . . and does not assume the duties and obligations of such a carrier. He is at most a private carrier for hire. . . . Such a one undertakes to possess the skill adequate to the undertaking, and promises to exercise due diligence and care in its performance, but ordinary skill, diligence, and prudence are all that the law exacts from him. . . . The highest degree of diligence is the rule as to public carriers of passengers, and public policy forbids its relaxation; but a private carrier for hire may discharge himself from liability for accident by showing that he exercised the usual skill, care, and diligence ordinarily exercised by those engaged in the same pursuit, to furnish a safe coach, harness, and horses, and a competent and careful driver."

In determining in the present case the question of the liability of the defendant for the accident resulting from the defective

fastening of the thimble to the neck yoke, the proper inquiry was, Was such defect discoverable by the defendant by the exercise of ordinary care,—that is, by such care as is usually exercised by persons of ordi-

nary prudence in the conduct of such livery-stable business?

There is error, and a new trial is ordered.

The other Judges concur.

GEORGIA SUPREME COURT.

City Council of AUGUSTA *et al.*, *Plffs. in Err.*,

v.

Joseph S. REYNOLDS, Solicitor General.

(.....Ga.....)

- *1. A fair occupying 75 or 80 feet in width and 4 blocks in length of an important business street in a city, and consisting of numerous tents, inclosing shows and exhibitions, in front of which are stationed men blowing horns and talking through megaphones to attract attention, together with various other stands, booths, structures, Ferris wheels, merry-go-rounds, and other devices for amusement of the public and profit to the owners; which fair a company of the state militia is permitted to station on the street for a week,—is a public nuisance of a most aggravated nature.
2. There is nothing in the charter of the city of Augusta which permits the city authorities to grant the use of its streets for the operation of an enterprise of the nature above indicated.
3. A court of equity has jurisdiction, at the instance of the solicitor general, to restrain by injunction the erection of a public nuisance.

(May 10, 1905.)

ERROR to the Superior Court for Richmond County to review a judgment in favor of plaintiff in a suit to enjoin the alleged obstruction of a public street. *Affirmed.*

Statement by Cobb, J.:

An information was filed in behalf of the state by the solicitor general of the Augusta circuit, upon the petition of named parties, complaining of the city council of Augusta and John D. Twiggs, Jr., as captain of the Oglethorpe Infantry, a company of the state militia. The petition alleged, in substance, as follows: For several years past it has been customary from time to time to hold street fairs or carnivals in the city of Augusta. The city council has granted the defendant Twiggs permission to hold one of such fairs during the first week in May, 1905, on Broad street, which is 180 feet wide, and is the principal business street

and thoroughfare in the city. Seventy-five feet of the street in width and 4 blocks in length will be occupied by the tents, buildings, and structures of the fair. The fair will consist of tents, inclosing shows and exhibitions, structures, stands, Ferris wheels, merry-go-rounds, "shoot the chutes," the "loops," and various and sundry devices and constructions and obstructions, and will monopolize the portion of the street in which it is placed. These obstructions will seriously interfere with the use of the street by the public for traffic, travel, and business, and will occasion great hurt and annoyance to the citizens in general. The carnival will consist of a large number of separate shows and exhibitions, each in a separate tent or inclosure, besides numerous stands or booths for the sale of articles of merchandise. Criers or "spielers" will be stationed in front of each tent, show, stand, or booth, who, by the use of horns, megaphones, bells, drums, and similar instruments, will attempt to attract crowds of people in the street to each place. Admission will be charged by the proprietors to the said shows and exhibitions. It is alleged that the city council of Augusta has no authority, under its charter, to permit such an obstruction of its streets as will be made by the carnival; that, the nuisance not being completed, the statutory remedy for the abatement of nuisances is not applicable, and that a separate proceeding would have to be instituted to abate each show or exhibition; and that for these reasons a court of equity has jurisdiction to enjoin the erection of the obstructions composing the fair. The prayer was for such an injunction. The case was heard on demurrer to the petition. The judge granted an interlocutory injunction, and the defendants excepted.

Messrs. O. Henry Cohen and Austin Branch, for plaintiffs in error:

The structures which it is alleged were about to be erected were not of a character, extent, and duration, nor for a purpose, which would constitute them nuisances *per se*, and only nuisances *per se* should be enjoined at an interlocutory hearing.

The right of the public in a street is a relative, and not an absolute, one, and

*Headnotes by Cobb, J.

NOTE.—As to power to authorize obstruction of highway, see also, in this series, note to Spencer v. Andrew, 12 L. R. A. 115.
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partial obstructions are occasionally allowed.

Graves v. Shattuck, 35 N. H. 257, 69 Am. Dec. 536; *People v. Cunningham*, 1 Denio, 524, 43 Am. Dec. 709.

The question, what obstructions amount to a nuisance, can in most cases be determined only by considering the size of the obstructions as related to the breadth of the highway and the amount of traffic thereon.

State v. Edens, 85 N. C. 572; *Allegheny v. Zimmerman*, 95 Pa. 287, 40 Am. Rep. 648; *Nolin v. Franklin*, 4 Yerg. 163; *Tompkins v. Hodgson*, 4 Thomp. & C. 435; 27 Am. & Eng. Enc. Law, p. 688; *McDonald v. St. Paul*, 82 Minn. 308, 83 Am. St. Rep. 428, 84 N. W. 1022; *State v. Berdetta*, 73 Ind. 185, 38 Am. Rep. 117; *Dubois v. Kingston*, 102 N. Y. 219, 55 Am. Rep. 804, 6 N. E. 273; *Weinstein v. Terre Haute*, 147 Ind. 556, 46 N. E. 1004; *Vason v. South Carolina R. Co.* 42 Ga. 635; *Augusta v. Burum*, 93 Ga. 68, 26 L. R. A. 340, 19 S. E. 820; *Laing v. Americus*, 86 Ga. 756, 13 S. E. 107; *Hanbury v. Woodward Lumber Co.* 98 Ga. 54, 26 S. E. 477.

The authority of the city of Augusta over its streets is plenary.

Blome's Code, 308; *Mt. Carmel v. Shaw*, 157 Ill. 37, 27 L. R. A. 580, 46 Am. St. Rep. 311, 39 N. E. 584; 27 Am. & Eng. Enc. Law, p. 114.

The statutory remedy provided by § 4760 is adequate and complete, and therefore, under our law, exclusive.

Johnson v. Gilmer, 113 Ga. 1146, 39 S. E. 469; *Brannan v. A. B. Baxton & Co.* (Ga.) 50 S. E. 45; *Booth v. Mohr* (Ga.) 50 S. E. 173; *Hitchcock v. Culver*, 107 Ga. 184, 33 S. E. 35; *Broomhead v. Grant*, 83 Ga. 452, 10 S. E. 116; *Ruff v. Phillips*, 50 Ga. 130; *Powell v. Foster*, 59 Ga. 790.

Equity interferes to enjoin private nuisances, even, with reluctance, and for two reasons and two alone, to wit:

1. Irreparable damage, such as damage to health, etc.

Lowe v. Holbrook, 71 Ga. 565; *DeGire v. Seltzer*, 64 Ga. 425; *Butler v. Thomasville*, 74 Ga. 574; *De Baughn v. Minor*, 77 Ga. 815, 1 S. E. 433; *Farley v. Gate City Gaslight Co.* 105 Ga. 337, 31 S. E. 193; *Code*, 3863.

2. Where the offense is continuing, permanent, or constantly recurring, and equity enjoins to avoid multiplicity of suits.

Georgia Chemical, etc. Co. v. Colquitt, 72 Ga. 172; *Kavanagh v. Mobile & G. R. Co.* 78 Ga. 273, 2 S. E. 636; *Russell v. Napier*, 80 Ga. 79, 4 S. E. 857; *Farley v. Gate City Gaslight Co.* 105 Ga. 337, 31 S. E. 193.

Mr. George T. Jackson also for plaintiffs in error.

Messrs. E. H. Callaway and J. S. Reynolds, for defendant in error: 69 L. R. A.

The intended use of the street was a nuisance.

Savannah v. Wilson, 49 Ga. 476; *Laing v. Americus*, 86 Ga. 756, 13 S. E. 107; *Maddox v. Cunningham*, 68 Ga. 431, 45 Am. Rep. 500; *Simon v. Atlanta*, 67 Ga. 618, 44 Am. Rep. 739; *White v. State*, 99 Ga. 18, 37 L. R. A. 642, 26 S. E. 742; *Kavanagh v. Mobile & G. R. Co.* 78 Ga. 271, 2 S. E. 636, 78 Ga. 803, 4 S. E. 113; *Savannah & W. R. Co. v. Woodruff*, 86 Ga. 96, 13 S. E. 156; *Daly v. Georgia S. & F. R. Co.* 80 Ga. 793, 12 Am. St. Rep. 286, 7 S. E. 146; *Augusta & S. R. Co. v. Augusta*, 100 Ga. 703, 28 S. E. 126.

Every unauthorized encroachment upon a street is a public nuisance.

Norrell v. Augusta R. & Electric Co. 116 Ga. 316, 59 L. R. A. 101, 42 S. E. 466; *Savannah, F. & W. R. Co. v. Gill*, 118 Ga. 741, 45 S. E. 623; *Western & A. R. Co. v. Atlanta*, 113 Ga. 546, 54 L. R. A. 294, 38 S. E. 996; *Salter v. Taylor*, 55 Ga. 310; *Savannah, A. & G. R. Co. v. Shiels*, 33 Ga. 601; *Speir v. Brooklyn*, 139 N. Y. 6, 21 L. R. A. 641, 36 Am. St. Rep. 664, 34 N. E. 727; *Smith v. McDowell*, 148 Ill. 51, 22 L. R. A. 393, 35 N. E. 141; *Elias v. Sutherland*, 18 Abb. N. C. 126; *Hibbard v. Chicago*, 59 Ill. App. 470; *Elliott, Roads & Streets*, pp. 477, 478.

An obstruction may be a nuisance, although it is not of a permanent character.

Elliott, Roads & Streets, pp. 480-482; 15 Am. & Eng. Enc. Law, 2d ed. p. 491; *Com. v. Ruggles*, 6 Allen, 588; *State v. Laverack*, 34 N. J. L. 204; *Cole v. Newburyport*, 129 Mass. 594, 37 Am. Rep. 394; *Little v. Madison*, 42 Wis. 643, 24 Am. Rep. 435, 49 Wis. 605, 35 Am. Rep. 793, 6 N. W. 249; *Rea v. Carlile*, 6 Car. & P. 636; *Com. v. Haines*, 4 Clark (Pa.) 17; *Hagerstown v. Witmer*, 86 Md. 293, 39 L. R. A. 657, 37 Atl. 965; *Ely v. Campbell*, 59 How. Pr. 333; *Costello v. State*, 108 Ala. 45, 35 L. R. A. 303, 18 So. 820; *Georgia S. & F. R. Co. v. Harvey*, 84 Ga. 374, 10 S. E. 971; *Davis v. East Tennessee, V. & G. R. Co.* 87 Ga. 605, 13 S. E. 567; *Western & A. R. Co. v. Cox*, 93 Ga. 561, 20 S. E. 68; *Richmond v. Smith*, 101 Va. 161, 43 S. E. 345; *Hall's Case*, 1 Vent. 169.

Equitable jurisdiction may be based upon the principle of restraining irreparable mischief, or of preventing vexatious litigation or a multiplicity of suits.

Farley v. Gate City Gaslight Co. 105 Ga. 337, 31 S. E. 193.

A multiplicity of suits will be necessary to abate the proposed nuisances, unless a court of equity entertains jurisdiction to restrain the defendants from placing this carnival upon the street.

Georgia Chemical, etc. Co. v. Colquitt, 72

Ga. 172; *Hill v. MoBurney Oil & Fertiliser Co.* 112 Ga. 791, 52 L. R. A. 398, 38 S. E. 42; *Powell v. Foster*, 59 Ga. 790; *Columbus v. Jaques*, 30 Ga. 512; *Lofton v. Collins*, 117 Ga. 440, 61 L. R. A. 150, 43 S. E. 708.

The remedy, in equity, to prevent the erection of a purpresture and public nuisance in a street or highway, is by injunction on behalf of the people, sued out by the attorney general or other proper officer.

People v. Vanderbilt, 28 N. Y. 396, 84 Am. Dec. 351; *Re Frazee*, 63 Mich. 396, 6 Am. St. Rep. 311, 30 N. W. 72; *Com. v. Plaisted*, 148 Mass. 375, 2 L. R. A. 142, 12 Am. St. Rep. 573, 19 N. E. 224; *Atlanta v. Warnock*, 91 Ga. 210, 23 L. R. A. 301, 44 Am. St. Rep. 17, 18 S. E. 135; *Elliott, Roads & Streets*, p. 485.

Mr. W. K. Miller also for defendant in error.

Cobb, J., delivered the opinion of the court:

1. Streets are primarily intended for the use of travelers, and a municipal corporation has no power, in the absence of express legislative authority, to allow a street to be used for any other purpose. Pol. Code 1895, § 745. Any permanent structure in a street which materially interferes with travel thereon is a public nuisance. Permanent structures which do not interfere with travel, and which are erected for public purposes, such as telegraph and telephone poles, and the like, are permissible. But no permanent structure of any character which interferes in the slightest degree with the right of travel upon the street is ever permissible where such structure is erected for purely private purposes. Temporary obstructions in a street are permissible under certain circumstances, even where the obstruction is for the benefit or convenience of an individual. A merchant may temporarily obstruct a passage along a street, either in receiving goods from a carrier on the street, or delivering goods to such carrier. A householder may temporarily obstruct a street in moving his effects out of or into his house. It is impossible to enumerate all the cases in which the temporary obstruction of a street may be allowed, but the general rule is that, if the purpose for which the obstruction is created is lawful, and the obstruction exists only for such a time as is reasonably necessary to accomplish the purpose which brings about the necessity for the obstruction, such an obstruction would not be a public nuisance. What would be a reasonable time is to be determined according to the circumstances of each case. If the obstruction continues for a time that is not reasonably necessary for the accomplishment of the purpose, then it 69 L. R. A.

becomes a public nuisance. What would be an unreasonable time in cases where goods are being received into or delivered from a place of business, or where household effects are being carried into or out of a place of residence, might not be an unreasonable time where the obstruction is made necessary on account of buildings being erected upon property abutting the street. In all cases the obstructions to public travel should be removed as soon as the reason for the obstruction has ceased. To continue to obstruct a public street with those things necessary in case of the erection of a building upon abutting property after the building has reached a stage where such obstructions are no longer necessary in carrying on the work would render the person so continuing the obstruction liable as the maintainer of a public nuisance. Any temporary obstruction in a public street is presumptively a public nuisance, and it is incumbent upon the persons responsible for the presence of such obstruction to show that it was placed in the street in furtherance of a lawful and legitimate purpose, and has not been continued any longer than was reasonably necessary for the accomplishment of this purpose. Persons who have places of business or residences upon lots abutting upon the street may temporarily obstruct the street under those circumstances, where it is necessary to completely enjoy the rights and privileges incident to ownership of property so situated. Persons who own vacant lots abutting upon a street may temporarily obstruct the street whenever necessary to improve such property by the erection of buildings thereon, but no such necessity can ever exist when upon the property to be improved there is ample room for the deposit of all material to be used in the building and the carrying on of all work essential to its construction.

The question to be determined in the present case is whether a street fair of the character described in the petition would be such an obstruction of a public street as would make it a public nuisance. It would not be a permanent obstruction, for it is only to continue one week. Being a temporary obstruction only, it is to be determined whether it results from a lawful purpose. The obstruction is purely for private gain. The fact that the promoter of the enterprise is a military company which is a part of the state militia does not make it one inaugurated for a public purpose. It is to occupy not more than one half of the street. But the public is entitled to the whole of every street as against anyone who places obstructions therein for other than a lawful purpose. *Com. v. Ruggles*, 6 Allen, 588; 1 Wood, Nuisances, 3d ed. § 250. The

power over streets, given to municipal corporations under the ordinary grants in municipal charters, does not authorize the municipal authorities, even by express ordinance, to permit the erection in streets of temporary obstructions for purely private gain. The enterprise described in the petition is not in any sense a public enterprise. It is merely a scheme of private individuals for pecuniary gain, and the use of the street, either in whole or in part, has not as a basis any purpose which the law would recognize as lawful, in the absence of express legislative authority permitting it. In other words, the enterprise sought to be carried on in the street would, if permitted, be nothing more or less than a public nuisance, and a public nuisance of a most aggravating character. See *Rea v. Carlile*, 6 Car. & P. 636; *State v. Laverack*, 34 N. J. L. 204; 15 Am. & Eng. Enc. Law, 2d ed. pp. 499, 500; Elliott, Roads & Streets, 2d ed. § 648. There are some old English cases which hold that a fair in a highway was permissible, but an examination of those cases will show that the ruling in each was based upon the existence of an immemorial custom. See *Elwood v. Bullock*, 13 L. J. Q. B. N. S. 330; *King v. Smith*, 4 Esp. 109. Besides, the old English fairs were very different enterprises from the one described in the present petition.

2. It is therefore to be determined whether there is any authority in the charter of the city of Augusta for permitting a portion of one of its streets to be used for the purpose of a street fair of the character described in the petition. The charter of Augusta contains the ordinary grants in reference to the laying out and control of streets. Blome's Code of Augusta, pp. 308, 455. Those powers do not authorize such a use of the street, and it was not seriously contended in the argument that they did. It is, however, strenuously insisted that, under the act of 1898 (Acts 1898, p. 131) amending the charter of Augusta, the municipal authorities have power to permit such a use of the streets. Taken as a whole, the act seems to be limited to a delegation of power to deal with the streets for railroad and depot purposes. But there is some very broad language in the act, and for the purposes of this case it will be treated as conferring the broader power to deal with the streets for any purpose. The act declares: "When, in the opinion of the city council of Augusta, the whole, or any part of a street, has ceased to be of general utility or use as a street, the city council, in its discretion, may permit platforms, gangways, tracks, or other structures to be constructed upon such level, and with such width, height, length, and 69 L. R. A.

of such material, as it may prescribe and approve, and on such terms and conditions as it may designate; or the city council of Augusta, in its discretion, may declare the same vacant and abandoned as a street, and donate the same to a use which, in their opinion, will be of advantage or utility to the commercial or business interests of the city, on such terms as the city council may prescribe." It is claimed that this confers upon the city authorities the power to vacate a street and use the land for any purpose that may be beneficial to the commercial interests of the city. Let this be conceded. The further contention is made that the power to vacate altogether and for all time carries with it the power to vacate in part and for a limited time. But the exercise of this power is dependent upon the city council having reached the conclusion that the street is no longer of public utility, and before the power to vacate can be exercised it must appear that it is the opinion of the council that the street is no longer of public utility. It not only does not appear that it is the opinion of the city council that the portion of Broad street where permission was granted to hold the street fair has ceased to be of public utility, but it appears from the petition that Broad street is the principal and most important business street in the city, and the use of the street for the fair was limited to one week. The present record does not present any such case as is contemplated by the act of 1898, even under the liberal construction contended for. The council has not exercised any authority based upon an opinion that the portion of Broad street in question has ceased to be of public utility, or will not be of public utility during the week the fair is to be held; but it has simply authorized private individuals, for their own pecuniary benefit, to use a large portion of an important business street, and thereby deprive the public, for several days, of the right to use that portion of the street for traffic or travel. There is absolutely nothing in the act of 1898, or in any other provision of the charter of Augusta, which can be properly construed as authority for the city authorities to permit such a use of one of its streets.

3. The jurisdiction of courts of equity, on the information of the proper public officer in behalf of the public, to restrain the erection or continuance of a public nuisance, is well settled. *Columbus v. Jaques*, 30 Ga. 506; *Lofton v. Collins*, 117 Ga. 434, 61 L. R. A. 150, 43 S. E. 708.

Judgment affirmed.

All the Justices concur except **Candler, J.**, absent.

IDAHO SUPREME COURT.

Henry E. HOWES *et al.*, *Respts.*,
v.

Abraham BARMON *et al.*, *Appts.*

(.....Idaho.....)

- *1. A license is a personal privilege to do certain acts upon the lands of another, but creates no estate therein, is revocable at will, and may rest in parol, while an easement is an estate in real property, and its grant falls within the statute of frauds.
2. Where B. is erecting a two-story building, and proposes to H. & K., who own and occupy a two-story building on the adjoining lot, that he will build a stairway on the side of his building next to H. & K.'s building, and that they may use the same for ingress and egress to and from the second story of their building, in consideration of H. & K. allowing B. to erect a porch on a 5-foot strip of a vacant lot adjoining the back end of B.'s building, and each party agrees thereto, and enters upon the use so agreed upon,—*Held*, that the permission to use such stairway does not amount to the grant of an easement, but constitutes a license only, and is revocable by the licensor.
3. A court of equity will not grant the aid of specific performance where the party invoking its aid has not parted with any consideration or property, and no irreparable damage is suffered, and no fraud is inflicted upon him, and where he is *in statu quo* at the time of the commencement of his action.
4. Unless the evidence be clearly to the contrary, a court will presume that a parol agreement to impress real property with a servitude was made with a knowledge of the provisions of the statute of frauds, and was therefore intended as a license only, and not as an easement.

(May 16, 1905.)

APPEAL by defendants from a judgment of the District Court for Shoshone County in plaintiffs' favor in an action brought to enjoin the closing of a stairway and interference with plaintiffs' right of passage therein. *Reversed*.

The facts are stated in the opinion.

Messrs. Walter A. Jones and Samuel R. Stern, for appellants:

One who seeks to enforce a specific performance of a contract is bound to establish

*Headnotes by AILSHIE, J.

NOTE.—As to distinction between license and easement generally, see also note to *Nowlin v. Whipple*, 6 L. R. A. 159; also the later case in this series of *Nunnally v. Southern Iron Co.* 28 L. R. A. 421.

As to revocability of license to maintain a burden on land after the licensee has incurred expense in creating the burden, see *Pifer v. Brown*, 49 L. R. A. 497, note.
60 L. R. A.

clearly and distinctly the existence of a contract and its terms.

Deeds v. Stephens (Idaho) 79 Pac. 77; *Rice v. Rigley*, 7 Idaho, 115, 61 Pac. 290.

An easement cannot be created by parol. *Tiedeman*, Real Prop. § 600; 10 Am. & Eng. Enc. Law, 2d ed. p. 412.

A license is an authority given to do some act, or a series of acts, on the land of another, without possessing an estate therein, and is revocable.

10 Am. & Eng. Enc. Law, 2d ed. p. 407; 18 Am. & Eng. Enc. Law, 2d ed. p. 1127; *Tiedeman*, Real Prop. § 653.

Defendants revoked the license before the commencement of this action, and with the knowledge and consent of these plaintiffs.

Barbour v. Hickey, 2 App. D. C. 207, 24 L. R. A. 763; *Pifer v. Brown*, 43 W. Va. 412, 49 L. R. A. 497, 27 S. E. 399; *Wiseman v. Lucksinger*, 84 N. Y. 31, 38 Am. Rep. 479; *Cronkhite v. Cronkhite*, 94 N. Y. 323; *Crosdale v. Ianigan*, 129 N. Y. 604, 26 Am. St. Rep. 551, 29 N. E. 824; *Hathaway v. Yakima Water, Light & P. Co.* 14 Wash. 469, 53 Am. St. Rep. 874, 44 Pac. 896; *Musgrove v. Hodges*, 46 Kan. 764, 27 Pac. 121.

A married woman can only be deprived of her real estate in the mode prescribed by statute, and a certificate with acknowledgment is as much an essential part of the execution of the deed as her signature.

Leonis v. Lazzarovich, 55 Cal. 52; Pom. Spec. Perf. § 299; *Jackson v. Torrence*, 83 Cal. 521, 23 Pac. 695; *Bonelli Bros. v. Blakemore*, 66 Miss. 136, 14 Am. St. Rep. 550, 5 So. 228.

A "way" is an incorporeal hereditament, or, since livery of seisin could not have been made of it at common law, it could only be created by deed or other writing. It is therefore said to lie in grant.

Greenleaf's Cruise, Real Prop. title, *Deed*, C. 4, §§ 35, 36.

A right of way is an interest in lands, and a grant by parol is obnoxious to the statute of frauds.

Thompson v. Gregory, 4 Johns. 81, 4 Am. Dec. 255; *Richter v. Irwin*, 28 Ind. 26; *Hall v. McLeod*, 2 Met. (Ky.) 98, 74 Am. Dec. 400; *Kerr, Fraud & Mistake*, § 718; *Walker v. Shackelford*, 49 Ark. 503, 4 Am. St. Rep. 61, 5 S. W. 887; *Hodgkins v. Farrington*, 150 Mass. 19, 5 L. R. A. 209, 15 Am. St. Rep. 168, 22 N. E. 73.

Nothing can be regarded as part performance to take the case out of the operation of the statute which does not place the party in a situation which is a fraud upon him, unless the contract be executed.

Weber v. Marshall, 19 Cal. 447.

Where nothing has been done further than to pay a consideration, there is nothing in the way of restoring the parties to their original condition, and therefore of revoking the licence.

Huff v. McCauley, 53 Pa. 206, 91 Am. Dec. 203; *Wilson v. St. Paul, M. & M. R. Co.* 41 Minn. 56, 4 L. R. A. 378, 42 N. W. 600; *Woodward v. Seely*, 11 Ill. 157, 50 Am. Dec. 445; *Johnson v. Skillman*, 29 Minn. 95, 43 Am. Rep. 192, 12 N. W. 149; *Great Falls Waterworks Co. v. Great Northern R. Co.* 21 Mont. 487, 54 Pac. 966.

Mr. W. W. Woods, for respondents:

The court has always affirmed the equitable power of the court in proper cases to grant specific performance of parol contracts for the sale of lands. Part performance takes these cases out of the provisions of the statute of frauds.

Bowman v. Ayers, 2 Idaho, 465, 21 Pac. 405; *Stowcell v. Tucker*, 7 Idaho, 312, 62 Pac. 1033; *Feeney v. Chester*, 7 Idaho, 324, 63 Pac. 192; *Francis v. Green*, 7 Idaho, 668, 65 Pac. 362; *Deeds v. Stephens*, 8 Idaho, 514, 69 Pac. 534; *Barton v. Dunlap*, 8 Idaho, 82, 66 Pac. 832; *Flickinger v. Shaw*, 87 Cal. 126, 11 L. R. A. 134, 22 Am. St. Rep. 234. 25 Pac. 268; *Grimshaw v. Belcher*, 88 Cal. 217, 22 Am. St. Rep. 298, 26 Pac. 84.

Contracts made by husband and wife where possession has been delivered will be specifically enforced.

Clayton v. Frazier, 33 Tex. 91; *Womack v. Womack*, 8 Tex. 397, 58 Am. Dec. 119; *Dalton v. Rust*, 22 Tex. 133.

Mr. Robert N. Dunn, also for respondents:

The mere fact that the deed was taken in the name of Mrs. Barmon alone created no inference that the property was her separate property, the deed having been made on a purchase.

Meyer v. Kinzer, 12 Cal. 254; *Pisley v. Huggins*, 15 Cal. 128.

All property acquired by either husband or wife after the marriage, except that acquired in one of the particular ways mentioned in §§ 2495 and 2496, is community property, and the burden is on the party claiming it as separate property to prove it to be such by clear and convincing evidence.

Davis v. Green, 122 Cal. 364, 55 Pac. 10; *Re Boody*, 113 Cal. 682, 45 Pac. 860; *Yesler v. Hochstetler*, 4 Wash. 349, 30 Pac. 398; *Dimmick v. Dimmick*, 95 Cal. 323, 30 Pac. 547; *Morgan v. Lones*, 78 Cal. 58, 20 Pac. 250; *Pisley v. Huggins*, 15 Cal. 128; *Meyer v. Kinzer*, 12 Cal. 254.

Ailshie, J., delivered the opinion of the court:

In this case the trial court entered a de-

creed for the specific performance of a parol contract to grant a perpetual easement in a stairway maintained in appellants' building. The principal facts, upon which the decree was entered are briefly as follows: In the month of November, 1899, the respondents, Howes & King, were the owners of lot 6 and the south one half of lot 8 in block 21 in the city of Wallace, on which stood a two-story brick building, the ground floor of which was occupied by them as a store building, and the second floor as a dwelling. About this time the appellants purchased the north half of lot 8, which adjoins the Howes & King property on the east, and began to erect a two-story brick building, 50 feet square. Prior to this time Howes & King had maintained a back stairway to their building, with the landing on the vacant lot purchased by the Barmons, and, in passing from the street to and from their stairway, they passed over this vacant lot. When the Barmons began to build, they tore away the landing, and, of course, left Howes & King without any means of ingress or egress to and from the second story of their building. At this juncture the respondent Howes and the appellant Abraham Barmon had some discussion over the construction of a stairway by the Barmons, and the future use thereof by Howes & King. Up to this time the Barmons had planned to build their stairway on the east side of their building. Howes and Barmon do not agree as to what conversation took place between them with reference to the stairway and the future use thereof, and we therefore quote from the finding of the trial court on that point. He finds "that, during the time of the construction of said building, these defendants offered to give the plaintiffs the use forever of the front stairway leading to the upper story of their said building, and connecting with the upper story of the building so occupied by the plaintiffs and their families, for the consideration of a strip of land of 5 feet on the north part of the south one-half of lot 8, block 21, and plaintiffs agreed to said proposition." This finding of the court is followed by a finding that in the month of November, 1899, in pursuance of said contract, the plaintiffs went into the possession and use of the stairway, and the defendants at the same time went into the possession and use of the 5-foot strip off the north end of the south half of lot 8. This strip of land was contiguous to, and immediately south of, the Barmon premises, on which the building was erected. The record shows that, after the conversation took place between Howes and Barmon, the plans for the Barmon building were so modified as to run the stairway up on the west side of

the building, and next to the Howes & King building, instead of on the east side, as originally planned. No written agreement of any kind was entered into, and after the building was completed the stairway was used by the Barmons and their tenants, and also by Howes & King and their tenants. On the other hand, the Barmons, by means of posts, erected a porch 5 feet wide and 50 feet long (the full length of their building) to the second story of the building, and used that, in connection with their residence in the second story of that building, until a few days prior to the commencement of this action. Matters ran along in this manner until about the 14th day of June, 1902, when the Barmons tore away the porch, and ceased to use the same, and notified Howes & King that it was their intention to revoke the license previously granted to them to use the stairway; and they thereupon proceeded to lock up the front entrance and close up the entrance from the top of the stairway into the Howes & King building. The respondents thereupon commenced this action, and secured a temporary injunction against the appellants, restraining them from closing up the stairway or interfering with their free use thereof. The Barmon property was purchased in the name of Fannie Barmon, the wife of the defendant Abraham Barmon, and at all times has stood upon the records in her name, and is claimed by her as her separate property. A great portion of the briefs of counsel has been devoted to the discussion of the evidence on that question, and the law applicable thereto. The court found, however, that the property was the community property of the defendants, and we are inclined to think there is sufficient evidence in the record to justify that finding. It is not necessary for us, however, to discuss the sufficiency of the evidence to sustain the findings, for the reason that, in the view we take of this case, the findings of fact do not support the legal conclusions that the court has drawn from them.

The appellants claim that the privileges exercised by each over the realty of the other were merely mutual licenses, revocable by either at will. On the other hand, the respondents claim that these transactions amounted to mutual contracts for conveyances by good and sufficient deeds,—a title from Howes & King to the Barmons to the 5-foot strip of ground immediately south of the Barmon building, and a conveyance from the Barmons to Howes & King of a perpetual easement in the stairway ascending from the street to the second story of their building.

It is difficult to ascertain from the great mass of conflicting decisions just when a li-

cense to use or impose a servitude upon the real property of another ceases to be a mere license revocable at will, and ripens into the certainty and dignity of an easement. Still there are some primary and fundamental principles, well established, which underlie this class of cases, a reference to which should afford a reasonably safe guide.

It is settled law that a license creates no estate in lands, and may therefore rest in parol. *Johnson v. Skillman*, 29 Minn. 95, 43 Am. Rep. 192, 12 N. W. 149; *Mumford v. Whitney*, 15 Wend. 380, 30 Am. Dec. 60; *Great Falls Waterworks Co. v. Great Northern R. Co.* 21 Mont. 487, 54 Pac. 963; *Cook v. Stearns*, 11 Mass. 533; *Clark v. Glidden*, 60 Vt. 702, 15 Atl. 358; *Wood v. Leadbitter*, 13 Mees. & W. 838, 16 English Ruling Cases, 54; *Jones, Easements*, §§ 63, 68. On the other hand, an easement is an interest or estate in real property, and is subject to the operation of the statute of frauds. Rev. Stat. 1887, § 6007; 14 Cyc. Law & Proc. p. 1144; *Pifer v. Brown*, 43 W. Va. 412, 49 L. R. A. 497, and note, 27 S. E. 399; *Clark v. Glidden*, 60 Vt. 702, 15 Atl. 358; *Jones, Easements*, § 65. Where the contract or agreement, whether it be called a license or an easement, looks to the acquirement of a right of passage, as in this case, over a stairway, and rests entirely in parol, it is clear, under all the authorities, that the licensee or grantee must have entered into possession, expended money, and made improvements in such manner and to such an extent that a refusal to enforce the agreement in specific terms would work a fraud upon the licensee or grantee. 10 Am. & Eng. Enc. Law, 2d ed. p. 412; 18 Am. & Eng. Enc. Law, 2d ed. p. 1146; *Baltimore & H. R. Co. v. Algire*, 65 Md. 337, 4 Atl. 203. See note to *Pifer v. Brown*, 49 L. R. A. 497. It is also true that the alleged part performance relied on to take the case out of the statute of frauds must be founded on, and referable solely to, the specific terms of the agreement. *Johnson v. Skillman*, 29 Minn. 95, 43 Am. Rep. 192, 12 N. W. 149; *Wheeler v. Reynolds*, 66 N. Y. 227; *Wiseman v. Lucksinger*, 84 N. Y. 31, 38 Am. Rep. 479. In this case the respondents had parted with nothing whatever. They paid no consideration for the perpetual easement they claim to have purchased. They were out nothing for the construction of the stairway, and the evidence shows that they never at any time have assisted in maintaining or keeping up the stairway, or keeping the same cleaned or lighted; nor did the respondents offer to show upon the trial what agreement, if any, they made with reference to the maintenance of the stairway, or the care and lighting of the same, or the width thereof, or the character

of the stairway which should be constructed or maintained. It is true that the appellants entered into the possession and use of the 5-foot strip of land which respondents contend was to be given as a consideration for this easement. But it is not contended anywhere that the use of this strip of land was of any greater value for the same period of time than was the right to pass over the stairway for a like period of time. These rights appear to have been mutual and interchangeable, and one would apparently offset the other. This arrangement or agreement should be interpreted and dealt with in the light of the circumstances under which the parties acted. It is clearly apparent from the testimony of both Howes and Barmon that, whatever conversation or agreement they had, it was merely in the light and spirit of an exchange of neighborly courtesies, and was never given the consideration which the parties would attach to a contract which looks to one party parting with the fee to his property, and the other to burdening his realty with a perpetual servitude. As an instance of this, the title to the property stood on the records in the name of Mrs. Barmon at the time of the agreement, and yet no contract was made with her, and nothing appears to have been said in reference to the transfer of title, or whether or not the property was community property, or the separate property of the wife.

There is no reason shown in this case, that we can discover, why the aid of a court of equity should be invoked in behalf of the plaintiffs. If the court should refuse to decree them a perpetual easement in this stairway, they would be in no worse position than they would have been in the first place, had the Barmons erected their building without permitting plaintiffs to use their stairway. In that event Howes & King would have been under the necessity of erecting a stairway by means of which to reach the second story of their building. They have parted with no consideration for the use of this stairway, nor have they lost any property or right by reason of having neglected to build a stairway themselves. If they are refused a decree in this case, they will only be left in the same position they originally occupied. This is a case where a refusal by the court to grant plaintiffs a decree will leave them absolutely *in statu quo*. But courts of equity grant relief in such cases upon the principal theory that the parties cannot be placed in the position they originally occupied, and therefore equity will compel them to live up to their agreements. Here the reasons for equitable interposition do not seem to exist, and we do not think it would be either just or con-

scionable for a court to encumber the appellants' property with a perpetual servitude, which the evidence shows would depreciate the property from 10 to 25 per cent. The privileges granted by appellants to respondents were evidently of a purely personal character, and would not have been conferred on a stranger to the licensors, even though he had had title to the Howes & King property. But if the easement should be decreed as contended for, it would run with the Howes & King property, and would pass to their grantees, whoever they might be. After the perusal of a great number of conflicting and inharmonious decisions, we have been unable to find any case where the courts have held a license such as this irrevocable on the ground alone that the licensee had been let into possession; but in such cases, where specific performance has been required, the courts have uniformly rested their decisions upon the grounds that the licensee had not only been let into possession, but that he had made expenditures or erected valuable improvements, for which he could not be adequately compensated in damages. *Lawrence v. Springer*, 49 N. J. Eq. 289, 31 Am. St. Rep. 702, 24 Atl. 933; *Wheeler v. Reynolds*, 66 N. Y. 227; notes to cases hereinbefore cited. The modern decisions seem strongly inclined to hold a parol agreement looking to encumbering real property with a servitude as a mere license, revocable at will, and this we think the much safer rule. While this court is not now prepared to go to the extent announced in *Crosdale v. Lanigan*, 129 N. Y. 604, 26 Am. St. Rep. 551, 29 N. E. 824, still the language there used by the New York court appeals to us as both safe and just, when they say: "The courts in this state have upheld with great steadiness the general rule that a parol license to do an act on the land of the licensor, while it justifies anything done by the licensee before revocation, is nevertheless revocable at the option of the licensor; and this, although the intention was to confer a continuing right, and money had been expended by the licensee upon the faith of the license. This is plainly the rule of the statute. It is also, we believe, the rule required by public policy. It prevents the burdening of lands with restrictions founded upon oral agreements easily misunderstood." See also *Johnson v. Skillman*, 29 Minn. 95, 43 Am. Rep. 192, 12 N. W. 149; *Cronkhite v. Cronkhite*, 94 N. Y. 323; *St. Louis Nat. Stockyards v. Wiggins Ferry Co.* 112 Ill. 384, 54 Am. Rep. 243; *Wood v. Michigan Air Line R. Co.* 90 Mich. 334, 51 N. W. 263. This seems to grow out of the proposition that, since a parol license to impress real property with a servitude cannot be perpetual or irrev-

cable, on account of the prohibitions of the statute of frauds, and the parties not having complied with the requirements of the statute, they will be presumed to have dealt in conformity with law, and therefore to have intended a license rather than an easement.

The trial court evidently concluded in this case that the acts and conduct of the parties amounted to an executed contract for a perpetual easement over the appellants' property, but we are clearly of the opinion that it only amounted to a license revocable at will. It follows that *the judgment must be reversed*, and it is so ordered. The cause is remanded, with directions to enter judgment in accordance with the views herein expressed. Costs awarded to appellants.

Stockalager, Ch. J., and Sullivan, J., concur.

W. G. WHITNEY, *Respt.*,

v.

E. H. DEWEY, *Appt.*

(.....Idaho.....)

- *1. Where a motion for a new trial has been made, and the statement used on such motion contained an assignment and specification of errors, and an appeal is taken from the order denying the motion, and the original brief of appellant contains no enumeration of errors relied on, but refers to the transcript and discusses such errors, and prior to the argument in the appellate court a supplemental brief is filed by appellant, making a specific enumeration of such errors, the same will be regarded as a substantial compliance with the rules of this court, and the case will be examined on the merits.
2. Section 4427, Rev. Stat. 1887, gives to an aggrieved party an exception to the ruling of the court in granting or overruling a motion for a new trial, and on appeal from such order the appellant is entitled to have the assignment and specification of errors contained in his statement used on the hearing of such motion examined and considered by the appellate court.
3. A deed absolute on its face cannot be delivered to the grantee therein named, to be by him held in escrow; and a delivery which purports to be such will operate as absolute and freed from all parol conditions, and title will vest at once.
4. It is a settled principle of law that the evidence of delivery of a deed must come from without the deed: in other words, a deed does not upon its face show delivery, and therefore parol evidence is admissible to show such fact.
5. Parol evidence is inadmissible to

*Headnotes by AILSHIE, J.

NOTE.—For a case in this series holding that a deed cannot be delivered in escrow to the grantee, see *Darling v. Butler*, 10 L. R. A. 460, with note as to definition of escrow. 69 L. R. A.

show that a deed delivered to the grantee and absolute on its face shall take effect only upon the performance of some condition or the happening of some contingency unexpressed therein.

6. In such case the vesting of title is determined by the legal effect of the terms of the grant, and cannot be controlled by parol evidence.
7. A grantor cannot by warranty deed, absolute on its face, and free from conditions or restrictions, convey such a title to his grantee as will enable the grantee to pass a good title to a specific corporation, and at the same time attach such parol conditions to the deed upon its delivery as to preclude the grantee from transferring an equally good title to any other person or corporation.
8. Where B. executes a warranty deed free from any conditions or qualifications as to the vesting of title, and delivers it to the grantee, W., accompanied with a contemporaneous parol agreement to the effect that W. shall form a corporation and deed the property to such corporation, and thereupon pay B. \$1,000 cash and deliver to B. \$5,000 worth of first-mortgage bonds of the corporation secured on the property so deeded, and the deed is placed in the hands of the grantee to facilitate such transaction, —Held, that the delivery was absolute, and title vested at once in the grantee.
9. Even though a valid delivery of a deed had not been made at the time of its execution, still the grantor may thereafter ratify the wrongful taking of the deed by the grantee after the grantor has acquired complete knowledge of the facts of the transaction, and thereby perfect the title.

(February 23, 1905.)

APPEAL by defendant from a judgment of the District Court for Canyon County in plaintiff's favor in an action brought to quiet title to certain real estate. *Reversed.*

The facts are stated in the opinion.

Messrs. N. M. Ruick and W. E. Borah, for appellant:

There is no rule of pleading and practice which will permit an allegation that a deed was delivered under the terms of a written contract, and proof of the fact that it was delivered under an oral contract, when the question of delivery is not an incident, but goes to the vital controversy in the case, and to the very validity of the deed itself.

Spader v. McVell, 130 Cal. 500, 62 Pac. 828; *Frazier v. Ebenezer Baptist Church*, 60 Kan. 404, 56 Pac. 752; *Westchester F. Ins. Co. v. Coverdale*, 9 Kan. App. 651, 58 Pac. 1029; *Maynard v. Firemen's Fund Ins. Co.* 34 Cal. 60, 91 Am. Dec. 672; *Stout v. Coffin*, 28 Cal. 65; *Cox v. McLaughlin*, 63 Cal. 207; *Hinkle v. San Francisco & N. P. R. Co.* 55 Cal. 627; *Perkins Windmill & Ax Co. v. Yeoman*, 23 Ind. App. 483, 55 N. E. 782; *Stewart v. Cleveland, C. C. & St. L.*

R. Co. 21 Ind. App. 218, 52 N. E. 89; *Trueblood v. Shellhouse*, 19 Ind. App. 91, 49 N. E. 47; *Browning v. Walbrun*, 45 Mo. 477; *Glick v. Weatherwax*, 14 Wash. 560, 45 Pac. 156; *Wheeler v. Schad*, 7 Nev. 204; *Adams v. Hicks*, 41 Tex. 239; *Rogers v. Kimball*, 121 Cal. 247, 63 Pac. 649; *Mon-dran v. Goux*, 51 Cal. 151.

If a writing imports upon its face to be a complete expression of the whole agreement, it is to be presumed that the parties have introduced into it every material item and term; and parol evidence cannot be admitted to add another term to the agreement, although the writing contains nothing on the particular one to which the parol evidence is directed.

Harrison v. McCormick, 89 Cal. 327, 23 Am. St. Rep. 469, 26 Pac. 830; *Nicholson v. Tarpey*, 89 Cal. 617, 26 Pac. 1102; *Thompson v. Libby*, 34 Minn. 374, 26 N. W. 1; *Naumberg v. Young*, 44 N. J. L. 333, 43 Am. Rep. 380; *Hei v. Heller*, 53 Wis. 415, 10 N. W. 620; *Oreery v. Holly*, 14 Wend. 26; *Stone v. Harmon*, 31 Minn. 512, 19 N. W. 88; *Mackey v. Magnon*, 12 Colo. App. 137, 54 Pac. 907; *Ming v. Pratt*, 22 Mont. 262, 56 Pac. 279; *Judson v. Malloy*, 40 Cal. 307; *McIntosh-Huntington Co. v. Rice*, 13 Colo. App. 393, 58 Pac. 358; *Irving v. Cunningham*, 66 Cal. 15, 4 Pac. 766; *Liverpool, L. & G. Ins. Co. v. T. M. Richardson Lumber Co.* 11 Okla. 585, 69 Pac. 938; *Forsyth Mfg. Co. v. Castlen*, 112 Ga. 199, 81 Am. St. Rep. 28, 37 S. E. 485; *Hand v. Miller*, 58 App. Div. 126, 68 N. Y. Supp. 531; *Hilgar v. Miller*, 42 Or. 552, 72 Pac. 319.

Whether a deed passes title or not must be determined by its legal effect. If it has been executed and delivered its effect is determined by its language. The deed cannot be delivered to the grantee as an escrow.

Mowry v. Heney, 86 Cal. 471, 25 Pac. 18; *Co. Litt.* 36a; *Williams v. Green*, Cro. Eliz. pt. 2, p. 884; *Shep. Touch.* 59; *Whyddon's Case*, Cro. Eliz. pt. 2, p. 520; *Braman v. Bingham*, 26 N. Y. 483; *Worrall v. Munn*, 5 N. Y. 238, 55 Am. Dec. 330; *Blewitt v. Boorum*, 142 N. Y. 357, 40 Am. St. Rep. 600, 37 N. E. 119; *Lawton v. Sager*, 11 Barb. 349; *Fairbanks v. Metcalf*, 8 Mass. 237; *Ward v. Lewis*, 4 Pick. 518; *Darling v. Butler*, 10 L. R. A. 469, 45 Fed. 332; *Hubbard v. Greeley*, 84 Me. 340, 17 L. R. A. 511, 24 Atl. 799; *Hargrave v. Melbourne*, 86 Ala. 270, 5 So. 285; *Richmond v. Morford*, 4 Wash. 337, 30 Pac. 241, 31 Pac. 513; *Stevenson v. Crapnell*, 114 Ill. 19, 28 N. E. 379; *Neely v. Lewis*, 10 Ill. 31; 3 Washb. Real Prop. 267; *Kingsbury v. Burnside*, 58 Ill. 310, 11 Am. Rep. 67; *Jackson v. Cleveland*, 15 Mich. 94, 90 Am. Dec. 266; *Baker v. Baker*, 159 Ill. 394, 42 N. E. 867; *McCann* 69 L. R. A.

v. Atherton, 106 Ill. 35; *Gaston v. Portland*, 16 Or. 255, 19 Pac. 130; *Miller v. Fletcher*, 27 Gratt. 403, 21 Am. Rep. 356; *Wadsworth v. Warren*, 12 Wall. 313, 20 L. ed. 404.

There was an attempt to show by parol evidence a trust which is in the teeth of our statute of frauds.

Rev. Stat. § 607; *Feeney v. Howard*, 79 Cal. 525, 4 L. R. A. 826, 12 Am. St. Rep. 162, 21 Pac. 985; *Johnson v. Calnan*, 19 Colo. 168, 41 Am. St. Rep. 224, 34 Pac. 905; *Doran v. Doran*, 99 Cal. 311, 33 Pac. 929; *Highland Park Co. v. Walker*, 13 Colo. App. 352, 57 Pac. 759.

If the grantor delivers the deed to the grantee, the law will not allow the solemn recital therein of conveyance and delivery to be so modified as to show that it was held by the grantee in escrow, or for some other purpose than that of conveying title.

Mays v. Shields, 117 Ga. 814, 45 S. E. 68; *Sims v. Greenfield & N. R. Co.* 102 Mo. App. 29, 74 S. W. 421; *Findley v. Means*, 71 Ark. 289, 73 S. W. 101; *Galveston, H. & S. A. R. Co. v. Pfeuffer*, 56 Tex. 72; *Ward v. Dougherty*, 75 Cal. 240, 7 Am. St. Rep. 151, 17 Pac. 193; *Tunison v. Chamberlin*, 88 Ill. 379; *McClendon v. Brockett*, 32 Tex. Civ. App. 150, 73 S. W. 854; *Hoffmire v. Martin*, 29 Or. 240, 45 Pac. 754; *Bury v. Young*, 98 Cal. 446, 35 Am. St. Rep. 186, 33 Pac. 338; *Ruiz v. Dow*, 113 Cal. 490, 45 Pac. 867; *Foley v. Cowgill*, 5 Blackf. 18, 32 Am. Dec. 49; *Hicks v. Goode*, 12 Leigh, 479, 37 Am. Dec. 677; *Moss v. Riddle*, 5 Cranch, 351, 3 L. ed. 123; *McGee v. Allison*, 94 Iowa, 527, 63 N. W. 324; *Beers v. Beers*, 22 Mich. 43; *Blewett v. Front-Street Cable R. Co.* 49 Fed. 126; *Bryan v. Walsh*, 7 Ill. 567.

There was a complete delivery.

McLennan v. McDonnell, 78 Cal. 273, 20 Pac. 566; *Kenniff v. Caulfield*, 140 Cal. 34, 73 Pac. 803; *Standiford v. Standiford*, 97 Mo. 231, 3 L. R. A. 299, 10 S. W. 836; *Hoffmire v. Martin*, 29 Or. 240, 45 Pac. 754; *Wittenbrock v. Cass*, 110 Cal. 1, 42 Pac. 300; *Martin v. Flaherty*, 13 Mont. 96, 19 L. R. A. 242, 40 Am. St. Rep. 415, 32 Pac. 287; *Phelan v. Hyland*, 197 Ill. 395, 64 N. E. 360; *Schlicher v. Keeler*, 61 N. J. Eq. 394, 48 Atl. 393; *Doe ex dem. Smith v. Roe*, 3 Penn. (Del.) 233, 50 Atl. 59; *Adams v. Baker*, 50 W. Va. 249, 40 S. E. 356; *Delaplain v. Grubb*, 44 W. Va. 612, 67 Am. St. Rep. 788, 30 S. E. 201; *Hargrave v. Melbourne*, 86 Ala. 270, 5 So. 285.

The transfer was ratified.

McNulty v. McNulty, 47 Kan. 208, 27 Pac. 821; *Tucker v. Allen*, 16 Kan. 312; *Devin v. Himer*, 29 Iowa, 297; *Hall v. Vanness*, 49 Pa. 457; *Pittman v. Sotley*, 64 Ill. 155; *Swisher v. Palmer*, 106 Ill. App. 432;

Taylor v. Smith, 61 App. Div. 623, 71 N. Y. Supp. 160; *Harkness v. Cleaves*, 113 Iowa, 140, 84 N. W. 1033; *Holbrook v. Chamberlin*, 116 Mass. 155, 17 Am. Rep. 146; *Parker v. Hill*, 8 Met. 447; *Cook v. Patrick*, 135 Ill. 499, 11 L. R. A. 573, 26 N. E. 658.

Messrs. O. O. Haga and Hawley, Puckett, & Hawley, for respondent:

Appellant has assigned no error in this court on which he relies or seeks a reversal of the judgment entered against him, contrary to the established rules of practice and the rules of this court.

Rev. Stat. § 3863; 8 Am. & Eng. Enc. Law, p. 29; *Hanson v. McCue*, 43 Cal. 178; *United States v. Tidball*, 3 Ariz. 384, 29 Pac. 385; *Williston v. Fisher*, 28 Ill. 43.

The failure to file assignment of errors must entail an affirmance of the judgment or decree.

McNeill v. Kyle, 86 Ala. 338, 5 So. 461; *Putnam v. Putnam*, 3 Ariz. 182, 24 Pac. 320; *Globe Invest. Co. v. Boyum*, 3 N. D. 538, 58 N. W. 339; 2 Enc. Pl. & Pr. pp. 922-927; *Rehberg v. Greiser*, 24 Mont. 487, 62 Pac. 820, 63 Pac. 41; *Charles Schatzlein Paint Co. v. Godin*, 24 Mont. 483, 62 Pac. 819; *Skilling v. Curran*, 30 Mont. 370, 76 Pac. 998; *Purdy v. Steel*, 1 Idaho, 216; *Brovelli v. Bianchi*, 136 Cal. 612, 69 Pac. 416; *Squires v. Foorman*, 10 Cal. 298; *Haggin v. Clark*, 28 Cal. 162; *Haas v. Pueblo County*, 5 Colo. 125; *Johnson v. Robinson*, 68 Tex. 399, 4 S. W. 625; *Schroeder v. Schmidt*, 74 Cal. 459, 16 Pac. 243; *Malone v. Del Norte County*, 77 Cal. 217, 19 Pac. 422; *Pearson v. Flanagan*, 52 Tex. 266; *Chappell v. Missouri P. R. Co.* 75 Tex. 82, 12 S. W. 977; *San Antonio & A. P. R. Co. v. Adams*, 6 Tex. Civ. App. 102, 24 S. W. 839; *Hutton v. Reed*, 25 Cal. 479; *Brewster v. Johnson*, 51 Cal. 222; *McCormack v. Phillips*, 4 Dak. 506, 34 N. W. 39; *Syndicate Improv. Co. v. Bradley*, 6 Wyo. 171, 43 Pac. 79, 44 Pac. 60; *Ashley v. Martin*, 50 Ala. 537; *Ashman v. Flint & P. M. R. Co.* 90 Mich. 567, 51 N. W. 645; *Bishop v. Middleton*, 43 Neb. 10, 26 L. R. A. 445, 61 N. W. 129; *Daggs v. Hoskins*, 5 Ariz. 236, 52 Pac. 350; *Penny v. Fellner*, 6 Okla. 386, 50 Pac. 123; *Gavin v. Gavin*, 92 Cal. 292, 28 Pac. 567; *Kyle v. Craig*, 125 Cal. 107, 57 Pac. 791; *Jay v. Zeissness*, 6 Okla. 591, 52 Pac. 928.

Errors must be separately stated and distinctly pointed out; general assignments are not sufficient.

Bell v. Southern P. R. Co. 144 Cal. 560, 77 Pac. 1124; *Louisville, N. A. & O. R. Co. v. Kenicker*, 8 Ind. App. 404, 35 N. E. 1047; *Eagle Fire Co. v. Globe Loan & T. Co.* 44 Neb. 380, 62 N. W. 895; *Sigler v. McConnell*, 45 Neb. 598, 63 N. W. 870; *Chicago, R. I. & P. R. Co. v. Moffitt*, 75 Ill. 524; 69 L. R. A.

Chicago City R. Co. v. Van Vleck, 40 Ill. App. 367; *Phillips v. Owsley*, 4 Ky. L. Rep. 832; *Honeycutt v. St. Louis, I. M. & S. R. Co.* 40 Mo. App. 674; *Arohbishop v. Hack*, 23 Or. 536, 32 Pac. 402; *McOullough v. Martin* (Ind. App.) 35 N. E. 719; *Saunders v. Montgomery*, 143 Ind. 185, 41 N. E. 453; *McCormack v. Phillips*, 4 Dak. 506, 34 N. W. 39; *Christian v. Bowman*, 49 Minn. 99, 51 N. W. 663; *Stephenson v. Flagg*, 41 Neb. 371, 59 N. W. 785; *Reilly v. Atchison*, 4 Ariz. 72, 32 Pac. 262; *Bill v. Klaus*, 4 Dak. 328, 30 N. W. 171; *Commercial Nat. Bank v. Brill*, 37 Neb. 626, 56 N. W. 382; *Sherman v. Shau*, 9 Nev. 148; *Metropolitan Nat. Bank v. Rogers*, 3 C. C. A. 668, 3 U. S. App. 406, 53 Fed. 776; *Richardson v. Walton*, 9 C. C. A. 604, 17 U. S. App. 525, 61 Fed. 535; *Nading v. Elliott*, 137 Ind. 261, 36 N. E. 695; *Dabney's Appeal*, 120 Pa. 344, 14 Atl. 158; *Lutlopp v. Heckmann*, 70 N. J. L. 272, 57 Atl. 1046; *Vinall v. Hendricks* (Ind. App.) 71 N. E. 682; *Lincoln v. Bailey* (Neb.) 99 N. W. 830; *Bitter v. Mouat Lumber & Invest. Co.* 27 Colo. 120, 59 Pac. 403; *Chicago, B. & Q. R. Co. v. German Ins. Co.* 2 Kan. App. 395, 42 Pac. 594; *Case v. Jacobitz*, 9 Kan. App. 842, 62 Pac. 115; *Whitinger v. Nelson*, 29 Ind. 441; *Bartholomew v. Preston*, 46 Ind. 286; *Pierce v. Manning*, 2 S. D. 517, 51 N. W. 332; *Toulouse v. Burkett*, 2 Idaho, 184, 10 Pac. 26; *Rice v. Innskeep*, 34 Cal. 224; *Prince v. Lynch*, 38 Cal. 531, 99 Am. Dec. 427; *Pico v. Cuyas*, 47 Cal. 174; *Warren v. Quill*, 9 Nev. 264; *Glaser v. Glaser*, 13 Okla. 389, 74 Pac. 944; *Borgerson v. Cook Stone Co.* 91 Minn. 91, 97 N. W. 734; *McNab v. Northern P. R. Co.* 12 N. D. 568, 98 N. W. 353; *Lichty v. Clark*, 10 Neb. 472, 6 N. W. 760; *United States v. Trabing*, 3 Wyo. 147, 6 Pac. 721; *Hawkins v. Hubbard*, 2 S. D. 633, 51 N. W. 774; *First Nat. Bank v. Comfort*, 4 Dak. 167, 28 N. W. 855; *Myers v. Longstaff*, 14 S. D. 98, 84 N. W. 233; *Boyd v. Bryan*, 11 Okla. 56, 65 Pac. 940.

The statement used on motion for a new trial, when used on an appeal from a judgment, takes the place of a bill of exceptions only, and only errors of law therein contained, if properly specified, can be considered.

Rev. Stat. § 4426; *Carpentier v. Williamson*, 25 Cal. 158; *United States v. Trabing*, 3 Wyo. 147, 6 Pac. 721; *Withers v. Kemper*, 25 Mont. 432, 65 Pac. 422.

Declarations of White against his title under such a deed are admissible.

Stanley v. Green, 12 Cal. 164; *Daly v. Josslyn*, 7 Idaho, 657, 65 Pac. 442.

The deed was not delivered to White, in the sense that such term is used in the conveyance of real property.

9 Am. & Eng. Enc. Law, p. 154; *Black*

v. *Sharkey*, 104 Cal. 279, 37 Pac. 939; *Branson v. Oregonian R. Co.* 11 Or. 161, 2 Pac. 86; *Lee v. Richmond*, 90 Iowa, 695, 57 N. W. 613; *Steel v. Miller*, 40 Iowa, 403; *Berkshire v. Peterson*, 83 Iowa, 197, 48 N. W. 1035; *Head Bros. v. Thompson*, 77 Iowa, 267, 42 N. W. 188; *Bunn v. Stuart*, 183 Mo. 375, 81 S. W. 1091; *Hastings v. Vaughan*, 5 Cal. 315; *Gilmore v. Morris*, 13 Mo. App. 114; *Shaw v. Cunningham*, 18 S. C. 631; *Lindsay v. Lindsay*, 11 Vt. 621; *Hurlburt v. Wheeler*, 40 N. H. 73; *Den ex dem. Farlee v. Farlee*, 21 N. J. L. 279; *Stoney v. Winterhalter*, 8 Sadler (Pa.) 492, 11 Atl. 611; *Stephens v. Buffalo & N. Y. City R. Co.* 20 Barb. 332.

There can be no delivery without an acceptance.

Beardsley v. Hilson, 94 Ga. 50, 20 S. E. 272; *Hall v. Hall*, 107 Mo. 101, 17 S. W. 811; *Guggenheimer v. Lockridge*, 39 W. Va. 457, 19 S. E. 874; *Moore v. Flynn*, 135 Ill. 74, 25 N. E. 844; *Metcalfe v. Brandon*, 60 Miss. 685; *Koehler v. Hughes*, 148 N. Y. 507, 42 N. E. 1051; *Bremmerman v. Jennings*, 101 Ind. 253; *Com. v. Jackson*, 10 Bush, 424; *Meigs v. Dexter*, 172 Mass. 217, 52 N. E. 75; *Hawkes v. Pike*, 105 Mass. 561. 7 Am. Rep. 554; *Comer v. Baldwin*, 18 Minn. 172, Gil. 151; *Stephens v. Buffalo & N. Y. City R. Co.* 20 Barb. 332; *Steffian v. Milmo Nat. Bank*, 69 Tex. 513, 6 S. W. 823; *Wheeler & W. Mfg. Co. v. Briggs*, (Tex.) 18 S. W. 555; *Wiggins v. Lusk*, 12 Ill. 132; *Woodbury v. Fisher*, 20 Ind. 387, 83 Am. Dec. 325; *Doe ex dem. Herbert v. Herbert*, 1 Breese (Ill.) 278, 12 Am. Dec. 192; *M'Gehee v. White*, 31 Miss. 41; *Deere v. Nelson*, 73 Iowa, 187, 34 N. W. 809; *Higman v. Stewart*, 38 Mich. 513; *Jummel v. Mann*, 80 Ill. App. 288; *Stevens v. Stevens*, 150 Mass. 557, 23 N. E. 378; *Leppoo v. National Union Bank*, 32 Md. 136; *Kearny v. Jeffries*, 48 Miss. 343; *Bullitt v. Taylor*, 34 Miss. 741, 69 Am. Dec. 412; 2 Washb. Real Prop. 581; *Tuttle v. Turner*, 28 Tex. 759; *Hulick v. Scovil*, 9 Ill. 159.

There will be no presumption of acceptance on the part of the grantee where a burden would be imposed upon him by such presumption, as the payment of a consideration. In such cases the acceptance must be clearly proved.

Gifford v. McCloskey, 38 Hun. 350; *Jefferson County Bldg. Asso. v. Heil*, 81 Ky. 513; *Rittmaster v. Brisbane*, 19 Colo. 371, 35 Pac. 736; 3 Washb. Real Prop. 6th ed. § 2160.

White is estopped from asserting his secret equities against Whitney.

Bigelow, Estoppel, p. 547; *Ewart, Estoppel*, p. 96; *Davis v. Handy*, 37 N. H. 65; 69 L. R. A.

Rangeley v. Spring, 21 Me. 130; *Horn v. Cole*, 51 N. H. 287, 12 Am. Rep. 111.

On petition for rehearing.

Respondent and Willard White were partners, associated together under the contract of September 7, 1899; the testimony in question consists of admissions and declarations made by one partner to the other during the partnership, and concerning the very matter for which the parties were associated together.

The utmost good faith is due from every member of a partnership towards every other member; and if any dispute arises between partners touching any transaction, by which one seeks to benefit himself at the expense of the firm, or the other member or members, "he will be required to show not only that he has the law on his side, but that his conduct will bear to be tried by the highest standard of honor."

Roby v. Colehour, 135 Ill. 300, 25 N. E. 777; *Shumaker, Partn.* pp. 235-242; 22 Am. & Eng. Enc. Law, p. 114.

Appellant stands in the shoes of White. White repeatedly stated to his partner and associate Whitney, the man to whom it was his duty fully and truthfully to disclose the facts, that the deed was given to him in trust; that there were restrictions thrown around it; that it was not to be used until the conditions of the contract of December 25th had been complied with.

The rule excluding parol testimony to show conditions attached to a deed was not intended to be binding on the grantee so as to bar him from showing that there were conditions intended which were, in fact, against his interest.

The admissions and declarations against interests made by White are admissible to show that he took the deed of January 25th, 1900, with certain restrictions and conditions.

If Beery conveys to White on condition that White shall convey to a corporation, which shall execute certain bonds, make certain payments to Beery, and construct certain improvements upon the land; and then, if White declines to carry out the conditions, refuses to convey to the corporation, refuses to pay the money or issue the bonds but transfers the property to Dewey in direct violation of the conditions on which the transfer was made, and the latter takes with full notice of the conditions, —cannot Beery, or those claiming under him, maintain an action under § 4538, Rev. Stat. 1887, against the pretended claim of Dewey?

Appellant is estopped, by the established rules of estoppel, from asserting title in himself.

22 Am. & Eng. Enc. Law, p. 114; *Gal-*

braith v. Lunsford, 1 L. R. A. 522, and *note*, 87 Tenn. 89, 9 S. W. 365; *Dickerson v. Colgrove*, 100 U. S. 578, 25 L. ed. 618; *Henshaw v. Bissell*, 18 Wall. 255, 21 L. ed. 835; *Continental Nat. Bank v. National Bank*, 50 N. Y. 575; 2 Pom. Eq. Jur. 265.

That White did not execute a formal assignment of this contract to respondent is wholly immaterial, as equity regards that as done which ought to be done.

1 Pom. Eq. Jur. §§ 363-377; 11 Am. & Eng. Enc. Law, p. 180.

Equity will treat the person in whose favor the act should be performed as clothed with the same interest, and entitled to the same rights, as if the act were actually performed.

16 Cyc. Law & Proc. pp. 135, 136; *Sourvine v. Supreme Lodge K. of P.* 12 Ind. App. 447, 54 Am. St. Rep. 532, 40 N. E. 646; *Junction R. Co. v. Ruggles*, 7 Ohio St. 1; *Remington v. Higgins*, 54 Cal. 620; *Randall v. White*, 84 Ind. 509; *Ames v. Richardson*, 29 Minn. 330, 13 N. W. 137; *Mattes v. Frankel*, 157 N. Y. 603, 68 Am. St. Rep. 804, 52 N. E. 585; *Young v. Stampfer*, 27 Wash. 350, 67 Pac. 721; 1 Pom. Eq. Jur. § 365; Broom, Legal Maxims, 279.

Atlashe, J., delivered the opinion of the court:

A motion was made in this case to strike from the files the "supplemental brief of appellant," upon the grounds that the same was filed without permission of court having been obtained, and for the further reason that there is no authority in law, or any rule of this court, for the filing of a supplemental brief. It appears that within the time prescribed by the rules of this court the appellant served his brief upon the respondent, but the original brief filed by appellant contains no enumeration of errors relied on for a reversal of the judgment. The original brief, however, discusses errors complained of, and refers to the page and folio of the transcript containing the same. Appellant made a motion for a new trial in the lower court, and his statement on motion for new trial contains specific assignments of error covering nine pages of the transcript, and are directed at both the insufficiency of the evidence to justify the findings, decision, and judgment of the trial court, as well as errors of law occurring at the trial in the admission and exclusion of evidence. After the service of the original brief, and prior to the calling of the case for oral argument, appellant prepared, served, and filed what he termed a "supplemental brief of appellant," in which he specifically enumerates the errors relied on for a reversal of the judgment; and 69 L. R. A.

it is this brief that respondent seeks to have stricken from the files.

Respondent has furnished us with a great many authorities to the effect that a failure on the part of the appellant to assign errors is fatal to the appeal, and that in such a case the appellate court cannot, and will not, examine the transcript for the purpose of ascertaining whether or not error has been committed. *Purdy v. Steel*, 1 Idaho, 216, holds that "all exceptions taken in the court below will be treated as waived, unless the matters so excepted to are assigned as error in this court;" and from the opinion in that case it seems that no assignment of error was ever made, either in the trial court on motion for a new trial, or contained in the statement, or enumerated in the brief in this court. *United States v. Tidball*, 3 Ariz. 384, 29 Pac. 385; *Putnam v. Putnam*, 3 Ariz. 182, 24 Pac. 320; and *Charouleau v. Shields* (Ariz.) 76 Pac. 821, are all from the Arizona supreme court, and rest upon the peculiar statutes of that territory. An examination of these cases discloses the fact that there is a statute in Arizona requiring the assignment of errors to be filed with the clerk of the trial court prior to the printing of the transcript, and the supreme court has held that such statute is mandatory. *Haas v. Pueblo County*, 5 Colo. 125, holds that a failure to file any assignment of errors in the appellate court, either at the time of filing the transcript or thereafter, is fatal, and that the appeal will be dismissed. There a court rule requires the appellant to assign errors at the time of filing the transcript of record, and provides that the appeal or writ of error will be dismissed for failure to do so. *Rehberg v. Greiser*, 24 Mont. 487, 62 Pac. 820, 63 Pac. 41, is from the supreme court of Montana, and is a case where the appeal was dismissed for failure to set out any specification of errors, and is founded on a rule very similar to paragraph 1 of rule 6 of this court (22 Mont. xxx., 57 Pac. vi.); but the court there held that the filing of such an enumeration of errors was not jurisdictional, and in the course of the opinion referred to the fact that in other cases the court had disallowed motions to dismiss for such failure. It was held, however, that the particular case then under consideration did not present such facts as would justify them in disallowing the motion. *Broveli v. Bianchi*, 136 Cal. 612, 69 Pac. 416, simply holds that upon an appeal from an order denying a motion for a new trial, where "the evidence is not pointed out in the brief of appellant, and no suggestion made as to the respects wherein the evidence fails to support the findings," the court "will not endeavor to discover the

respects wherein the evidence is insufficient, but will presume that it supports every material finding of fact." *Schroeder v. Schmidt*, 74 Cal. 459, 16 Pac. 243, holds that an "error [committed] in granting a nonsuit . . . cannot be reviewed on an appeal from an order refusing a new trial, unless it was excepted to on the trial, and specified as error in the statement or bill of exceptions." The numerous other authorities cited by respondent on this point are practically to the same effect as those just reviewed. It does not appear from these authorities that the courts are inclined to refuse to examine a case on appeal where the errors have been assigned and specified in the statement on motion for new trial and are contained in the transcript on appeal, even though they are not specifically enumerated in the brief. In this case, however, appellant has substantially complied with the rule in filing his supplemental brief, enumerating the errors, prior to the case being called for argument in this court.

Respondent also contends that the appeal from the order denying the motion for a new trial cannot be considered in this court, on the ground that it has not been urged or assigned as error on appeal. Section 4427, Rev. Stat. 1887, allows an aggrieved party an exception as a matter of law to an order denying his motion for a new trial; and, since the appellant had assigned his errors in the statement and bill of exceptions used on the hearing of the motion, and had pointed out the insufficiency of the evidence to support certain findings as well as the errors of law committed at the trial, he is entitled now, upon his appeal from such order, to have those assignments of error examined and considered in this court. It is true that some of the courts, to whose decisions counsel have called our attention, have established a contrary rule; but our appellate practice is cumbersome enough at best, and we are not inclined to place such a construction on the statute and hold to such a technical observance of the rules of this court as will make appeals any more difficult of prosecution than they are at present. For the foregoing reasons, respondent's motion will be denied, and the case will be examined on its merits.

This action was commenced by plaintiff, W. G. Whitney, praying for a decree of the court quieting his title in and to lots 1, 2, 3, 5, and 6, in section 22, township 7 N., R. 1 west, Boise meridian, and situate in Boise and Canyon counties, and for a perpetual injunction against the defendant thereafter asserting any claim whatever in or to the premises described. The defendant answered, denying plaintiff's right and title, 69 L. R. A.

and setting up title in himself, in and to an undivided one-half interest in the premises described in the complaint. In order to properly understand this case, it is necessary to recite somewhat at length the history of the dealings and transactions between the plaintiff, Whitney, Willard White (defendant's grantor), and I. R. Beery (the grantor to both the plaintiff and White). The contract out of which all subsequent troubles seem to have grown was entered into on the 7th day of September, 1899, between the plaintiff, Whitney, and Willard White, and is as follows:

"This agreement witnesseth:

Whereas, W. G. Whitney and Willard White having acquired a dam, log storage and power site on the Payette river, at a point called the Black Rock Canyon about 6 miles above the town of Emmett, in Canyon county, Idaho, and,

Whereas, it is proposed to secure sufficient funds with which to erect a dam at said site, about 30 feet in height with a view to creating a large water power to be used in sawing lumber, elevating water upon both sides of the Payette river, for the purpose of irrigation, and for generating electric power to be utilized for railway and such other purposes as may be found feasible.

Now, therefore, in consideration of the premises, each of the parties hereto agrees to give his best efforts to the immediate accomplishment of the above-mentioned project, and does agree that the parties hereto are to own an equal interest in such undertaking, share and share alike.

It is further agreed that, in the event the said White shall fail to raise sufficient funds to construct said dam, or fails to make such progress as shall be satisfactory to said Whitney within one year from the date hereof, the said White agrees to assign all his right, title, and interest in the same to said Whitney.

Witness our hands and seals this 7th day of September, 1899.

Witnessed by: W. Garret Whitney.
Ben I. Bloch. Willard White.

According to the testimony, White, in pursuance of the terms of the contract of September 7th, went east for the purpose of raising money and procuring a contract for the proposed dam site, and on the 28th day of December of the same year entered into a contract with I. R. Beery, of Minneapolis, Minn., as follows:

This agreement made and entered into this 28th day of December, in the year of

our Lord one thousand eight hundred and ninety-nine.

Between I. R. Beery, of Minneapolis, Minnesota, the party of the first part, and Willard White of Boise, Idaho, party of the second part,

Witnesseth, that the said party of the first part for and in consideration of the covenants and agreements on the part of the said party of the second part hereinafter contained, agrees to sell and convey unto the said party of the second part, and the said second party agrees to buy, all those certain lots, pieces, and parcels of land, situate in the counties of Canyon and Boise, in the state of Idaho, and more particularly described as follows, to wit: Lots one (1), two (2), three (3), five (5), and six (6) of Section twenty-two (22), Township seven (7) North, Range one (1) West, B. M., for the sum of \$6,000.

And the said party of the second part in consideration of the premises agrees to pay to the said party of the first part the sum of \$6,000, to wit:

One thousand dollars in cash on or before February 1st, 1900, and \$5,000 in first-mortgage bonds in a corporation to be formed for the purpose of developing a power plant at a point upon the above-described property known as the Black Rock Canyon, said bonds to be issued upon said property and upon such improvements as shall be placed thereon.

And the said party of the second part agrees to pay all state and county taxes or assessments of whatsoever nature which are now or may become due on the premises above described.

In the event of failure to comply with the terms hereof by the said party of the second part, the said party of the first part shall be relieved from all obligations in law or equity to convey said property, and the said party of the second part shall forfeit all right thereto at the option of the party of the first part. And the said party of the first part, on receiving such payment at the time and in the manner above mentioned, agrees to execute and deliver to the said party of the second part or to his assigns a good and sufficient deed for the conveying and assuring to the said party of the second part the title to the above-described premises free and clear of encumbrances other than the taxes hereinbefore mentioned. And it is understood that the aforesaid stipulations are to apply to and bind the heirs, executors, administrators, and assigns of the respective parties, and that the said party of the second part is to have immediate possession of said premises.

In witness whereof, the said parties have
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hereunto set their hands and seals the day and year first above written.

I. R. Beery,
Willard White.

Thereafter, and on the 25th day of January, 1900, I. R. Beery and wife made and executed their warranty deed to the entire tract of land and premises described in the complaint in this action, and in such deed named Willard White as the grantee, and on the date of its execution the deed was placed in the hands of the grantee, White, at the city of Minneapolis, and was thereafter by White brought back to the state of Idaho, and has ever since been in White's possession and control. As to whether or not the deed of January 25th was ever actually delivered within the contemplation of law is a vital question in this case.

The next important step in the course of these transactions occurred on April 25, 1900, when Beery and White entered into a new agreement, which by its terms provided that it should take the place of the former agreement, of date December 26th. The important part of the agreement of April 25th, and that which has any special bearing upon the matters in controversy in this action, is as follows:

Witnesseth, that whereas, I. R. Beery, party of the first part, is the equitable owner of the real property hereinafter described, while Willard White, party of the second part, holds the legal title thereto by virtue of a deed heretofore executed by the said I. R. Beery, and wife, under an agreement heretofore entered into by and between said Beery and said White, and

Whereas, it is desired by the parties to enter into a new and different agreement at this time in relation thereto,

Now, therefore, for and in consideration of the mutual covenants hereinafter contained, and to be by said parties paid, kept, and performed, it is agreed: That said Willard White has this day become the owner, absolute, of the equitable as well as the legal title to a one-half interest, undivided, in the property hereinafter described, for the consideration of seven hundred and fifty dollars (\$750.00), \$150 of which said gross sum has this day been paid, the receipt whereof by said Beery is hereby acknowledged; \$100 is to be paid on or before May 15th, 1900, and the remainder of said sum of \$750, to wit, \$500, is to be paid on or before January 1st, 1901.

Thereafter, and on the 13th day of May, 1901, the plaintiff, Whitney, secured from Beery a quitclaim deed to the lands and premises in controversy, the title to which

he seeks to quiet by this action, and which title is derived from Beery through the medium of this deed alone. On the 7th day of August, 1901, White executed and delivered a quitclaim deed of an undivided one-half interest in and to the property described, to R. M. Cobban and George H. Casey, and on September 27, 1902, Cobban and Casey by a quitclaim deed conveyed their undivided one-half interest to the defendant, Dewey. Dewey traces his title through a chain of quitclaim deeds back to the warranty deed executed by Beery and wife on January 25, 1900.

At the trial the court permitted the plaintiff to introduce the testimony of I. R. Beery and other witnesses, showing a parol agreement and understanding had between White and Beery at the time of the execution of the deed of January 25th, and by the terms of which agreement it is contended that the deed of January 25th was delivered upon conditions thereafter to be performed and complied with by the grantee, White, and on the failure to perform which no title should pass under the deed. The defendant objected to the introduction of this class of testimony, upon the grounds that the complaint alleges that the deed was placed in the hands of White with the understanding that the same should take effect and pass title from Beery to White only upon a compliance by White with the terms and conditions of the contract of December 26th, and that to permit parol testimony would be to contradict a written contract, and for the further reason that parol evidence is not admissible for the purpose of showing the terms and conditions under which a deed, absolute on its face, was delivered into the possession of White. The substance of the evidence given on this point is fairly stated by the grantor, Beery, in his testimony, as follows: "Mr. White first visited me about the 26th of December, 1899, when this contract was executed. Then he returned on the 25th of January, at the time we made the deed. At this time I executed and delivered to him this deed, placed it in his possession personally at the time he was in Minneapolis, and he carried it back to Idaho. I placed it in his hands so that the matter could be closed up promptly in connection with the transferring of the property to the corporation that was contemplated; these bonds were to be paid, and an issue of bonds on this property and power plant and ditches, etc., contemplated. I was to be paid when the matter was consummated and the bonds ready to be issued. The deed was placed in his hands to facilitate the matter, and so that we all could save time. He could pay me when he used the deed, just as though I sent the deed to him to hold. It was a

matter of trust with me." Other witnesses testified to subsequent statements made by White to the same effect.

The deed of January 25th from Beery to White was without any condition or reservation whatever expressed on the face of the instrument, and, so far as can be gathered from the indenture itself, it is absolute. It is admitted that this deed was delivered by the grantor into the personal and manual possession and control of the grantee, and passed completely from the control and direction of the grantor. The contention made by plaintiff on this point is about as follows: That, under the agreement of December 26th, White was expected to form a corporation for the construction of a big dam on the Payette river, with its site upon the lands in controversy, for the purposes of power and irrigation, and that, as soon as the corporation should be organized, the title to this property should be conveyed to such corporation, and thereupon Beery should be paid the sum of \$1,000, and delivered \$5,000 worth of first-mortgage bonds to be issued by such corporation in full payment for the property. And the plaintiff contends that the deed of January 25th was executed and delivered under the terms and conditions of the agreement of December 26th, and that it was mutually understood and agreed between the grantor and grantee at the time that the corporation should be formed, and that accordingly this deed was delivered to White in order to facilitate the transaction, and enable White to immediately convey the property to the corporation and perfect the title, and qualify the corporation to issue the bonds in payment of the balance of the purchase price. As above observed, this deed was delivered to the grantee, and contained upon its face no conditions whatever precedent to the vesting of title. Appellant insists that the facts disclosed in this case show an absolute delivery of the deed, and that parol evidence was inadmissible to attach any condition to the vesting of title under such a deed.

It is a well-settled principle of law that a deed cannot be delivered by the grantor to the grantee therein named to be held by the grantee in escrow. If such thing be done, the result is that title vests at once in the grantee. The holder of an escrow must be a third party, who for such purpose becomes the agent of both the grantor and grantee. In 13 Cyc. Law & Proc. p. 504, the writer of the text says: "A deed cannot be delivered as an escrow to the grantee, and a delivery which purports to be such will operate as an absolute one. This rule, however, applies only to those deeds which are upon their face complete contracts requiring nothing but delivery to make them

perfect, and does not apply to those which upon their face import that something besides delivery is necessary to be done in order to make them complete." The writer cites many authorities in support of that text. In 1 Devlin on Deeds, § 314, it is said: "A deed cannot be delivered to the grantee as an escrow. If it be delivered to him, it becomes an operative deed, freed from any condition not expressed in the deed itself, and it will vest the title in him, though this may be contrary to the intention of the parties. One of the grounds upon which this rule is based is that parol evidence is inadmissible to show that the deed was to take effect upon condition." The author thereupon proceeds to quote as a part of the text, and with approval, from the opinion of Harris, J., in *Lawton v. Sager*, 11 Barb. 349, in whose opinion the following language is used: "Whether a deed has been delivered or not is a question of fact, upon which, from the very nature of the case, parol evidence is admissible. But whether a deed, when delivered, shall take effect absolutely or only upon the performance of some condition not expressed therein, cannot be determined by parol evidence. To allow a deed absolute upon its face to be avoided by such evidence would be a dangerous violation of a cardinal rule of evidence." In *Braman v. Bingham*, 26 N. Y. 492, the court of appeals said: "The reason given for the rule excluding parol evidence of a conditional delivery to the grantee applies to all cases where the delivery is designed to give effect to the deed, in any event, without the further act of the grantor. 'When the words are contrary to the act, which is the delivery, the words are of none effect.' Co. Litt. 36a. 'Because then a bare averment, without any writing, would make void every deed.' *Williams v. Greene*, Cro. Eliz. pt. 2, p. 884. 'If I seal my deed and deliver it to the party himself, to whom it is made, as an escrow upon certain conditions, etc., in this case, let the form of the words be what it will, the delivery is absolute, and the deed shall take effect as his deed presently.' Shep. Touch. 59; *Wyddon's Case*, Cro. Eliz. pt. 2, p. 520; *Cruise's Dig.* title 33, *Deeds*, chap. 2, § 80. If a delivery to the grantee can be made subject to one parol condition, I see no ground of principle which can exclude any parol condition. The deed having been delivered to the grantee, I think the parol evidence that the delivery was conditional was properly excluded." The authorities to the foregoing effect might be multiplied, of which the following appear to be some of the leading cases: *Blewitt v. Boorum*, 142 N. Y. 357, 40 Am. St. Rep. 600, 37 N. E. 120; *Darling* 69 L. R. A.

v. Butler, 10 L. R. A. 469, 45 Fed. 332; *Miller v. Fletcher*, 27 Gratt. 403, 21 Am. Rep. 359; *Richmond v. Morford*, 4 Wash. 337, 30 Pac. 242, 31 Pac. 513; *Hubbard v. Greeley*, 84 Me. 340, 17 L. R. A. 511, 24 Atl. 799. In the latter case it was said: "An escrow is a deed delivered to a stranger, to be delivered by him to the grantee upon the performance of some condition or the happening of some contingency, and the deed takes effect only upon the second delivery. Till then, the title remains in the grantor. And if the delivery is in the first instance directly to the grantee, and he retains the possession of it, there can be no second delivery, and the deed must take effect on account of the first delivery, or it can never take effect at all. And, if it takes effect at all, it must be according to its written terms. Oral conditions cannot be annexed to it. It will therefore be seen that a delivery to the grantee himself is utterly inconsistent with the idea of an escrow. And it is perfectly well settled by all the authorities, ancient and modern, that an attempt to thus deliver a deed as an escrow cannot be successful; that, in all cases where such deliveries are made, the deeds take effect immediately and according to their terms, divested of all oral conditions."

Counsel for respondent contend that, while there was a manual delivery of the deed, there was no intention to pass title, and that on that theory of the case the evidence admitted was proper and competent to show such fact. While it is not directly contended that the grantee can hold a deed in escrow from his grantor, the argument of counsel, as applied to the facts of this case, would amount in the end to such a position. The leading authorities cited by respondent in support of this position are 9 Am. & Eng. Enc. Law, 2d ed. p. 154: *Black v. Sharkey*, 104 Cal. 279, 37 Pac. 939; *Lee v. Richmond*, 90 Iowa, 695, 57 N. W. 613; *Steel v. Miller*, 40 Iowa, 403; *Bunn v. Stuart*, 183 Mo. 375, 81 S. W. 1091; *Hastings v. Vaughn*, 5 Cal. 315. In 9 Am. & Eng. Enc. Law, 2d ed. p. 154, under the heading of "What is Delivery—(c) A Question of Intention," the author says: "The real test of delivery is this: Did the grantor, by his acts or words, or both, intend to divest himself of title? If so, the deed is delivered." By the foregoing language we do not understand the writer to mean that, where the question of the delivery of the deed arises, parol testimony may be introduced tending to show the intention of the parties to such an extent as to control the vesting of title contrary to the express written language of the deed itself, or, in other words, attach

conditions to the deed; and, indeed the authorities cited by the author in support of the text do not go to such an extent. Counsel quote at length from *Black v. Sharkey*, 104 Cal. 279, 37 Pac. 939, where the court uses language that would indicate the view that evidence might be introduced to prove that the parties did not intend the deed should take effect according to its terms; but it should be observed that in that case the only question under consideration, and the only one decided, was whether or not parol evidence might be introduced to show that the deed which had been duly executed and was found in the possession of the grantee had ever been in fact delivered. The opinion in that case is by the court commissioners, and makes no reference to the former case of *Mowry v. Heney*, 86 Cal. 471, 25 Pac. 17. The latter opinion was by the court, and it was there expressly held that, "when an absolute deed has been delivered to the grantee, the title becomes vested free from any conditions, and its operation cannot be defeated by parol proof of an intention on the part of the grantor, known to the grantee, that it should not take effect except in event of the grantor's death; nor is parol evidence admissible to show that the delivery of the deed to the grantee was subject to any condition not expressed therein." We cannot, therefore, view the *Black-Sharkey* Case as in any way overruling or modifying *Mowry v. Heney*. *Hastings v. Vaughn* was to the same effect as the latter case. In *Lee v. Richmond* the Iowa court held that there had been no delivery of the deed, and that the instrument had reached the hands of the grantee, not by way of delivery as a consummation of the transaction, but for inspection and approval of another person; the court saying: "The deed was not to be regarded as delivered unless the settlement attempted was approved by Fulton, and, as it was not approved by him, there was never in law any delivery, and the deed is without effect." *Steel v. Miller* was a suit apparently founded on fraud in the transaction, and the court held that the minds of the parties had never met on the question of a delivery, and that no legal delivery ever took place. The evidence in the case appears, however, to be directed at the specific question of delivery alone. In *Bunn v. Stewart* a father appears to have executed deeds in favor of certain of his children and grandchildren, with the intention of retaining them until such future time as he saw fit to deliver them in the distribution of his estate, but later he became entangled in divorce proceedings, and placed certain of the deeds in controversy in the hands of two of the grantees with instructions to hold

them until he called for their return, but the grantees, contrary to his instructions, placed them of record, and the supreme court of Missouri held upon that state of facts that no legal delivery ever took place.

The extent to which the intention of the parties enters into the act of delivery of a deed is very fairly stated by the author in 13 Cyc. Law & Proc. p. 561, and the authorities cited in support thereof. It is beyond controversy that the evidence of delivery must come from without the deed. In other words, a deed never shows upon its face nor by the terms thereof a delivery, and parol evidence thereof must necessarily be admitted when the question of delivery arises. And it will, perhaps, often be difficult to accurately determine the exact extent to which the intention of the parties is admissible as to the ultimate result of divesting the grantor of title; but such testimony should never be considered by the court to the extent of governing and controlling the express terms of the instrument, where it is clear that a delivery has been made, even though the parties have mistakenly supposed the legal effect would be different. Of course, such evidence would be competent if it should be shown that under no circumstances, and in no event, and under no conditions was the title ever to pass from the grantor, because such a showing would disprove a legal delivery. It would show a failure to consummate the contract and sale of the property. But where it is the intention of the parties for the title to pass upon any contingency or in any event from the grantor to the grantee, and the deed is delivered to the grantee, absolute on its face, then the vesting of title becomes a question of law, and must date from the delivery, and, since the grantee cannot act as the agent of both himself and the grantor for the purpose of a second delivery, title must necessarily have passed upon the original delivery. This rule is very clearly stated by the New York court in *Braman v. Bingham*, 26 N. Y. 492, where it was said: "The reason given for the rule excluding parol evidence of a conditional delivery to the grantee applies to all cases where the delivery is designed to give effect to the deed, in any event, without the further act of the grantor." See also *Hubbard v. Greeley*, 84 Me. 340, 17 L. R. A. 511, 24 Atl. 799.

In this case, giving the respondent the most favorable construction that can possibly be placed upon the evidence, it was the intention of the grantor, Beery, to vest title in his grantee, White, so as to enable the grantee to transfer a perfect title to the proposed corporation. Beery expected to receive \$5,000 worth of first-mortgage bonds

of the corporation as a balance of payment of the purchase price of the property. Such bonds would have been valueless to Beery unless the corporation could secure a good and perfect title to the property on which the mortgage bonds were to issue. Now, then, the question arises, Could the grantor, Beery, by warranty deed, absolute on its face, convey such a title to his grantee as would enable the grantee to pass a good and perfect title to the corporation, and at the same time attach such parol conditions to the deed upon its delivery as to preclude his grantee from conveying and transferring an equally good title to any other person or corporation? We must answer this question unqualifiedly in the negative. If the grantor, Beery, desired to limit the right of his grantee to transfer this property to any particular person or corporation, it was necessary to express that limitation upon the face of the instrument. For the foregoing reasons, we are clearly satisfied that the court erred in receiving and considering the evidence offered for the purpose of showing a failure to vest title in the grantee.

There is another significant fact in this case, and one which alone would prevent the plaintiff from quieting his title under a quitclaim deed to the undivided one-half interest held by him, and that reason is found in the agreement of April 25th. It is there recited that the parties desire to enter into a "new and different agreement," and the agreement provides "that, whereas, I. R. Beery, party of the first part, is the equitable owner of the real property hereinafter described, while Willard White, party of the second part, holds the legal title thereto by virtue of a deed heretofore executed, . . . now, therefore, . . . it is agreed: That said Willard White has this day become the owner, absolute, of the equitable as well as the legal title to a one-half interest, undivided, in the property hereinafter described." It readily appears from the provisions of this agreement that whatever may have been the understandings and agreements between Beery and White at the time of the delivery of the deed, thereafter they adjusted those matters, entered into a new agreement, and Beery ratified and confirmed the delivery of the deed,—at least to the extent of an undivided one-half interest; and consequently, at the time of the execution of the quitclaim deed to Whitney, Beery had no right, title, or interest in and to such undivided interest in this property. Even though a valid delivery of the deed had not been made at the time of its execution, it is settled law that the grantor may thereafter ratify the wrongful taking of a deed after he has complete knowledge of the facts of the taking, and 69 L. R. A.

thereby perfect the title. 9 Am. & Eng. Enc. Law, p. 155, and authorities cited; 13 Cyc. Law & Proc. p. 565, and notes.

It has been suggested that, since the appellant takes his title by quitclaim deed, he is for that reason chargeable with notice that the title of his grantor is doubtful, and that he is therefore not a bona fide purchaser. This appears to be conceded by counsel, but the same principle applies with equal force to the respondent, who takes title likewise by quitclaim deed. Under this line of authorities both parties would be equally chargeable with notice of defects in their grantor's title. 9 Am. & Eng. Enc. Law, 2d ed. p. 106, and notes; *Leland v. Isenbeck*, 1 Idaho, 469; *Butte Hardware Co. v. Frank*, 25 Mont. 344, 65 Pac. 4; *Anderson v. Thunder Bay River Boom Co.* 57 Mich. 216, 23 N. W. 776; *Wetzstein v. Laregey*, 27 Mont. 212, 70 Pac. 717; *Dickerson v. Colgrove*, 100 U. S. 578, 25 L. ed. 618. It is doubtful, however, if such a rule could or ought to prevail under the recording laws of this state.

Respondent contends that, even though it be conceded that title passed from Beery to White, nevertheless, under the partnership agreement of September 7th between White and Whitney, White was unable to part with any title to anyone other than Whitney himself. This contention is based upon that clause in the contract of September 7th reading as follows: "It is further agreed that in the event the said White shall fail to raise sufficient funds to construct such dam, or fails to make such progress as shall be satisfactory to said Whitney within one year from the date hereof, the said White agrees to assign all his right, title, and interest in the same to said Whitney." It is conceded that White did not raise the necessary funds within the time prescribed, but it is equally true that the two, White and Whitney, continued in the possession of the property, and to some extent operated upon the property, for considerable time after the expiration of the year. White never assigned his interest to Whitney, nor does it appear that Whitney ever demanded that he do so, except to demand that White convey to him an interest acquired under the deed of January 25th. The appellant in this case only claims an undivided one-half interest in the property. He is the successor in interest of White. The respondent acquired a quitclaim deed from Beery to the entire property. He must therefore, so far at least as is disclosed by this record, own the other undivided one-half interest in the property. They are therefore on equal footing. A rule which in equity would preclude White from acquiring an interest in the property to the exclusion of his partner,

Whitney, would apply with equal force to Whitney. This is not an action by the plaintiff to compel White, or his grantor with notice, to assign any interest acquired under the partnership agreement, and as to whether or not an agreement such as the one above quoted, stipulating for assignment, could be made the basis upon which a court of equity would declare a forfeiture, is a matter on which we are not required in this case to express any opinion.

The judgment of the lower court will be reversed, and the cause remanded for further proceedings in harmony with the views herein expressed. So ordered. Costs awarded to appellant.

Stocklager, Ch. J., and Sullivan, J.,
concur.

A petition for rehearing having been filed, the following response thereto was handed down May 31, 1905:

Respondent's petition for a rehearing in this case does not present anything new, or any question not originally considered by us, though it again discusses some questions which we did not deem it necessary to pass upon in the original opinion. The persistence with which counsel insists that we have mistaken both the law and the equities in this case has led us to again examine the case at length, and, after so doing, we are unable to see wherein the judgment of the trial court could be affirmed. It must necessarily be true that the court cannot see either the law or the equities of a case in the same light in which they are viewed by counsel for the losing party, and it may be, indeed, that sometimes the court mistakes them entirely. However, notwithstanding counsel's studied argument to the contrary, we are convinced that this is not a case where we have mistaken either.

We are asked in the petition to announce more definitely the position of the court as to what title White took under the deed of January 25th. The only interest the appellant claims, and for which he is litigating, is an undivided one-half interest in this property, and we have held that under the record he is entitled to such interest. Under the deed of January 25th, the entire legal title passed from Beery to White. Under the contract of April 25th, Beery recognized that the entire legal title had passed from him, and that all the interest he retained in the property was an equity. What that equity was is not recited, but we would infer from the record that it consisted in a vendor's lien for the unpaid purchase price. By that contract Beery parted absolutely with all of his equity in an undivided one-half interest in this property. It therefore follows that after the execution of the con-

tract of April 25, 1900, both the legal title to the entire property and equitable title to an undivided one-half interest therein was vested in White, and that by the terms of that agreement White recognized a remaining equity in Beery to the other undivided half interest in this property, and for that equity agreed to pay the sum of \$750 on or before January 1, 1901. White does not appear to have paid this sum, or to have received any further deed from Beery to his equity in this remaining half interest. On the contrary, Whitney appears to have received a deed from Beery for the entire tract of land on May 13, 1901. So far as the facts, therefore, disclosed by this record are concerned, we conclude that the appellant, Dewey, now owns an undivided one-half interest in the property as described in the deed taken by him, and Whitney the other one-half interest.

It is suggested that White acquired all the interest he obtained in this property while sustaining a fiduciary relation toward Whitney, his partner, under the agreement of September 7, 1899. This, we think, is correct, and it is equally true with reference to Whitney. But counsel contends that this relation had been terminated prior to the date on which Whitney acquired his deed. To this we cannot assent. The contract of September 7th was made for a period of one year, and yet respondent repeatedly admits in his testimony that they continued to do business in all respects as though it were still in force and effect from the date upon which it was executed until the 1st of April, 1901, and that all that then occurred looking to the termination of the partnership relation consisted merely in respondent notifying White that he was going to declare the matter off. It takes more than a notice of this kind to dissolve a partnership and terminate a trust or fiduciary relation existing between partners. If White acquired the entire title, one half thereof would undoubtedly have inured to the benefit of his partner, Whitney. If, on the other hand, he acquired only a one-half interest in the property, and in the meanwhile, and during the existence of that relation, and in pursuance thereof, his partner acquired the other half interest, then such interest and equities must offset each other, and the obligations resting upon them by reason of such relation will be met in that respect.

Again, it is insisted by counsel that White and his grantee are estopped to now assert title to this property on account of the declarations and statements made by White to Whitney and others after receiving the deed from Beery. These statements were of the same character as the testimony

of Beery concerning the conditions imposed on White upon the delivery of the deed. It is not contended by appellant that the statements which are claimed to have been made by White after receiving this deed were not true. It would appear from this record that if he made these statements he was, as a matter of fact, only stating what had actually occurred. But the trouble is that the law will not permit parol testimony of such matters to defeat the vesting of title. If, therefore, the statements he made were true concerning such matters, they were not of such a character as to prejudice the respondent, or in any way to deceive him as to the facts or mislead him in his action or conduct. The respondent is presumed to have known, as a matter of law, that such conditions could not be attached to a deed upon its delivery to the grantee, and, having had full notice of the execution of the deed and of the agreements and contracts in relation thereto, he was, as a matter of law, neither deceived nor prejudiced by the statements or declarations so made. So long as he obtains his share as a partner in the fruits of the enterprise, he has no cause for complaint.

It should be further observed that it nowhere appears that any of these statements or declarations made by White were subsequent to the contract of April 25th. It would, appear, however, from the record that they must have been made prior to that time.

It seems to us from a reading of the record before us that respondent must have understood that he and his associate, White, were acquiring title by virtue of the deed of January 25th and contract of April 25th, or else he would not have continued to occupy and improve the property for a period of more than a year thereafter. They do not appear to have had any other contract or agreement whereby they could acquire the title to that property, as they had failed to make their payments under the contract of December 28th, and that contract had been superseded by the contract of April 25th. It does not seem reasonable that respondent would have spent a year's time and labor on this property unless he felt that he had title or legal and binding obligations whereby he, or he and his associate, could acquire title thereto.

Other questions were argued by respondent in his brief, and have also been presented in his petition for rehearing, but we do not think they properly arise upon this appeal, nor is the record in such a condition as to justify us in discussing them. Besides, a legal determination of some of the points urged would necessitate other par-

ties to the action in order to give them any binding effect.

We find no reason for granting a rehearing in this case, and it will therefore be denied.

Stockslager, Ch. J., and Sullivan, J., concur.

**Harry C. GRICE, Appt.,
v.**

Jay WOODWORTH et al., Respts.

(.....Idaho.....)

- *1. Where W. and W., husband and wife, enter into an oral contract for the sale of their homestead, and the purchaser takes possession thereof, and pays the purchase price, and makes valuable improvements thereon, all of which is done with the full knowledge and consent of the wife, the purchaser is entitled to a decree requiring them to convey said premises to him.
2. The provisions of §§ 2921, 2922, 3040, and 3041 of the Revised Statutes of 1887 were enacted for the purpose of protecting the homesteads and other rights of married persons,—particularly the wives,—and were not intended to operate as a shield to relieve against fraudulent transactions on their part.
3. Sections 3040, 3041, Rev. Stat. 1887, are, in their nature, rules of evidence, and are subject to the same legal principles as are conveyances falling under the statute of frauds, and the rules of equitable estoppel and waiver.

(*Ailshie, J., dissents.*)

(December 31, 1904.)

A PPEAL by plaintiff from a judgment of the District Court for Latah County in favor of defendants in an action to compel specific performance of a contract to convey real estate. *Reversed.*

The facts are stated in the opinion.

Messrs. R. V. Conser and Stewart S. Denning, for appellant:

A party who, under a verbal contract, has purchased real estate, gone into possession, made valuable improvements there-

*Headnotes by SULLIVAN, Ch. J.

NOTE.—As to estoppel of married women generally, see, in this series, *Galbraith v. Lunsford*, 1 L. R. A. 522, and *note*; *Cook v. Walling*, 2 L. R. A. 769, and *note*; *Central Land Co. v. Laidley*, 3 L. R. A. 826; *Dobbin v. Cordiner*, 4 L. R. A. 333; *Long v. Crossan*, 4 L. R. A. 783, and *note*; *Wilder v. Wilder*, 9 L. R. A. 97; *Vansandt v. Wier*, 32 L. R. A. 201; *Mohler v. Shank*, 34 L. R. A. 161; *Williamson v. Jones*, 38 L. R. A. 694; *National Granite Bank v. Tyndale*, 51 L. R. A. 447; *Hunt v. Reilly*, 59 L. R. A. 206; *McNeeley v. South Penn Oil Co.* 62 L. R. A. 562; and cases in *note* to *Webb v. John Hancock Mut. L. Ins. Co.* 66 L. R. A. 636.

on, and paid the purchase price, is entitled to a specific performance of the contract.

Rev. Stat. § 6008; Wait, Fraud. Conv. 2d ed. §§ 436, 437; 2 Lomax's Digest of Real Prop. 41; *Thomas v. Dickinson*, 12 N. Y. 364; *Holland v. Hoyt*, 14 Mich. 238; *Butler v. Lee*, 11 Ala. 885, 46 Am. Dec. 230; *Wilkinson v. Scott*, 17 Mass. 249; *Linscott v. McIntire*, 15 Me. 201, 33 Am. Dec. 602; *Gibson v. Wilcozen*, 16 Ind. 333; *Bowen v. Bell*, 20 Johns. 338, 11 Am. Dec. 286; *Stowell v. Tucker*, 7 Idaho, 312, 62 Pac. 1033.

Sections 3040 and 3041 of the Revised Statutes of 1887, covering the conveyances and abandonment of the homestead, are simply rules of evidence and are controlled by the same legal principles as conveyances falling under the statute of frauds.

Andola v. Picott, 5 Idaho, 27, 46 Pac. 928; *Stowell v. Tucker*, 7 Idaho, 312, 62 Pac. 1033; *Law v. Butler*, 44 Minn. 482, 9 L. R. A. 856, 47 N. W. 53; *Walker v. Kelly*, 91 Mich. 212, 51 N. W. 934; *Harkness v. Burton*, 39 Iowa, 101.

Where an oral conveyance of land is made, which ought to have been in writing, and acknowledged under the statute of frauds, in a state, and the vendee has been placed in possession of the property by the vendor and paid the purchase price, if there be nothing illegal or immoral in the transaction, a court of equity will decree specific performance of the verbal contract.

Wait, Fraud. Conv. §§ 436-438, and notes; *Andola v. Picott*, 5 Idaho, 27, 46 Pac. 928; *Von Rosenberg v. Perrault*, 5 Idaho, 719, 51 Pac. 774; *Stowell v. Tucker*, 7 Idaho, 312, 62 Pac. 1033; *Grimshaw v. Belcher*, 88 Cal. 217, 22 Am. St. Rep. 301, and note, 26 Pac. 84; *Flickinger v. Shaw*, 87 Cal. 126, 11 L. R. A. 134, 22 Am. St. Rep. 234, and notes, 25 Pac. 268; *Burlingame v. Rowland*, 77 Cal. 315, 1 L. R. A. 829, 19 Pac. 526; *Manly v. Howlett*, 55 Cal. 95; *Bakersfield Town Hall Asso. v. Chester*, 55 Cal. 98; *Anson v. Townsend*, 73 Cal. 415, 15 Pac. 49; *Freeman v. Freeman*, 51 Barb. 306; *Karns v. Olney*, 80 Cal. 90, 13 Am. St. Rep. 101, 22 Pac. 57; *Sedgw. & W., Trial of Title to Land*, 844-847; *Fry, Spec. Perf.*, 259, 260; *Bigelow, Estoppel*, 3d ed. 470, 513; *Gilbert v. American Surety Co.* 61 L. R. A. 253, 57 C. C. A. 619, 121 Fed. 499; *Manchester & L. R. Co. v. Concord R. Corp.* 66 N. H. 100, 9 L. R. A. 689, 3 Inters. Com. Rep. 319, 49 Am. St. Rep. 582, 20 Atl. 383.

The statute of frauds applies to executory, and not to executed, contracts.

Coffin v. Bradbury, 3 Idaho, 770, 95 Am. St. Rep. 37, 35 Pac. 715.

The rule of estoppel is that one who, with knowledge, accepts the proceeds of an un-

authorized sale of his property, is estopped to dispute the validity of the sale.

Escolle v. Franks, 67 Cal. 137, 7 Pac. 425; *Godman v. Winter*, 64 Ala. 410, 38 Am. Rep. 13; *France v. Haynes*, 67 Iowa, 139, 25 N. W. 98; *Schenck v. Sautter*, 73 Mo. 46; *Moore v. Hill*, 85 N. C. 218; *Field v. Doyon*, 64 Wis. 560, 25 N. W. 653; *Booth v. Wiley*, 102 Ill. 84.

A wife is estopped from claiming that she did not join in the conveyance.

Mudgett v. Clay, 5 Wash. 103, 31 Pac. 424; *Sadler v. Niess*, 5 Wash. 182, 31 Pac. 630, 1030; *Konnerup v. Frandsen*, 8 Wash. 551, 36 Pac. 493; *Payne v. Still*, 10 Wash. 433, 38 Pac. 994; *Boston Clothing Co. v. Solberg*, 28 Wash. 263, 68 Pac. 715; *Washington State Bank v. Dickson*, 35 Wash. 641, 77 Pac. 1067; *Shinn v. Macpherson*, 58 Cal. 599; *Riddell v. Shirley*, 5 Cal. 488; *Bishop v. Hubbard*, 23 Cal. 514, 83 Am. Dec. 132; *Lunt v. Neeley*, 67 Iowa, 97, 24 N. W. 739; *Wooters v. Feeny*, 12 La. Ann. 449; *Norton v. Nichols*, 35 Mich. 149; *Reed v. Morton*, 24 Neb. 760, 1 L. R. A. 736, 8 Am. St. Rep. 247, 40 N. W. 282; *Bodine v. Killeen*, 53 N. Y. 93; *Godfrey v. Thornton*, 46 Wis. 679, 1 N. W. 362; *Sexton v. Wheaton*, 8 Wheat. 239, 5 L. ed. 607; *Parker v. Coop*, 60 Tex. 111; *Storrs v. Barker*, 6 Johns. Ch. 166, 10 Am. Dec. 316; *Brown v. Coon*, 36 Ill. 243, 85 Am. Dec. 402; *Anderson v. Cosman*, 103 Iowa, 266, 64 Am. St. Rep. 177, 72 N. W. 523; *Bradshaw v. Remick*, 90 Iowa, 409, 57 N. W. 897; *Laurence v. Spear*, 17 Cal. 421; *Reis v. Lawrence*, 63 Cal. 129, 49 Am. Rep. 83.

Where the husband alone aliens homestead, and delivers or abandons premises, it has been held null in favor of grantees, and so vests title in him notwithstanding the invalidity of conveyance.

Brown v. Coon, 36 Ill. 243, 85 Am. Dec. 402; *Fishback v. Lane*, 36 Ill. 437; *Hall v. Fullerton*, 69 Ill. 448; *Stewart v. Mackey*, 16 Tex. 56, 67 Am. Dec. 609; *Jordan v. Godman*, 19 Tex. 273; *Vasey v. Township*, 1, 59 Ill. 188; *Harkness v. Burton*, 39 Iowa, 101; *McDonald v. Crandall*, 43 Ill. 231, 92 Am. Dec. 112; *Hoskins v. Litchfield*, 31 Ill. 137, 83 Am. Dec. 215.

There can be no reason why a married woman should not be estopped by her fraudulent acts when they amount to a tort. *Glidden v. Strupler*, 52 Pa. 403; *Johns v. Reardon*, 11 Md. 470.

Messrs. Forney & Moore, for respondents:

The statutes of Idaho specifically declare how the sale of a homestead may be made. This method of procedure excludes all others.

Barton v. Drake, 21 Minn. 305; *Law v.*

Butler, 44 Minn. 482, 9 L. R. A. 858, 47 N. W. 53.

A married woman can only be divested of her estate in the manner prescribed by statute, and the homestead can only be conveyed in the mode prescribed by statute.

Mathews v. Davis, 102 Cal. 207, 36 Pac. 358; *Jackson v. Torrence*, 83 Cal. 533, 23 Pac. 695; *Cohen v. Davis*, 20 Cal. 195; *Security Loan & T. Co. v. Kauffman*, 108 Cal. 218, 41 Pac. 467; *Gleason v. Spray*, 81 Cal. 217, 15 Am. St. Rep. 47, 22 Pac. 551; *Barber v. Babel*, 36 Cal. 14; *Mellen v. McMannis* (Idaho) 75 Pac. 98.

On petition for rehearing.

The wife is released from her common-law disability only in so far as an enlargement of her rights may be given by statute, and no farther.

Bassett v. Beam, 4 Idaho, 107, 36 Pac. 501; *Dernham v. Rowley*, 4 Idaho, 754, 44 Pac. 643; *Northwestern & P. H. Bank v. Rauch*, 5 Idaho, 752, 51 Pac. 764, 7 Idaho, 152, 61 Pac. 516.

Fraud will not divest a married woman's title in the face of a statute declaring a different and exclusive mode of divestiture.

Morrison v. Wilson, 13 Cal. 495, 73 Am. Dec. 593; *Mathews v. Davis*, 102 Cal. 207, 36 Pac. 358; *Jackson v. Torrence*, 83 Cal. 533, 23 Pac. 695; *California Fruit Transp. Co. v. Anderson*, 79 Fed. 404; *Security Loan & T. Co. v. Kauffman*, 108 Cal. 218, 41 Pac. 467; *Gleason v. Spray*, 81 Cal. 217, 15 Am. St. Rep. 47, 22 Pac. 551; *Barber v. Babel*, 36 Cal. 14; *Kantrowitz v. Prather*, 31 Ind. 92, 99 Am. Dec. 587; *Steel v. St. Louis Smelting & Ref. Co.* 106 U. S. 447, 27 L. ed. 226, 1 Sup. Ct. Rep. 389.

The ratification of an invalid sale by the acceptance of the purchase money is wholly destitute of the essential elements of estoppel *in pais*.

Henshaw v. Bissell, 18 Wall. 271, 21 L. ed. 838; *Pasley v. Freeman*, 3 T. R. 51.

For an estoppel *in pais* there must be conduct, acts, language, or silence, amounting to a representation or concealment of material facts, and the misrepresented or concealed facts known to the party sought to be charged with the estoppel, and unknown to the other party; and the conduct must be with the expectation that it will be acted on, or will likely be.

Norfolk & W. R. Co. v. Perdue, 40 W. Va. 454, 21 S. E. 755; *Williamson v. Jones*, 43 W. Va. 562, 38 L. R. A. 700, 64 Am. St. Rep. 891, 27 S. E. 410; *Glidden v. Strupler*, 52 Pa. 402.

Equity cannot breathe life into a legal nonentity.

1 Story, Eq. Jur. ¶ 177; *Herman*, Estoppel, ¶ 1099; *Mattox v. Hightshue*, 39 Ind. 95; *Rogers v. Higgins*, 48 Ill. 211; 60 L. R. A.

Leitch v. Neal, 7 W. Va. 569; *Elliott v. Peirsol*, 1 Pet. 328, 7 L. ed. 164; *Barnett v. Shackelford*, 6 J. J. Marsh. 532, 22 Am. Dec. 100; *Stewart, Husb. & W.* §§ 409-420; *Washb. Real Prop.* 4th ed. p. 78.

Sullivan, Ch. J., delivered the opinion of the court:

This is an action to compel specific performance of a contract for the conveyance of real estate situated in Moscow, Latah county. It appears from the record: That the respondents are husband and wife, and that on the 7th day of January, 1895, the husband purchased the E. ½ of lots 4, 5, and 6 in block 2, Fry's addition to the town of Moscow, Latah county, and the consideration paid therefor was money acquired by the respondent Jay Woodworth subsequent to the marriage of the respondents. That on the 20th day of March, 1895, while respondents were residing on said premises and occupying the same as a homestead, the respondent Lillie I. filed her declaration of homestead upon said premises. That some time prior to the 30th day of August, 1901, the respondents had removed from Moscow, in the county of Latah, to Wallace, in the county of Shoshone, and that respondent Woodworth had listed said property for sale with real-estate agents residing and doing business in said town of Moscow at the price of \$1,500; and on said last-mentioned date the appellant paid to said agents for the respondent \$25 for a thirty-day option to purchase said premises, and thereafter, on the 20th day of September, the appellant took up said option, and orally promised the said agents to purchase said premises, and to pay the sum of \$1,500 therefor, as follows, to wit: To assume a mortgage upon said premises executed by the respondents to the Vermont Loan & Trust Company to secure the payment of \$950, together with interest thereon, and \$550 in cash; and thereupon, with the consent of said agents, the appellant entered into the possession of said premises, and moved his family into the residence situated upon said premises, and has ever since occupied the whole of said premises as a residence, all of which was known to the respondents. That, instead of paying said \$550 as agreed, the same was paid in payments as follows: November 1, 1901, \$100; December 1, 1901, \$175; January 4, 1902, \$100; July 6, 1902, \$100; September 16, 1902, \$100; aggregating in all the total sum of \$525. Said sums were paid over by the agents to the respondent Jay Woodworth. That after said payments were made the appellant personally demanded of Jay Woodworth a deed to said premises, and offered to pay him then and there the \$25

still due on the purchase price, with interest on all deferred payments, and the said Woodworth promised to execute a conveyance to said premises as soon as he conveniently could. That after the appellant had entered into possession of said premises he made improvements thereon of the value of \$250. That after appellant had so entered into the possession the respondent Lillie I. was informed of the improvements made thereon, and knew that said improvements had been made and possession taken by the appellant under the belief that he was the owner of said premises, and to all of which said Lillie I. made no objection, and consented thereto. Thereafter, in the month of March, 1903, the appellant again tendered the respondents the sum of \$25, as the balance still due on the purchase price, and demanded of them that they execute to him a good and sufficient deed of conveyance to said premises, which demand the respondent then and there refused, and the respondent Jay Woodworth, when asked his reason for refusing to execute the deed, informed the appellant that he had consulted with attorneys, and they had advised him that he could not be compelled to make the deed. That the payments made by appellant, including the \$525 referred to together with interest on said mortgage, taxes, and the improvements made by appellant, make a total of \$1,181.57. Upon the foregoing facts, judgment was rendered in favor of the respondents, decreeing to them the possession of said premises, and granting to the appellant a judgment for \$844.72; that being the balance after deducting the rental at the rate of \$12.50 per month, with interest thereon, from the sum of \$1,181.57, above mentioned. The case was decided upon the theory that a specific performance of the contract of sale could not be enforced, because of the provisions of our statute in regard to the conveyance of real estate by married women.

The question presented for decision is whether the respondents should be compelled to convey said property to the appellant under the facts of this case, it having been at one time occupied as a homestead. The sections of our statute in regard to the conveyance or encumbrance of a homestead by a married person, and the manner in which a homestead may be abandoned, are as follows:

"Sec. 2921. No estate in the homestead of a married person, or in any part of the community property occupied as a residence by a married person, can be conveyed or encumbered by act of the party, unless both husband and wife join in the execution of the instrument by which it is so conveyed or encumbered, and it be acknowledged by the
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wife as provided in chapter 3 of this title.

"Sec. 2922. No estate in the real property of a married woman passes by any grant or conveyance purporting to be executed or acknowledged by her, unless the grant or instrument is acknowledged by her in the manner prescribed in chapter 3 of this title, and her husband, if a resident of the territory, joins with her in the execution of such grant or conveyance."

"Sec. 3040. The homestead of a married person cannot be conveyed or encumbered unless the instrument by which it is conveyed or encumbered is executed and acknowledged by both husband and wife.

"Sec. 3041. A homestead can be abandoned only by a declaration of abandonment, or a grant or conveyance thereof, executed and acknowledged (1) by the husband and wife, if the claimant is married; (2) by the claimant, if unmarried."

Prior to the adoption of § 3041, above quoted, creditors of the homesteader often attached the premises homesteaded, and attempted to subject the same to the payment of the debt, on the ground of abandonment; and, in order to make the homestead more secure, a rule of evidence was established by the adoption of said section, and any litigant attempting to subject the homestead to the payment of his debt must show that the same was abandoned by a written declaration of abandonment, properly executed and acknowledged. The provisions of that section are not applicable to the case at bar. The case of *Mellen v. McMannis* (Idaho) 75 Pac. 98, decided by this court, is not in point. In that case it was not shown that the purchaser ever went into the possession of the premises or put any improvements thereon, or that Clark ever accepted the purchase price thereof, or that his wife ever knew anything about the sale or ever consented thereto.

Sections 3040 and 3041 are in the nature of rules of evidence, and are subject to the same legal principles as are conveyances falling under the statute of frauds, and the rules of equitable estoppel and waiver. We are aware that there is much conflict among the decisions of the question of how far the doctrine of equitable estoppel applies to married women. One of the leading decisions of the Pacific Coast states is that of *Morrison v. Wilson*, 13 Cal. 495, 73 Am. Dec. 593. See also cases cited in 1 Notes on California Reports, pp. 604, 605. In § 814. 2 Pomeroy's Equity Jurisprudence, it is stated as follows: "Upon the question how far the doctrine of equitable estoppel by conduct applies to married women, there is some conflict among the decisions. The tendency of modern authority, however, is strongly towards the enforcement of the

estoppel against married women, as against persons *sui juris*, with little or no limitation on account of their disability. This is plainly so in states where the legislation has freed their property from all interest or control of their husbands, and has clothed them with partial or complete capacity to deal with it as though they were single. Even independently of this legislation there is a decided preponderance of authority sustaining the estoppel against her either when she is attempting to enforce an alleged right or to maintain a defense." The author cites modern English cases, as well as American, to sustain the text. In the case of *Galbraith v. Lunsford*, 87 Tenn. 89, 1 L. R. A. 522, 9 S. W. 365, in referring to *Morrison v. Wilson*, 13 Cal. 495, 73 Am. Dec. 593, the Tennessee court says that the case of *Morrison v. Wilson*, 13 Cal. 495, 73 Am. Dec. 593, "relied on so confidently by counsel for complainant, seems to not only deny the application of an estoppel *in pais* to a married woman, but goes so far as to hold that affirmative fraud on her part will not effect that result. It is sufficient to say of this case that it not only loses sight of the distinction referred to as to defective execution of a contract, but is directly opposed to our own adjudged cases, so far as the element of fraud is concerned." In *Pilcher v. Smith*, 2 Head, 208, it is said: "The legal disability of coverture carries with it no license or privilege to practise fraud or deception on other innocent persons."

The provisions of our statutes above quoted must not be so construed as to permit the respondent Lillie I. to reap the benefits of a fraud perpetrated on the appellant. It must be borne in mind that there is no conflict in the evidence in this case whatever. The legal disability of married women in this state has been almost entirely removed. They have been given elective franchise; they may hold office; and under the 2d section of an act approved March 9, 1903 (Sess. Laws 1903, p. 346), the wife is given the management, control, and absolute power of disposition of her separate property, with like effect as a married man may in relation to his real and personal property. It is true that said act was passed subsequent to the contract involved in this suit, but this only tends to show and support the doctrine laid down in 2 Pom. Eq. Jur. § 814.

As to the statute of frauds, § 6007, Rev. Stat., provides that no estate or interest in real property, other than for leases having a term not exceeding one year, nor any trust or power over or concerning it, or in any manner relating thereto, can be created, granted, assigned, surrendered, or declared

otherwise than by operation of law, or a conveyance or other instrument in writing, subscribed by the party creating, granting, assigning, surrendering, or declaring the same, or by his lawful agent thereunto authorized in writing. It is conceded that no instrument in writing has been executed in this case. Section 6008, Rev. Stat., provides that the section above cited must not be construed to affect the power of a testator in the disposition of his real property by a last will and testament, nor to prevent any trust from arising or being extinguished by implication or operation of law, nor to abridge the power of any court to compel the specific performance of an agreement in case of part performance thereof. In the case at bar it is shown that the contract sued on is an executed contract, so far as appellant is concerned. Hence, so far as the statute of frauds is concerned, the trial court should have compelled the respondents to convey the property in controversy, by good and sufficient deed, to the appellant. Courts of equity will not permit the statute of frauds or the statute in regard to conveyance of married women to be a shield to protect fraud; and those statutes were not enacted to encourage frauds and cheats. The appellant had paid the price agreed to be paid for the property, had taken possession thereof, and expended \$250 in improving the same, all of which was assented to by respondent Lillie I.; and, under the well-established rules of law applicable to the case, the appellant is the owner of the equitable title thereto. Because of the facts of this case, the principle that governs is more in the nature of an estoppel or waiver on the part of respondent Lillie I., and not the broad principle of abandonment, as suggested by the provisions of § 3041, Rev. Stat., above quoted. While the provisions of the sections above quoted were made for the protection of married woman, they were not intended to operate as a shield to relieve them against a fraudulent transaction, such as the one under consideration, and she is estopped by her own acts from interposing the provision of said sections as a valid defense to this action. The verbal agreement for the transfer of the homestead in question was assented to by both husband and wife, and was followed by change of possession, and permanent improvement placed thereon by the purchaser, and a payment of the purchase price. Those acts operated to transfer the equitable title to the appellant. That being true a court of equity will compel the respondents to convey the legal title to the appellant.

The judgment is reversed, and the cause remanded for further proceedings in con-

formity with the views herein expressed. Costs are awarded to appellant.

Stockslager, J., concurs.

Allshie, J., dissenting:

If it should be conceded, which I am not now prepared to do, that the doctrine of estoppel *in pais* can be applied to a married woman in this state, still I do not think the conduct of the wife, as shown in this case, is sufficient to establish an estoppel against her. It is clear from the record that the appellant did not contract with the husband or part with his money upon any representation or action of the wife, and she cannot, therefore, be charged with any acts of fraud. It is equally clear, without citation of authority, that the wife should not be held for the fraudulent acts of her husband, in which she has not participated. For this reason, the judgment should be affirmed.

A petition for rehearing having been filed, **Stockslager, Ch. J.,** on May 13, 1905, handed down the following additional opinion:

Counsel for petitioner filed a lengthy petition setting up many reasons why a rehearing should be granted. The earnestness of the petition, and well-known ability of counsel representing her, prompted the court to hear further argument, and a rehearing was granted. Briefs were filed and arguments heard at the March term at Lewiston. The questions discussed are, first, as to the estoppel of Mrs. Woodworth; secondly, that of fraud on her part. These questions were discussed on the hearing, and were considered by the court from every standpoint before the opinion was finally agreed upon. We agree that the legislature of this state has uniformly dealt kindly, and we think fairly, in protecting married women in their property rights. In this legislation for her protection, it was not intended to shield her in any wrongful act. Under the facts in this case, which are fully stated in the opinion by Mr. Chief Justice Sullivan, I do not think she can escape the doctrine of equitable estoppel. Counsel for petitioner call our attention to a number of authorities, among them being § 813, Pomeroy's Eq. Jur., vol. 2. We quote the section from their brief: "The measure of the operation of an estoppel is the extent of the representation made by one party, and acted on by the other. The estoppel is commensurate with the thing represented, and operates to put the party entitled to its benefit in the same position as if the thing represented were true. With respect to the persons who are bound by, or who may claim the benefit of, the estoppel, it operates between the immediate

parties and their privies, whether by blood, by estate, or by contract. A stranger who is not a party nor a privy can neither be bound nor aided. Since the whole doctrine is a creature of equity and governed by equitable principles, it necessarily follows that the party who claims the benefit of an estoppel must not only have been free from fraud in the transaction, but must have acted with good faith and reasonable diligence; otherwise no equity will arise in his favor." Applying this rule to the party claiming exemption from the doctrine of estoppel, what is her standing in a court of equity? She knew the defendant appellant entered into the possession of the property, put valuable improvements thereon, and paid all but \$25 of the agreed purchase price, and then, when he demands a deed, comes into a court of equity and asks for relief under a plea that she had filed a homestead declaration on the property; he offering to allow plaintiff to take judgment for amount found due the plaintiff after deducting rental for the property for the time it was occupied by plaintiff, and she asking to be dismissed with her costs. Under the rule laid down by Mr. Pomeroy, above quoted, it is immaterial whether there was an allegation or proof of fraud on the part of the defendants or not. He says: "The party who claims the benefit of an estoppel must not only have been free from fraud in the transaction, but must have acted with good faith and reasonable diligence; otherwise no equity will arise in his favor." Now, what was the duty of Mrs. Woodworth when she visited the premises in dispute, and found them occupied by appellant and his family, making valuable and lasting improvements upon the house in good faith, believing they were the owners thereof? Mrs. Grice, wife of appellant, testifies: "I am the wife of plaintiff. Was his wife at the time he moved into and took possession of the Woodworth property. Am acquainted with Mrs. Woodworth, one of the defendants in this action. Have known her for eight or nine years at Moscow. She was living either at Wallace or Wardner at the time we took possession of the property. I knew of her coming back to Moscow two years ago,—the spring of 1902. I was down at the hospital one afternoon, and met Mr. Woodworth in the hall. He was going down-stairs, and he said: 'Lillie is upstairs. You had better go upstairs and see her.' Miss Baker was with me at the time. We went upstairs. Mrs. Woodworth was in the parlor, and we sat down and talked. In our conversation, she asked me how I liked our new home. I said, 'Real well;' that it was fine, and such a pretty location,—and remarked that it was rather large. She said that was the objection she always

had to the place. That was the substance of the conversation. I had another conversation with her—I imagine in June—some time in 1902. I know it was quite warm. She and her mother called at the house one afternoon. They came in, sat down, and talked to me. We had the house painted at the time. She remarked how pretty the house looked since it was painted. She says: 'It is just the color we intended to have it painted if we hadn't sold the place.' She says: 'You have the sitting room painted, too. It is very pretty.' Lecta D. Baker testified she had lived in Moscow about sixteen years. Knew all the parties to the case, and has known Mrs. Woodworth ever since she has lived in Moscow. Heard the two conversations related by Mrs. Grice, and practically relates them in the same language. Mrs. A. J. McDonald testifies to a conversation with Mrs. Woodworth in March, 1903. She says, "She asked Mrs. Woodworth if they weren't sorry that they had sold their home," and she said, "I guess we are." I said, "Why did you sell?" She said that Mr. Woodworth said they were going away, and they would never come back to Moscow again, and they thought they might just as well sell while they had a chance. If Mrs. Woodworth desired to deal fairly with the Grices when she returned from Moscow, and found them in possession of her property, upon which she had filed a homestead declaration, if she did not know they were occupying the property under a claim of purchase prior to that time, she should have then said to them: "You are improving property, upon which I have filed my homestead declaration. I have never consented to the sale of it, and still desire to claim it as my home." This would have been good faith and reasonable diligence. Equity does not permit her to remain silent as to her claims, and by her conversation encourage appellants to continue their payments and improvements on the property, and then, when they demand a deed, answer by saying: "You can take a judgment against my husband for the amount you have paid on the purchase price and for the improvements made, less the reasonable rental during the time you have occupied the premises, but the property has increased in value, and I am informed I can hold it under my homestead declaration. You may enforce your judgment against my husband if you can, but I will hold the property, which has about doubled in valuation." Courts of equity should not and will not encourage such transactions as are shown to exist in this case, and exempt them from compliance with the contract.

After carefully reconsidering this case we are still of the view that the opinion here-
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tofore filed correctly states the law of this case.

Sullivan, J., concurs.

Ailshie, J., dissenting:

The application of the doctrine adopted in this case to the facts it discloses works an effectual rape of the statute, in the name of that facile and beguiling progeny of equity called "estoppel." I shall not enter upon any discussion as to whether or not the homestead of a married woman may be alienated or transferred in any other manner than that pointed out by statute. I am convinced, however, that, if the doctrine of estoppel adopted by my brothers is applicable to a married woman, and not forbidden by express statute, notwithstanding such a rule the facts of this case are entirely barren of the elements of estoppel. In 16 Cyc. Law & Proc. p. 726, Prof. Bigelow defines the essential elements of estoppel *in pais* as follows: "In order to constitute an equitable estoppel, there must exist a false representation or concealment of material facts: it must have been made with knowledge, actual or constructive, of the facts; the party to whom it was made must have been without knowledge, or the means of knowledge, of the real facts; it must have been made with the intention that it should be acted upon; and the party to whom it was made must have relied on or acted upon it to his prejudice." Applying this test to the facts disclosed in the record, not a single element of estoppel as against Mrs. Woodworth can be gleaned from this case. All the acts, declarations, and conduct of the wife in this case which are held to constitute an estoppel are narrated in the opinions of my associates, and it is therefore unnecessary for me to repeat them here. The acts and declarations of the wife in this case, by which she is estopped to set up the plea of her homestead right, were made to third parties, and that in the course of casual conversation which took place long after the purchaser, Grice, had paid the entire purchase price, with the exception of a very trivial sum. And indeed there is no evidence in the record anywhere showing, or tending to show, that the substance of these conversations and declarations, or any part thereof, was ever at any time communicated to Grice prior to the commencement of this action. It is not even shown when the wife came into knowledge of the fact that her husband had sold, or contracted to sell, this homestead, and, so far as the record is concerned, that information may have been gathered by her long after her husband had received the entire purchase price, with the exception of \$25 unpaid at the time the ac-

tion was commenced. It is said by the chief justice in his opinion that, "if Mrs. Woodworth desired to deal fairly with the Grices when she returned from Moscow and found them in possession of her property, . . . she should have then said to them: 'You are improving property upon which I have filed my homestead declaration. I have never consented to the sale of it, and still desire to claim it as my home.'" One would infer from this statement that Grice had no information as to the filing of the homestead, but that would be a wrong impression. As a matter of fact, the homestead declaration was of record long before Grice entered into the contract with Woodworth or took possession of the property, and he was chargeable with notice of such fact, as well as with notice of the provisions of the statute to the effect that the wife cannot be divested of her homestead right except by an instrument in writing duly acknowledged by her. The laches and neglect shown in this case are to my mind entirely chargeable to appellant, rather than to the respondent Mrs. Woodworth. It is true, as said by counsel for respondent in their brief, "that a certain degree of negligence is a luxury that all mankind are licensed to enjoy, and for which every man must make an allowance in his dealings with other men." This is said upon the theory, I presume, that all men—and women too—are human, and may not live up to all the moral obligations their neighbors may think that Code imposes; but for every such dereliction a court of equity cannot interpose with an adequate and speedy remedy. It is difficult to understand upon what theory either the actions, declarations, or conduct of this married woman are to be construed into an estoppel against her defending her homestead rights where the record contains not a word showing that the party who purchased from her husband parted with a single dollar or made the slightest improvement upon the property upon any statement, act, or representation made by her. In speaking of an estoppel by actions and conduct, Justice Field, in *Henshaw v. Bissell*, 18 Wall. 271, 21 L. ed. 840, says: "For its application there must be some intended deception in the conduct or declarations of the party to be estopped, or such gross negligence on his part as to amount to constructive fraud." Such is not the 69 L. R. A.

case here. The wife is apparently estopped in this case because she didn't, as soon as she learned of this sale by her husband, rush out upon the street and to her neighbors, and recount her troubles to everyone with whom she met, and, of course, necessarily berate the conduct of her husband, and brand him as one who was obtaining money under false pretenses.

After reading the majority opinion in this case, the *femes covert* of this commonwealth, in order to hereafter avoid the plea of estoppel, will find it necessary, where their speculative husbands have parted with the old homestead without their consent, to then turn Xantippes, and rail their grievances as well from the housetops and market places as from the forum. And indeed, in order that they may not be estopped, they should, on their "days at home," apprise all their gentle callers that, while their impecunious spouses lured them away from the old homestead bound with cords of affection, still they are as deeply attached to that declaration of homestead as they were on the day when a considerate husband first suggested its execution. Or when she returns the call made by the "innocent purchaser's" wife, she might save herself from the bar of estoppel by reciting to that good dame how their husbands both were ignorant of the statute, as well as unmindful of her individual property rights, and learned in the arts of fraud. Or when the "innocent purchaser," ignorant of the statute, calls to pay her avaricious husband his monthly instalment, she might eject him from the premises and deliver him a personal discourse, and thereby, in a modest but Portian way, save herself from this oft salutary, ever convenient, but sometimes dangerous, plea of estoppel. The majority have told the good wives of this state that they must talk or be estopped. I am chagrined to hear it. It is enough if they keep still; indeed, the law hath required no more; and, moreover, equity taketh no delight in a parade of grievances and multiplicity of troubles where peace and quietude might reign. I am persuaded that it hath never before been written that our good wives should be estopped by the courtesies and pleasantries they exchange when "making calls" or at the "tea party."

I think the judgment should be affirmed.

KENTUCKY COURT OF APPEALS.

Thomas HACKETT, *Appt.*,
v.

Trustees of BROOKSVILLE GRADED
SCHOOL DISTRICT *et al.*

(.....Ky.....)

1. Offering a prayer at the beginning of school each day, asking direction and guidance, which does not represent any peculiar view or dogma of any sect or denomination, does not bring a public school within a provision of the Constitution that no portion of any fund or tax raised for educational purposes shall be used in aid of any sectarian or denominational school.
2. A school is not a place of worship, nor is the teacher a minister of religion, within the meaning of a constitutional provision that no person shall be compelled to attend any place of worship or contribute to the support of any minister of religion, although prayer is offered at the opening of sessions of the school.
3. The King James translation of the Bible is not a sectarian book within the meaning of a statute providing that no sectarian book shall be used in any common school.

(May 31, 1905.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Bracken County denying an injunction to restrain alleged sectarian or denominational exercises in a public school. *Affirmed.*

The facts are stated in the opinion.

Mr. William A. Byrne for appellant.

Mr. E. L. Worthington, for appellees:

In making choice of an English translation to be read, it was eminently proper to select the translation that is commonly used by English speaking people, and against which the fewest objections could be urged.

The King James translation of the Bible is not a sectarian book.

State ex rel. Freeman v. Scheve, 65 Neb. 853, 59 L. R. A. 927, 91 N. W. 846, 93 N. W. 169; *Vidal v. Philadelphia*, 2 How. 200, 11 L. ed. 235.

Reading the Bible in the public schools is not forbidden by the Constitution.

Pfeiffer v. Board of Education, 118 Mich. 560, 42 L. R. A. 536, 77 N. W. 250; *Moore v. Monroe*, 64 Iowa, 367, 52 Am. Rep. 444, 20 N. W. 475; *Donahue v. Richards*, 38 Me. 379, 61 Am. Dec. 256; *Cook County v. Chicago Industrial School for Girls*, 125 Ill.

NOTE.—As to reading of Bible, or repeating of prayers, in schools, see also, in this series, *State ex rel. Weiss v. District Board*, 7 L. R. A. 330; *Pfeiffer v. Board of Education*, 42 L. R. A. 536; *State ex rel. Freeman v. Scheve*, 59 L. R. A. 927; and *Billard v. Board of Education*, 66 L. R. A. 166.
69 L. R. A.

540, 1 L. R. A. 437, 8 Am. St. Rep. 415, 18 N. E. 183.

O'Rear, J., delivered the opinion of the court:

Appellant, who resides in the town of Brooksville, and has children attending the Brooksville graded common school, brought this suit against the trustees and teachers of the school, seeking an injunction against the use of the English translation of the Bible, known as the "King James" or "Authorized Edition," and to prevent the teachers from opening the school with prayers or songs alleged to be of a denominational character. On full hearing the injunction was denied, and the petition dismissed.

To get at the exact question presented for decision on this appeal, we will eliminate the allegation concerning worship of God by singing sectarian songs. There was no proof whatever that any songs of any kind had been sung during the school year in which the suit was brought, nor was it either required or permitted. Whether it was permissible to have sung the songs complained of is not, therefore, a matter considered by the court.

Appellant invokes § 189 of the Constitution of Kentucky and § 4368, Ky. Stat. 1903, which read as follows:

"No portion of any fund or tax now existing, or that may hereafter be raised or levied for educational purposes, shall be appropriated to, or used by, or in aid of, any church, sectarian, or denominational school." Const. § 189.

"No books or other publications of a sectarian, infidel, or immoral character shall be used or distributed in any common school; nor shall any sectarian, infidel, or immoral doctrine be taught therein." Ky. Stat. 1903, § 4368.

The Brooksville graded common school is maintained by the state by the imposition of taxes. It is open alike to all white children within certain ages who or whose parents are residents of the district. It is in no sense a sectarian, church, or denominational school. Section 189 of the Constitution was aimed not to regulate the curriculum of the common schools of the state, but to prevent the appropriation of public money to aid schools maintained by any church or sect of religionists. If the Constitution deals directly with the question of compulsory worship, it is in § 5, which reads as follows: "No preference shall ever be given by law to any religious sect, society, or denomination; nor to any particular creed, mode of worship, or system of ecclesi-

astical polity; nor shall any person be compelled to attend any place of worship, to contribute to the erection or maintenance of any such place, or to the salary or support of any minister of religion; nor shall any man be compelled to send his child to any school to which he may be conscientiously opposed; and the civil rights, privileges, or capacities of no person shall be taken away, or in any wise diminished or enlarged, on account of his belief or disbelief of any religious tenet, dogma, or teaching. No human authority shall, in any case whatever, control or interfere with the rights of conscience." If, under the guise of public instruction, children should be required to attend schools where worship of God was compulsory, it would seem to be within the prohibition of that section. We find from the evidence in this case that, while chapters of passages from the Bible (King James translation) were read, and prayers were offered by the teachers at the opening of the school each morning, appellant's children, who are members of the Roman Catholic Church, were not required to attend during those exercises, nor were they or others who were conscientiously opposed to doing so required to participate in them.

Two questions are presented by the record for decision: (1) Does the offering of prayer to God in opening a school, such as was offered in the Brooksville school, make that school a "sectarian school," within the meaning of § 189 of the Constitution? (2) Is the King James translation of the Bible a "sectarian book," within the meaning of § 4368, Ky. Stat.?

The prayer that was offered, and which it is urged converted the school into a sectarian school, is as follows: "Our Father who art in Heaven, we ask Thy aid in our day's work. Be with us in all we do and say. Give us wisdom and strength and patience to teach these children as they should be taught. May teacher and pupil have mutual love and respect. Watch over these children, both in schoolroom and on the playground. Keep them from being hurt in any way, and at last, when we come to die, may none of our number be missing around Thy Throne. These things we ask for Christ's sake. Amen." It has not been pointed out to us wherein the prayer quoted is sectarian in its construction. The Reverend Father James A. Cusack, a witness for appellant, asseverates that, in his opinion, it is sectarian. But he admits that there is nothing in it repugnant to the doctrines of his religious belief (Roman Catholic). Nor does he claim that it is promulgated, authorized, or used by any sect of religionists whatever. As neither the form nor substance of the prayer complained of seems to represent any

peculiar view or dogma of any sect or denomination, or to teach them, or to detract from those of any other, it is not sectarian in the sense that the word is commonly used and understood, and as it was evidently intended in the section quoted. The constitutional convention, in framing the organic law for all the people of the state, must be presumed to have used ordinary words, not according to the peculiar views of a few, but as generally used. The word "sectarian," from the connection in which it is used, cannot be given the construction contended for by appellant, which seems to be that any form of prayer not authorized by a particular church is sectarian.

Though it be conceded that any prayer is worship, and that public prayer is public worship, still appellant's children were not compelled to attend the place where the worshipping was done during the prayer. The school was not "a place of worship," nor are its teachers "ministers of religion," within the contemplation of § 5 of the Constitution, although a prayer may be offered incidentally at the opening of the school by a teacher. Meetings of the general assembly are opened by prayer, and other state institutions authorize the worship of God. They have never been regarded as fostering sectarian teachings. The complaint in this case goes only to the sectarian feature of the exercises, not because they were religious. It is not contended that it was the purpose of the Constitution to prevent worship, nor to prevent teachers in the public schools from assuming worshipful relations. The great aim was to keep church and state forever separate as distinct institutions; to prevent the government of one form assuming rightful control of the government of the other. Nor is it clear that it was intended to keep religion out of the school, though it is apparent that one aim, at least, was to keep the "church" out. The question is not presented, and is not, therefore, decided, whether any exercise which partakes incidentally of worship is prohibited.

The main question, we conceive to be, Is the King James translation of the Bible, or, for that matter, any edition of the Bible, a sectarian book? There is, perhaps, no book that is so widely used and so highly respected as the Bible; no other that has been translated into as many tongues; no other that has had such marked influence upon the habits and life of the world. It is not the least of its marvelous attributes that it is so catholic that every seeming phase of belief finds comfort in its comprehensive precepts. Many translations of it, and of parts of it, have been made from time to time, since two or three centuries before the beginning of the Christian era. And since the

discovery of the art of printing and the manufacture of paper in the sixteenth century, a great many editions of it have been printed. There is controversy over the authenticity of some parts of some of the editions. And there are some people who do not believe that any of it is the inspired or revealed word of God. Yet it remains that civilized mankind generally accord to it a reverential regard, while all who study its sublime sentiments and consider its great moral influence must admit that it is, from any point of view, one of the most important of books. That it has drawn to its careful study and research into its history and translations so many profound scholars of history, is not to be wondered at. The result has been that, while many editions of the several translations have been made, those based upon the revision compiled under the reign of King James I., 1607-1611, and very generally used by Protestants, and the one compiled at Douay some time previous, and which was later adopted by the Roman Catholic Church as the only authentic version, are the most commonly used in this country. That the Bible, or any particular edition, has been adopted by one or more denominations as authentic, or by them asserted to be inspired, cannot make it a sectarian book. The book itself, to be sectarian, must show that it teaches the peculiar dogmas of a sect as such, and not alone that it is so comprehensive as to include them by the partial interpretation of its adherents. Nor is a book sectarian merely because it was edited or compiled by those of a particular sect. It is not the authorship nor the mechanical composition of the book, nor the use of it, but its contents, that give it its character. Appellant's view seems to be that the church is the custodian and interpreter of the Bible as God's word. From that it is supposed that any Bible not put forth by authority of a church claiming that prerogative is sectarian. The question is not whether the version used is canonical or apocryphal. That question does not at all enter into the matter. Otherwise it would inevitably lead to the state that any book not favored by some church authority, or which may be supposed by it to be hostile to its teachings, would be sectarian. In that way the authority of a church could largely control the course of study in the public schools by issuing its bull against certain scientific or moral treatises as being atheistic or heretic. The very mischief aimed at by the framers of the Constitution, and by the people adopting it, would thus be accomplished, *viz.*, the interference in matters of state by the church.

If the legislature or the constitutional convention had intended that the Bible

should be proscribed, they would simply have said so. The word "Bible" is shorter and better understood than the word "sectarian." It is not conceivable that, if it had been intended to exclude the Bible from public schools, that purpose would have been obscured within the controversial word. Nor can we conceive that under the American system of providing thorough education of all the youth, to fit them for good citizenship in every sense, the legislature or the constitutional convention could have intended to exclude from their course of instruction any consideration of such a work, whose historical and literary value, aside from its theological aspects, would seem to entitle it to a high place in any well-ordered course of general instruction. The history of a religion, including its teachings and claim of authority,—as, for example, the writings of Confucius or Mahomet,—might be profitably studied. Why may not also the wisdom of Solomon and the life of Christ? If the same things were in any other book than the Bible, it would not be doubted that it was within the discretion of the school boards and teachers whether it was expedient to include them in the common-school course of study without violating the impartiality of the law concerning religious beliefs. The objection does not appear to be to the matter. It is to the publication.

A learned witness for appellant, who gives it as a matter of religious belief and teaching, says that the church is the interpreter of the Bible, but that the Protestants teach, on the contrary, that everyone is his own interpreter. The Constitution may be said to teach, too, that everyone is his own interpreter, for it guarantees that everyone may worship God (which is supposed to include the study of His revealed word) according to the dictates of his own conscience. Children are taught the Constitution in the common schools. May it not be said then with equal force that to teach the Constitution, which itself teaches the right of perfect freedom in the worship of God, is sectarian, because some sect might deny that it was right to teach the children to worship God in any way except according to the teachings of that particular sect? Milton, Newton, Galileo, as well as Wickliffe, Whittingham, and Tyndale, came under the bans of the church. The philosophy and the writings of these great thinkers, wherein they do not teach sectarianism, may be used in the public schools, and in some part are so used, in spite of the fact that at one time they were believed to be hostile to God's revelations as interpreted by the church. This same question in one form or another has come before the courts of the country a number of times. It has not been so free from

doubt that the conclusions of the judges have always been harmonious. This has been in part owing to the differing expressions of the Constitutions and statutes being interpreted. While allowing that because of these differences in language the opinions may not appear to be precisely in point, yet they reflect the drift of judicial opinion in this country, so far as it has been expressed, concerning the main idea, —whether the Bible is a sectarian book. Likewise whether it may be read in the public schools at all. While some of the Constitutions construed in terms prohibit the use of sectarian books in the public schools, yet, independent of those provisions, it seems to be generally conceded that to teach sectarianism in a public school would be violative of religious freedom, which is guaranteed by every Constitution. With this explanation we will briefly review the decisions bearing on the subject.

One of the earliest cases, celebrated for the great learning displayed, as well as by the distinguished ability of the judge who wrote the opinion, is *Vidal v. Philadelphia*, 2 How. 127, 11 L. ed. 205, opinion by Mr. Justice Story. The question for decision, so far as it bears on this case, was whether a charitable bequest of the late Stephen Girard, establishing a college, prohibited the teaching of Christianity to its pupils. The will contained this restrictive clause: "I enjoin and require that no ecclesiastic, missionary, or minister of any sect whatsoever, shall ever hold or exercise any station or duty whatever in the said college; nor shall any such person ever be admitted for any purpose, or as a visitor, within the premises appropriated to the purposes of the said college." The intention of the testator, so far as it was not unlawful, was as the law of the case. The question was, Did he intend to exclude the teachings of Christianity, or its being taught by the clergy? The testator himself furnished this key to his thought (p. 133 of 2 How., p. 208, 11 L. ed.): "In making this restriction, I do not mean to cast any reflection upon any sect or person whatsoever; but, as there is such a multitude of sects, and such a diversity of opinion amongst them, I desire to keep the tender minds of the orphans, who are to derive advantage from this bequest, free from the excitement which clashing doctrines and sectarian controversy are so apt to produce; my desire is that all the instructors and teachers in the college shall take pains to instill into the minds of the scholars the purest principles of morality, so that, on their entrance into active life, they may, from inclination and habit, evince benevolence toward their fellow creatures, and a love of truth, sobriety, and industry, adopt-

ing at the same time such religious tenets as their mature reason may enable them to prefer." It would be difficult to express a more fitting description of the underlying principles of our government in its treatment of the subject of public education. In construing those provisions of the will which we have quoted as bearing particularly on the subject whether the Bible and its teachings might be employed in the college by lay teachers, the court said: "Why may not the Bible, and especially the New Testament, without note or comment, be read and taught as a divine revelation in the college; its general precepts expounded, its evidences explained, and its glorious principles of morality inculcated? What is there to prevent a work, not sectarian, upon the general evidences of Christianity, from being read and taught in the college by lay teachers? Certainly there is nothing in the will that proscribes such studies. Above all, the testator positively enjoins 'that all the instructors and teachers in the college shall take pains to instill into the minds of the scholars the purest principles of morality, so that, on their entrance into active life, they may, from inclination and habit, evince benevolence towards their fellow creatures, and a love of truth, sobriety, and industry, adopting at the same time such religious tenets as their matured reason may enable them to prefer.' Now, it may well be asked, What is there in all this, which is positively enjoined, inconsistent with the spirit or truths of Christianity? Are not these truths all taught by Christianity, although it teaches much more? Where can the purest principles of morality be learned so clearly or so perfectly as from the New Testament? Where are benevolence, the love of truth, sobriety, and industry, so powerfully and irresistibly inculcated as in the sacred volume? The testator has not said how these great principles are to be taught, or by whom, except it be by laymen, nor what books are to be used to explain or enforce them. All that we can gather from his language is that he desired to exclude sectarians and sectarianism from the college, leaving the instructors and officers free to teach the purest morality, the love of truth, sobriety, and industry, by all appropriate means; and, of course, including the best, the surest, and the most impressive." Two points are emphasized by the reasoning of the learned judge: (1) That is was sectarianism that was prohibited, and (2) that the Bible is not a sectarian book,—which are the two points most prominent in this case.

Donahoe v. Richards, 38 Me. 379, 61 Am. Dec. 256, was an action against a school board for expelling a pupil who refused to read the English version of the Bible, that

book having been adopted by the board as one to be used by pupils in the course of the school work. We note that counsel for appellee contends that this case ought not to be regarded as authority, because there was neither statute nor constitutional prohibition on the subject of sectarian teaching. Yet the court held that "the common schools are not for the purpose of instruction in the theological doctrines of any religion or of any sect. The state regards no one sect as superior to any other, . . . and, if the peculiar tenet of any particular sect were so taught, it would furnish a well-grounded cause of complaint on the part of those who entertained different or opposing religious sentiments." The court held that the King James translation of the Bible was not a sectarian book. It was said: "The Bible was used merely as a book in which instruction in reading was given. But reading the Bible is no more an interference with religious belief than would reading the mythology of Greece or Rome be regarded as interfering with religious belief or an affirmation of the Pagan creeds."

In *Spiller v. Woburn*, 12 Allen, 127, it was held that the public-school committee did not exceed their authority in passing an order that the Bible should be read at the opening of the schools on the morning of each day. "No more appropriate method could be adopted," said the court, "of keeping in the minds of both teachers and scholars that one of the chief objects of education, as declared by the statutes of this commonwealth, and which teachers are especially enjoined to carry into effect, is 'to impress on the minds of children and youth committed to their care and instruction the principles of piety and justice, and a sacred regard for the truth.'"

It is not deemed necessary in this state to define by statute now the purposes of public education. They are at least as broad as the broadest under any similar system in use in any of the states.

Pfeiffer v. Board of Education, 118 Mich. 560, 42 L. R. A. 536, 77 N. W. 250, was an application to the court to compel the board of education to discontinue the use of a certain book known as "Readings from the Bible" in the public schools of Detroit. The Constitution and laws of Michigan on the subject of religious freedom are substantially as are ours, save there was no express inhibition of sectarian instruction in public schools. The question decided by the court was that Readings from the Bible, though it was used as a text-book in the school, did not violate constitutional provisions guaranteeing to everyone the right to worship Almighty God according to the dictates of his own conscience; nor was it a 60 L. R. A.

compulsion of any person to attend or support any place of religious worship, or to pay taxes to any minister of the gospel or teacher of religion; nor was it an appropriation of the public money for the benefit of any religious sect or society; nor was it a diminution of the civil rights of any person on account of his religious belief. One judge dissented from the opinion of the court.

In *Moore v. Monroe*, 64 Iowa, 367, 52 Am. Rep. 444, 20 N. W. 475, it was shown that the teachers of the school were accustomed to occupy a few minutes each morning in reading selections from the Bible, in repeating the Lord's Prayer, and singing religious songs. The plaintiff had two children in the school, but they were not required to be present during the time thus occupied. A statute of that state provided: "The Bible shall not be excluded from any school or institution in this state, nor shall any pupil be required to read it contrary to the wishes of his parent or guardian." The Constitution of the state prohibited the legislature from passing any law interfering with the free exercise of religious worship, or compelling any person to pay taxes to support any religion, or for building any place of worship, or the maintenance of any ministry. The plaintiff's contention was that by the use of the schoolhouse as a place for reading the Bible, repeating the Lord's Prayer, and singing religious songs it was made a place of worship; that his children were compelled to attend a place of worship, and he, as a taxpayer, was compelled to aid in building and repairing a place of worship. The court held that the statute did not have any of the effects claimed by the plaintiff. In the absence of such a statute, a rule of the school board to the same effect could not, of course, violate the same constitutional principles, if the statute would not have done so.

The supreme court of Illinois, in *McCor-mick v. Burt*, 95 Ill. 263, 35 Am. Rep. 163, held that a rule of the directors of a public school requiring the reading of a King James edition of the Bible for fifteen minutes each morning, at which, however, no one was required to be present or to participate in, was not unconstitutional as interfering with the religious conviction of the plaintiff and his father, who were patrons of the school, and Roman Catholics.

In none of the states from which the foregoing opinions have been cited was there an express prohibition of the use of sectarian books. Still in all of them there was the familiar and fundamental constitutional provision guaranteeing religious freedom, which would have been violated, as was held in every instance, either in terms or by nec-

essary implication, by the teaching of sectarian doctrines. That such would have been the result of such teaching seems to us to be perfectly obvious. In the very learned and exhaustive note by Judge Freeman to *Cook County v. Industrial School for Girls*, 8 Am. St. Rep. 386 (case reported in 125 Ill. 540, 1 L. R. A. 437, 18 N. E. 183), it is shown that the Constitutions of twenty-four states contain provisions prohibiting the payment of moneys or any appropriation or grant for the support, benefit, or in aid of sectarian schools. The editor, commenting on the constitutional provisions mentioned, and others where they are silent upon the matter of sectarianism, says: "In view of the above decisions and constitutional provisions, we conclude that the words used in the several Constitutions in point, where the language does not expressly so indicate, must have been intended by the people who ratified them to provide against the promulgation or teaching of the distinctive doctrines, creeds, or tenets of any particular Christian or other religious sect in schools or institutions where such instruction was to be paid for out of the public funds, or aided by such funds or by public grants, and that a school or institution is sectarian when the doctrines or tenets of some particular faith, sect, or religion are taught to the exclusion of others; and especially so where a school or institution has a distinctive or strict denominational name descriptive or indicative of the fundamental doctrines of the sect to which it belongs; or where a school or institution is under the exclusive control of a sect having such name, and by a course of instruction excluding all others, seeks to inculcate its tenets alone, it is then sectarian; and it makes no difference that pupils of all sects, denominations, and religious beliefs, or those of no belief, are permitted the advantages of such school or institution. It is what is taught that is the determining factor."

This brings us to the consideration of the authorities relied on by appellant.

State ex rel. Weiss v. District Board, 76 Wis. 177, 7 L. R. A. 330, 20 Am. St. Rep. 41, 44 N. W. 907, is the principal case cited. The questions there presented were whether the reading of selected portions of the King James translation of the Bible during school hours violated the rights of conscience, compelled complainants to aid in support of a place of religious worship, and was sectarian instruction. All three propositions were decided in the affirmative. The decision is apparently against the weight of authority. The court seemed to realize as much, if they should be regarded as all bearing on the same principle. Speaking of them, but not discussing them in detail, the 69 L. R. A.

court said: "A number of cases in different states, supposed to have a bearing upon the main question here considered and determined [to wit, whether the King James version of the Bible is a sectarian book], have been cited, and quotations made therefrom at considerable length by the respective counsel and by the circuit judge . . . overruling the demurrer to the answer. None of the states in which those decisions were made seem to have in their Constitutions a direct prohibition of sectarian instruction in the public schools. It is believed that this state was the first which expressly embodied the prohibition in its fundamental law, and we are not aware of any direct adjudication of the question under consideration." The court seems to turn the case upon the fact that the King James version, "the whole of it," was used as a reading book in the school. The opinion admits that text-books founded upon or containing extracts from the Bible might be properly used. It was even said: "The constitutional prohibition of sectarian instruction does not include them, even though they may contain passages from which some inferences of sectarian doctrine might possibly be drawn. Furthermore, there is much in the Bible which cannot justly be characterized as sectarian. There can be no valid objection to the use of such matter in the secular instruction of the pupils. Much of it has great historical and literary value, which may be thus utilized without violating the constitutional prohibition. It may also be used to inculcate good morals,—that is, our duty to each other,—which may and ought to be inculcated by the district schools. No more complete code of morals exists than is contained in the New Testament, which reaffirms and emphasizes the moral obligations laid down in the Ten Commandments." With profound respect to the supreme court of Wisconsin, we are nevertheless unable to see how its position can be maintained logically. For it takes no notice of the conscientious conviction of the Jews, or nonbelievers, any of whom may have as valid objection to the use of any part of the New Testament as Roman Catholic citizens have to the King James version. It seems to narrow the question down to matter of canonical approval of the printed volumes. The court does not attempt to argue, nor do we see how it could be maintained, that that fact alone could make a book sectarian which in its matter was not inherently so.

The next case is *State ex rel. Freeman v. Schere*, 65 Neb. 853, 59 L. R. A. 927, 91 N. W. 846, 93 N. W. 169. The Constitution of Nebraska provides: "No sectarian instruction shall be allowed in any school

or institution supported, in whole or in part, by the public funds set apart for educational purposes." [Art. 8, § 11.] The action complained of was the reading of selections and extracts from the "King James's version or translation of the Bible," and the singing of certain religious and sectarian songs, and the offering of prayer to the Deity. The court said: "We do not think it wise or necessary to prolong a discussion of what appears to us an almost self-evident fact,—that exercises such as are complained of by the relator in this case both constitute religious worship and are sectarian in their character, within the meaning of the Constitution. Nor do we feel inclined to make what might be looked upon as a spurious exhibition of learning by quoting at length from the many judicial decisions and utterances of eminent men in this country concerning the subject. Perhaps the case most nearly in point, because of similarity both of facts involved and of constitutional enactments construed to those in the case at bar, is *State ex rel. Weiss v. District Board*. 76 Wis. 177, 7 L. R. A. 330, 20 Am. St. Rep. 41, 44 N. W. 967." It is undeniably the peculiar province of the supreme courts of the states to place final authoritative construction upon the Constitutions of their respective states in matters involving solely their internal policy. Whether the reasons given by the court are sound or not, is not material as affecting the binding force of the construction upon citizens and others whose actions come up for consideration by the government of that state. But where the opinion is cited abroad as persuasive argument why its conclusions should be elsewhere adopted, it is of the first importance that its reasoning should be sound. That similar provisions, or the same principle of law, have frequently come before other high courts of last resort, and been by them decided in a certain way, is a fact that cannot safely be ignored. It is more than likely that a general concurrence of judicial opinion on the same subject is apt to be right. Due deference to the enlightened judgment of the learned profession of the law, and to all concerned, leave no alternative but to consider all that has been said by courts of equal rank upon a subject of such universal importance as to have been incorporated in some form in every Constitution of the states of America. Two of the judges of the supreme court of Nebraska confined their concurrence to the point of "sectarian instruction." On petition for rehearing the chief justice filed a response on behalf of the court. The only case admitted to have a direct bearing on the question 69 L. R. A.

posing the court's conclusions was the Michigan case cited above. But we observe what appears to us to be a modification of the original opinion in parts of the response. After pointing out that there are admittedly verbal differences between the King James and the Douay translations of the Bible, which some sectarians regard as material, the court said: "But the fact that the King James translation may be used to inculcate sectarian doctrines affords no presumption that it will be so used. The law does not forbid the use of the Bible in either version in the public schools. It is not proscribed either by the Constitution or the statutes, and the courts have no right to declare its use to be unlawful because it is possible or probable that those who are privileged to use it will misuse the privilege by attempting to propagate their own peculiar theological or ecclesiastical views and opinions. The point where the courts may rightfully intervene, and where they should intervene without hesitation, is where legitimate use has degenerated into abuse,—where a teacher employed to give secular instruction violated the Constitution by becoming a sectarian propagandist. . . . The section of the Constitution which provides that 'no sectarian instruction shall be allowed in any school or institution supported, in whole or in part, by the public funds set apart for educational purposes,' cannot, under any canon of construction with which we are acquainted, be held to mean that neither the Bible nor any part of it, from Genesis to the Revelation, may be read in the educational institutions fostered by the state." The court also wisely noted that sectarian instruction might occur from frequent reading, even without note or comment, of "judiciously selected passages," and observed that whether such practices existed as amounted to sectarian instruction must be determined upon the facts of each particular case. We find ourselves in entire accord with the views quoted above from the response of the Nebraska supreme court.

In *Board of Education v. Minor*, 23 Ohio St. 211, 13 Am. Rep. 233, the only question presented or decided was whether the school board might not prohibit the reading of the Bible in the public schools. It was held that they could: that nothing in the laws of that state made it compulsory upon the boards or teachers to use the Bible as a text-book.

We believe the reason and weight of the authorities support the view that the Bible is not of itself a sectarian book, and, when used merely for reading in the common

schools, without note or comment by teachers, is not sectarian instruction; nor does such use of the Bible make the schoolhouse a house of religious worship.

The judgment of the circuit judge, having been in accord herewith, is affirmed.

Cantrill, J., absent.

MASSACHUSETTS SUPREME JUDICIAL COURT.

George S. ALLEN

v.

COMMONWEALTH of Massachusetts.

(188 Mass. 59.)

A farmer who supports his family from the products of the farm, and for many years has sold his surplus in a neighboring town, has an established business within the meaning of a statute authorizing the construction of a water-supply reservoir upon the site of the town, and providing compensation for any established business thereby destroyed, although he has no regular route or customers, or anything in the nature of good will.

(May 17, 1905.)

RESERVATION by the Supreme Judicial Court for Worcester County for the opinion of the full bench of a petition for compensation for destruction of an established business by the construction of a water-supply reservoir. *Judgment for petitioner.*

The facts are stated in the opinion.

Mr. John S. Lynch, for petitioner:

The petitioner was the owner of an established business on land in the town of West Boylston on April 1, 1895, within the meaning of § 14, chap. 488, of the Acts of 1895.

"Business" is a word of large signification, and denotes the employment or occupation in which a person is engaged to procure a living.

Goddard v. Chaffee, 2 Allen, 395, 79 Am. Dec. 796; *Gavin v. Com.* 182 Mass. 191, 65 N. E. 37; *Snow v. Sheldon*, 126 Mass. 332, 30 Am. Rep. 684; *Harris v. Amery*, L. R. 1. C. P. 148.

Agriculture is a business, and one of the largest businesses carried on in the United States.

Earle v. Com. 180 Mass. 583, 57 L. R. A. 292, 91 Am. St. Rep. 326, 63 N. E. 10; *Gavin v. Com.* 182 Mass. 191, 65 N. E. 37.

The ordinary meaning of the word "estab-

lish" is "to settle firmly or fix permanently what was before uncertain, doubtful, or disputed."

Smith v. Forrest, 49 N. H. 237.

Messrs. Ralph A. Stewart and Fred T. Field, for respondent:

It was not the intention of the legislature that the term "established business," as used in Stat. 1895, chap. 488, § 14, should be construed to be synonymous with "occupation" or "employment."

McKeon v. Chicago, M. & St. P. R. Co. 94 Wis. 477, 35 L. R. A. 252, 59 Am. St. Rep. 909, 69 N. W. 175; *State ex rel. Bragg v. Rogers*, 107 Ala. 444, 32 L. R. A. 520, 19 So. 909; *Burnett v. Com.* 169 Mass. 417, 48 N. E. 758.

The carrying on of a farm, and the sale from time to time of the surplus products thereof, do not constitute an established business.

Morton, J., delivered the opinion of the court:

The question in this case is whether the petitioner owned "an established business on land" within the meaning of Stat. 1895, chap. 488, § 14, p. 573. So much of the section as is material is as follows: "In case any individual or firm owning on the 1st day of April in the year 1895 an established business on land in . . . West Boylston, whether the same shall be taken or not under this act, . . . shall deem that such business is decreased in value by the carrying out of this act, whether by loss of custom or otherwise, and unable to agree with said board as to the amount of damages to be paid for such injury, such damages shall be determined." etc. The petitioner owned on the 1st of April, 1895, and had owned for a good many years, a small farm in West Boylston, consisting, it is said, of about 50 acres, which he carried on, and on which he lived and supported himself and family. He had no other business. He raised hay, grain, apples, and vegetables, but not in large quantities, and kept a cow, a horse, some hens, and a few hogs, and made each year a few barrels of cider from apples raised on the farm. The hay that was not consumed, and the eggs, vegetables, cider, and milk that were not required for the support of the family, were

NOTE.—For a case in this series holding that a doctor having an office in, and a practice extending throughout, a town in which land is taken for a public purpose, is within the protection of a statute providing for compensation to any individual owning an established business on land within the town, which is injured by the taking, see *Earle v. Com.* 57 L. R. A. 292, 60 L. R. A.

sold in the village of Oakdale, in West Boylston; and he occasionally sold a hog to the local butcher. He had no regular route or customers for the sale of the hay, eggs, vegetables, milk, and cider. It does not appear, and is perhaps not material, of how many persons his family consisted, nor how much hay and other produce or how many eggs and hogs he sold. The village of Oakdale was destroyed by the construction of the reservoir, and the petitioner brings this petition to recover the damages thereby caused to his business.

The act under which the petition is brought is entitled "An Act to Provide for a Metropolitan Water Supply," and provides for the construction of a reservoir, the effect of which will be to submerge certain towns and villages, and to destroy a large amount of property, and to interfere very seriously with, if not destroy, in many cases, business. Ordinarily, the damage done to a person's business by the exercise of the right of eminent domain is not a matter for which he is entitled to compensation. But in the present case the legislature has shown a disposition to deal liberally with those who would or might be injured by the carrying out of the act. In addition to providing compensation for real estate taken, and for real estate not taken, but directly or indirectly decreased in value, the act provides that in certain cases individuals and firms shall be compensated for damage done to their business, whether the land on which it is established is taken or not, and whether the business is decreased in value by loss of custom or otherwise. By subsequent acts these provisions were extended to the towns of Sterling, Boylston, and the part of Clinton within the limits of the reservoir. Stat. 1897, chap. 445, p. 429; Stat. 1898, chap. 551, p. 666; Stat. 1901, chap. 505, p. 451. By another act the legislature went so far as to provide that in certain cases the employees of corporations, partnerships, and individuals in West Boylston should be entitled to compensation when thrown out of work by the taking of the property of their employers under the act. Stat. 1896, chap. 450, p. 444. The purpose of the legislature to deal liberally with those affected by the construction of the reservoir is thus shown, and the provisions now before us should be construed in accordance with the intention thus manifested. The word "business" is of large significance, and "denotes the employment or occupation in which a person is engaged to procure a living." *Goddard v. Chaffee*, 2 Allen, 395, 79 Am. Dec. 796. That farming is a business is plain (*Snow v. Sheldon*, 126 Mass. 332, 30 Am. Rep. 684), and there is nothing in the statute that excludes it any more

than any other business from its operation. It is manifest, also, we think, that the petitioner was engaged in the business of farming. That was the means, and, so far as appears, the only means, whereby he procured a livelihood for himself and his family. The more difficult question is whether, as he carried it on, it was "an established business" within the meaning of the statute. That it was a business "on land in the town of West Boylston would seem to hardly admit of question." In this connection it is to be noted that the business of farming as carried on by the petitioner included not only the raising of farm products, but the selling of a portion of the same. As a farmer he raised and sold farm products. He had owned and had thus carried on the farm for many years,—fifteen it is said in the brief,—and, so far as he was concerned, the business was an established business. It had got beyond the stage of experiment, and had become his settled and only occupation, and, for aught that appears, furnished a comfortable living for himself and his family. Any element of uncertainty or chance that there may have been about it at any time had disappeared, and he could and did depend on it from year to year for a livelihood for himself and family. If the persons in Oakdale to whom he sold his surplus produce had gone to his farm, and bought there, or if he had had a shop in the village, there can be no doubt, we think, that he would have had an established business on land in West Boylston within the meaning of the act. It is said, however, that he had no regular route or customers, and that there was nothing in the nature of a good will,—such as goes, for instance, with a physician's practice: that, in short, there was nothing in the nature of property in the business as carried on by the petitioner, and that it was only such cases for which the legislature intended to provide. But this case would seem to show that there may be an established business without a regular route or regular customers, or anything in the nature of a good will. If these things are present in any given case, they show beyond question that the business is an established business. But the words have no settled meaning (*Ex parte Breull*, L. R. 16 Ch. Div. 484), and are to be construed with reference to the circumstances of each particular case. The petitioner had been carrying on the same business, in the same locality, and on and from the same farm, for fifteen years. How can it be said that the business was not an established business? Presumably the village of Oakdale was a small place, and he may have found it more to his advantage to sell where and as he could than to adhere to a

fixed route and regular customers; and so an established relation may have existed between him and the citizens of that village as to the sale of his farm products. It is also to be noted in this connection that by the terms of the act compensation is to be given whether the damage occurs by loss of custom or otherwise. The petitioner's farm was, as said in *Earle v. Com.* 180 Mass. 579, 583, 57 L. R. A. 292, 91 Am. St. Rep. 326, 63 N. E. 10, of a doctor's office, "the locally established center from which he distributed what he had to sell," and his business could therefore be fairly said to have been an established business on land in West Boylston. The fact that he did not raise things in large quantities, or that the farm was a small one, has, of course, no tendency to show that the business was not an established business. The legislature did not mean that everyone in the towns of West Boylston, Boylston, Sterling, and Clinton who should be injured in his business or occupation by the construction of the reservoir should receive compensation therefor. But by the building of the reservoir certain towns and villages would

be altogether destroyed, and the inhabitants scattered. Naturally, there would be cases in which individuals derived support for themselves and their families in whole or in part from supplying the wants of the people living in the towns and villages that would be thus broken up, and whose business would be very seriously interfered with, if not altogether destroyed. Such cases might well appeal to the consideration of the legislature, and we think that it was the object of the legislature to provide for them. By the use of the word "established" it intended to exclude cases where the business had not an element of fixity and permanence, and by the use of the words "on land in the town of West Boylston" to confine the right of recovery to cases which were local in their character. A majority of the court think that the petitioner's case comes within the scope of the statute as thus defined, and that he is entitled to recover, and that judgment should be entered in his favor for \$150, the amount of the damage found by the commissioners, and interest and costs. So ordered.

WISCONSIN SUPREME COURT.

W. K. RIDEOUT *et al.*, Admsrs., etc., of
Christian Sarau, Deceased, *Respts.*,

WINNEBAGO TRACTION COMPANY.
Appt.

(123 Wis. 297.)

*1. The term "negligence" by itself suggests only inadvertence or want of ordinary care, and, however great may be the

*Headnotes by MARSHALL, J.

NOTE.—Right to recover for ordinary negligence under allegation of gross, wilful, or wanton negligence, or vice versa.

I. Introduction, 601.

II. Allegation of wilful or gross negligence, 602.

III. Allegation of reckless or wanton negligence, or both, 608.

IV. Recovery on allegation of ordinary negligence, on proof of wilful or gross negligence, 608.

V. Under statute or ordinance, 612.

VI. Conclusion, 614.

I. Introduction.

In the endeavor to ascertain the true rule as to the right mentioned in the title hereto, one is met at the start with the difficulty in determining just what is comprehended in the term "gross negligence," and whether it can be so extended, when applied to the act of a 69 L. R. A.

degree of such want of care, so long as the element of inadvertence remains, wilfulness is excluded.

2. The term "gross negligence" signifies wilfulness. It involves intent, actual or constructive, which is a characteristic of criminal liability. If one is guilty of inadvertence causing injury to another, that one's fault is denominated want of ordinary care. If one is guilty of wilful misconduct causing actionable injury to another, the former's fault is denominated "gross negligence."

3. Since, in the first case suggested, intention to do the injury, actual or con-

party in the commission of an injury to another, as to become the equivalent of wilful or intentional injury. Some of the courts have intimated in strong terms that there is a decided difference; and in one state the ultimate court has decided that "negligence, whether slight, ordinary, or gross, is still negligence; . . . negligence is negative in its nature, implying the omission of duty, and excludes the idea of wilfulness. . . . When wilfulness is an element in the conduct of the party charged, the case ceases to be one of negligence." *Terre Haute & I. R. Co. v. Graham*, 95 Ind. 293, 48 Am. Rep. 719.

And in *Parker v. Pennsylvania Co.* 134 Ind. 673, 23 L. R. A. 552, 34 N. E. 504, it was said that "wilfulness does not consist in negligence; on the contrary, . . . the two terms are incompatible. Negligence arises from inattention, thoughtlessness, or heedlessness, while wilfulness cannot exist without purpose or design. No purpose or design can be said to

structive, must be absent, and in the second case present, a complaint using language to describe defendant's fault appropriate to both species of misconduct, as if they occurred at one and the same time, and that one included the other, is indefinite and uncertain.

4. Gross negligence does not include ordinary negligence, and proof of the former does not prove, but rather disproves, the latter.

5. Where a complaint is indefinite and uncertain because of the pleader's confusing the element of advertence with that of inadvertence, ordinary negligence with gross negligence, and the attention of the trial court is called thereto, though not in the most approved manner, it should compel the plaintiff to proceed upon one theory or the other, if both theories can be reasonably spelled out of the pleadings, or give such permissible construction to the

pleadings as to confine plaintiff's claim to one species of wrongdoing.

6. Where a complaint has a double aspect rendering it indefinite and uncertain, as above indicated, it is error to submit the cause to the jury upon both aspects, and, in case error is committed in that regard resulting in a verdict in favor of the plaintiff upon the ground of gross negligence and ordinary negligence as well, it is error to render judgment thereon, because of inconsistency in the findings.

(December 13, 1904.)

A PPEAL by defendant from a judgment of the Circuit Court for Winnebago County in favor of plaintiffs in an action brought to recover damages for the al-

exist where the injurious act results from negligence, and negligence cannot be of such a degree as to become wilfulness."

And the same court has held that the word "wanton," in a complaint in an action against a railroad company for injuring a child, in that the defendant in a wanton and careless manner ran a locomotive, etc., does not mean wilful. *Lafayette & I. R. Co. v. Huffman*, 28 Ind. 287, 92 Am. Dec. 318.

And also that an allegation in a complaint in an action against a railroad company for causing an injury to the plaintiff, that the train was run "recklessly and with gross negligence," does not imply that the injury was inflicted either purposely or wilfully. *Cincinnati & M. R. Co. v. Eaton*, 53 Ind. 307.

And again, in *Louisville, N. A. & C. R. Co. v. Bryan*, 107 Ind. 51, 7 N. E. 807, "to say that an injury resulted from the negligence and wilful conduct of another is to affirm that the same act is the result of two exactly opposite mental conditions. It is to affirm in one breath that an act was done through inattention, thoughtlessly, heedlessly, and at the same time purposely and by design." And yet in the same case it was conceded that an act done under such circumstances as evinced a reckless disregard for the safety of others, and a willingness to inflict the injury complained of, constituted wilful injury, as fully as an intentional act. This was approved in *Belt R. & Stock Yard Co. v. Mann*, 107 Ind. 89, 7 N. E. 893, in which case it was further said that, if the injurious act or omission was committed under such circumstances as that its natural and probable consequences would be to produce injury to others, it would be as effectual to entitle one to recover for an injury to which his own negligence may have contributed as if such act or omission had been purposely and intentionally committed with a design to produce injury.

In *Denver & R. G. R. Co. v. Buhehr*, 30 Colo. 27, 69 Pac. 582, the court said: "In passing, we observe that an allegation that an act is wanton, reckless, and grossly negligent is not equivalent to an allegation of a wilful or an intentional act."

The use of the expression "gross negligence," in a charge to the jury, does not of itself define, nor does it include only, that extreme degree of negligence which is wanton or reckless of its injurious consequences, and to which

the defense of contributory negligence does not obtain; and cannot be held as having been intended to submit the case to the jury for consideration as one of that character, and particularly so where other charges have recognized contributory negligence as a defense to the action.—*Florida Southern R. Co. v. Hirst*, 30 Fla. 1, 16 L. R. A. 631, 32 Am. St. Rep. 17, 11 So. 506.

And, as "gross negligence" is not confined to that extreme degree of negligence which evinces reckless disregard of human life or of the safety of persons exposed to its dangerous effects; or a conscious indifference to consequences; or which shows wantonness or recklessness, or a grossly careless disregard of the safety and welfare of the public, or a reckless indifference to the rights of others which is equivalent to an intentional violation of them,—It is not proper to charge a jury simply that gross negligence will justify the imposition of exemplary damages. *Ibid.*

It must be admitted that there are much truth and considerable logic in these statements. But the general trend of decision would appear from the cases to be in favor of the doctrine that an act may be so grossly negligent that it may be presumed to have been wilfully or intentionally done. And the last two Indiana cases seem substantially to concede such proposition.

In *RIDEOUT v. WINNEBAGO TRACTION Co.* the doctrine is asserted and maintained that "gross negligence" in the commission of an act which perpetrates an injury is the same as, and means and includes, a wilful injury; and, on the other hand, that between what is merely termed negligence, or ordinary negligence, and gross negligence there is a wide distinction,—one with a difference,—and that because of it no recovery can be sustained on proof of the former, under a complaint alleging the latter.

II. Allegation of wilful or gross negligence.

In *Louisville & N. R. Co. v. Johnston*, 79 Ala. 436, the gravamen of the action, as averred in the complaint, was, that the defendant "wilfully refused to stop" the train of cars at the station which was the point of the plaintiff's destination, and carried her several hundred yards beyond the customary stopping place, where she was compelled to alight without her consent and against her protest; and

leged negligent killing of plaintiffs' intestate. *Reversed.*

Statement by Marshall, J.:

Action for damages for the alleged wrongful killing of plaintiffs' intestate. The circumstances stated as a ground for a recovery are substantially these: From June 22, 1897, up to and inclusive of the event complained of, defendant was a corporation duly organized under the laws of this state, and authorized to operate an electric street railway on various streets, including Merritt street, in the city of Oshkosh, Wisconsin. August 24, 1903, the Uniformed Rank, Knights of Pythias in such city, some being on foot and some being in carriages,—one of the former being

Christian Sarau,—marched in parade formation along the street specially mentioned, escorted by a military band of twenty-four pieces discoursing music. Some of the marchers, including Sarau, in the exercise of ordinary care, walked between the rails of defendant's track located on such street, and others walked on either side thereof. While so doing defendant's servant with one of its cars approached the procession from the rear at a dangerous rate of speed, without giving any sufficient warning to the marchers to yield the right of way before reaching them. The car, going at such dangerous rate of speed, without sufficient warning being given as aforesaid, was carelessly, negligently, recklessly, and wantonly propelled into the

the court said that, under this averment of the complaint, there could be no recovery in the action, unless the evidence in the case satisfied the jury that the failure of the defendant's servant to stop the train was wilful, and, if it was merely negligent, without more, there would be a fatal variance between the allegations and the proof.

In *Birmingham Mineral R. Co. v. Jacobs*, 92 Ala. 187, 12 L. R. A. 830, 9 So. 320, the charge, in the first count of the complaint, that the servants and agents of the defendant company negligently, wantonly, recklessly, and wilfully caused, permitted, and suffered the collision of a train under their management and control with a dummy engine, whereby the said intestate was killed, was held not sustained, where there was no testimony tending to show that the collision was "wilfully caused by defendant's servants," but the trend of the whole testimony repelled such inference; and that the refusal of a request so to instruct the jury was error. The court said that this was the identical question which was raised and ruled on in *Louisville & N. R. Co. v. Johnston*, 79 Ala. 436, and that, while the point might be somewhat technical, they did not feel at liberty to depart from the ruling then made.

In *Highland Ave. & Belt R. Co. v. Winn*, 93 Ala. 306, 9 So. 509, where both counts of a complaint alleged that the plaintiff attempted to get off the defendant's train, after protesting against being required to do so, through fear superinduced by the threatening attitude of the conductor; and the first count further averred that the fall she received in making this coerced attempt was caused by the "wrongful and malicious act of the conductor" in requiring or forcing her to get off while the train was in motion; and in the second count the fall was ascribed to the "wilful and negligent acts of the conductor and engineer,"—the court, in reversing a judgment for the plaintiff, said that the doctrine of the court is that under such a complaint no recovery can be had for mere negligence; that wilfulness or its equivalent, recklessness, or wantonness must be proved; citing and approving *Louisville & N. R. Co. v. Johnston*, 79 Ala. 436, and stating that the principle of that case was adhered to and renounced in *Birmingham Mineral R. Co. v. Jacobs*, 92 Ala. 187, 12 L. R. A. 830, 9 So. 320.

The principle laid down in the last three 69 L. R. A.

cases, that a charge that the act complained of was wilful, or that it was knowingly done, cannot be supported by evidence of mere negligence, not involving wilfulness or knowledge of the danger, was affirmed, and the cases themselves were approved, in *Kansas City, M. & B. R. Co. v. Crocker*, 95 Ala. 412, 11 So. 262. The court in this case gave, by inference at least, an additional argument why this principle should be maintained, and stated that it had been held that a plea of contributory negligence to a complaint charging a wilful infliction of injury by the defendant is bad on demurrer; citing *Alabama G. S. R. Co. v. Frazier*, 93 Ala. 45, 30 Am. St. Rep. 28, 9 So. 303, the inference being that, if a plaintiff should allege in his complaint that the injury was caused by the wilfulness of the defendant, or that it was knowingly done, and the plaintiff was permitted to recover by proof of mere negligence, the defendant would be deprived of his defense of the contributory negligence of the plaintiff, as, under the decision in the *Frazier Case*, a demurrer to such a defense would be good.

And this theory would seem to be confirmed in another case, which decided that, where a count in a complaint against a railroad company for injury charged in one clause that the injury was wantonly inflicted, and the other clause set out the facts constituting the alleged wanton conduct; and, from the whole construed together,—as it must be,—it was evident that the facts relied upon to show wantonness amounted to no more than simple negligence,—a demurrer thereto should be sustained, *Memphis & C. R. Co. v. Martin*, 117 Ala. 367, 23 So. 231. The reason undoubtedly was that, although the defense of contributory negligence to a complaint alleging that the injury was wantonly inflicted would be demurrable, the plaintiff should not be permitted, by the use of the epithet "wantonly" in a general attempt to describe the injury,—which the facts alleged showed to be a case of ordinary negligence,—thus to deprive the defendant of his proper defense of contributory negligence.

Where a count in a complaint against a railroad company for causing injury to the plaintiff alleged that the defendant knew of plaintiff's danger, "and could, by the exercise of proper diligence, have prevented his injuries as aforesaid, which it negligently failed to do," the negligence thus averred being the equiva-

space occupied by the marchers and onto and over said Sarau, causing injuries from which he on the same day died.

Sarau suffered great mental and physical pain from the instant he was injured till death occurred, and plaintiffs as his personal representatives were put to great expense by reason of such wrongful conduct for medical and surgical care of and attendance upon Sarau, and for nursing and hospital bills.

Several times in the complaint the conduct of the defendant's servant who controlled the car was characterized as careless, negligent, reckless, wilful, and wanton, or by words of similar import. Allegations were made appropriate to a cause of action for damages to Sarau, which sur-

vived to his personal representatives, and also a cause of action for damages to his surviving relatives, the whole amount claimed being \$10,000.

Defendant answered putting in issue the allegations of the complaint as to its servant having negligently operated the car on the occasion in question, and pleaded as the proximate cause of the injury and death of Sarau, want of ordinary care on his part.

It fairly appears from the record, in harmony with the claim of respondents' attorneys upon the argument of the case in this court, that respondents' right to recover was intended to be grounded on gross negligence. The court, nevertheless, refused to construe the complaint in harmony

with the charge of wantonness or wilful misconduct, to authorize a recovery it was necessary to prove the negligence averred; and proof of simple negligence,—that is the failure to exercise ordinary care,—would not sustain such an allegation. *Louisville & N. R. Co. v. Hurt*, 101 Ala. 34, 13 So. 130.

In *Levin v. Memphis & C. R. Co.*, 109 Ala. 332, 19 So. 395, the counts upon which the trial was had claimed damages resulting from the defendant's wantonness or wilfulness, and there was no evidence of wantonness or wilfulness. This being so, the court said that, conceding for the argument that the evidence tended to show negligence on the part of the defendant, this did not authorize a recovery on the case made by the complaint; and an affirmative charge for the defendant was sustained.

Where a complaint against a railroad company for injury sustained by the plaintiff alleged that the injury was occasioned by an intentional, wilful, and deliberate act or omission of duty of defendant's servants, the plaintiff must be held to proof of such act or omission, as such a complaint states a cause of action based not upon mere negligence, but upon an intentional, wilful act or dereliction of duty on the part of defendant's servant, characterized by recklessness or heedlessness as to the consequences of his act, or failure to act. *Denver & R. G. R. Co. v. Buffehr*, 30 Colo. 27, 69 Pac. 582.

In *Chicago, B. & Q. R. Co. v. Dickson*, 88 Ill. 431, which was an action for damages for injuring the plaintiff by a collision, the first count of the plaintiff's declaration charged as the cause of the injury that the defendant's servants caused the whistle of the engine to be sounded in a loud, shrill, unnecessary, and negligent manner, needlessly, wantonly, negligently, and maliciously, whereby, etc.; the second count charged as the cause of the injury that, as the train was approaching from the rear, the servants of defendant caused the whistle to be sounded in sharp, shrill, loud sounds, and in quick and rapid succession, needlessly, recklessly, wilfully, wantonly, and maliciously, whereby, etc. The court held that, under the first count, it was competent for the plaintiff, under appropriate proof, to have made out a case of negligence on the part of the defendant, and that in answer to such a case, so made, it would have been competent for the

defendant to show contributory negligence on the part of the plaintiff, and, unless the negligence of the defendant was gross, and that of the plaintiff slight in comparison to that of the defendant, no recovery could have been had; but that, under the second count, the plaintiff could not recover upon proof of mere negligence on the part of the defendant; that no recovery could be had under that count, without proof that the sounding of the whistle in the manner charged was done needlessly, and either wantonly, recklessly, wilfully, or maliciously. Approved and followed in *Wabash R. Co. v. Speer*, 156 Ill. 244, 40 N. E. 885.

In view of the position taken by the court in these cases, it should be stated that the doctrine of comparative negligence prevails in Illinois.

Under a complaint charging wilfulness and gross negligence, and claiming that the injury complained of occurred by reason of the wilfulness and gross negligence of the defendant's servants, it was held that the plaintiff could recover only by proving that the deceased was wilfully killed by the railroad company, and that the simple fact that the deceased was struck and killed by the train under circumstances which did not tend to prove a wilful killing would not sustain such a complaint. *Indianapolis & V. R. Co. v. McClaren*, 62 Ind. 566.

"Gross or reckless negligence" is not wilful negligence; and it would be error to instruct a jury that, under a pleading charging a wilful injury, they might find for the plaintiff by simply finding that the defendant was guilty of "gross or reckless negligence," for it would be necessary to find wilfulness. *Chicago & E. I. R. Co. v. Hedges*, 105 Ind. 398, 7 N. E. 801.

In an action against a railroad company for killing the plaintiff's cow, the court said that a case like this must proceed upon one theory or the other; that a single paragraph of a complaint cannot be framed in such a manner as to entitle the party to recover either for an intentional or negligent injury as the facts may appear; and that in this case, the plaintiff having elected to sue for an injury intentionally and wilfully committed, he must stand by that theory, and cannot, without other pleadings, shift his ground and recover upon the theory that the defendant was negligent.

therewith, and submitted the cause to the jury for specific findings covering the subject of liability for ordinary negligence, and for gross negligence as well. The result was the following verdict:

(1) Sarau came to his death by injuries received at the time and place alleged in the complaint. (2) Defendant's employees were guilty of want of ordinary care and prudence in operating the car at the time of the accident. (3) Such want of ordinary care and prudence was the proximate cause of the injury to Sarau. (4) The motorman was guilty of gross negligence; his conduct was malicious, wanton, and reckless, evincing a disregard of consequences to others. (5) The car was going at a speed of 15 miles an hour when it ran

through the band, before it reached Sarau.

(6) He could not have seen the car approaching him in time to have avoided the collision. (7) The motorman did not try to stop the car upon its becoming apparent to him that it would strike Sarau. (8) When the accident occurred the car was running at the rate of 15 miles an hour. (9) Want of ordinary care on Sarau's part did not contribute to produce the injury. (10) Damages were caused by the occurrence, for doctors' bills and hospital bill, \$75, funeral expense, \$421, physical pain and mental suffering of Sarau, \$500, loss to his surviving relatives by his death, \$4,500.

After the coming in of the verdict the court changed finding 6 so as to decide that

Indiana, B. & W. Co. v. Overton, 117 Ind. 253, 20 N. E. 147.

Where, in an action against a railroad company for causing the death of the plaintiff's intestate, the complaint alleged that the killing was wilfully and intentionally done, a finding of a jury, the effect of which is a conclusion that the killing of the decedent was through the negligence of the defendant, will not support the complaint, or a judgment thereon, in favor of the plaintiff, no matter what the degree of that negligence may be, as negligence in a case, whether it be in a degree that may be termed slight, ordinary, or gross, is nevertheless negligence still; and, when wilfulness is the essential element in the act or conduct of the party charged with the wrong, the case ceases to be one of negligence. Wilfulness and negligence are opposite of each other; the former signifying the presence of intention, and the latter its absence. Cleveland, C. C. & St. L. R. Co. v. Miller, 149 Ind. 490, 49 N. E. 445.

An allegation in a complaint in an action against a railroad company for killing the plaintiff's horse averred that the servants of the company negligently, mischievously, and wilfully caused a large amount of steam to be let out of a locomotive and expelled therefrom, whereby the horse was frightened and became unmanageable, and was so injured that it was necessary to kill him. This allegation was held to admit of no other interpretation than a charge of wilfulness, and, as there was no evidence to show that the escape of the steam was unnecessary, it could not be presumed that it was so, and the evidence failed to sustain the allegation of wilful injury, although it was sufficient to sustain another count of the complaint charging negligence. Per Ross, J., in Louisville, N. A. & C. R. Co. v. Davis, 7 Ind. App. 222, 33 N. E. 451.

Where, in an action for injury to plaintiff by the gripman of a street railway company in forcing him off from the car, the petition charged that the gripman actually pushed the plaintiff from the car, while the plaintiff's own testimony showed that the gripman first shoved at him with a broom, then put that down, and tried to strike him with his hand, when the plaintiff dodged the blow, and in doing so fell off the car and was injured, a demurrer to the evidence should have been successful, as the evidence did not correspond with the allegation. 69 L. R. A.

legations; and for another reason, that the petition did not charge negligence pure and simple, but a singular commingling or jumble of both negligence and wanton acts; and, if the act is intentional, the question of negligence does not arise, and so proof of negligence does not sustain a charge of wanton or intentional injury. Raming v. Metropolitan Street R. Co. 157 Mo. 477, 50 S. W. 791, 57 S. W. 268.

The policy of the Code of Procedure of Missouri is to require the party to state in his pleading his real ground of action or defense, and, if he chooses one ground, he cannot so enlarge it as to recover on another; and where, in an action for a personal injury, the issues made by the pleadings are not large enough to embrace the hypothesis of a wilful or intentional injury, it is error for the court to instruct the jury on such a theory, although the evidence in a proper state of the pleadings might have warranted such an instruction, for the procedure is very strict to the effect that it is error to submit to the jury an issue of fact not made by the pleadings. O'Brien v. Loomis, 43 Mo. App. 29.

In Wilson v. Chippewa Valley Electric R. Co. 120 Wis. 630, 66 L. R. A. 912, 98 N. W. 536, the court said: "This court has held that, where the complaint simply charges negligence or want of ordinary care, there can be no recovery on the ground of wilful injury, or that reckless and wanton disregard of another's rights, equivalent to wilful injury, which has been termed 'gross negligence,' because this is a different cause of action. McClellan v. Chippewa Valley Electric R. Co. 110 Wis. 326, 85 N. W. 1018. Is the converse of the proposition true? We think it must logically be so held."

In an action against a railroad company for an injury alleged to have been caused by sparks escaping from the spark arrester of a steamboat, where the allegation of four counts of the declaration was that the defendant wilfully left the spark arrester open, thereby allowing sparks to escape and be carried by the wind upon plaintiff's property, and set fire to them, it was held that the charge involved more than negligence; that it implied malice. And that, as the evidence simply showed negligence on the part of the defendant, there could be no recovery under the evidence upon those counts. Montgomery v. Muskegon Boom.

Sarau could have seen the approaching car in time to have avoided the collision.

Exceptions were duly taken to preserve for review numerous questions, including those discussed in the opinion, so far as exceptions were necessary in that regard. Judgment was rendered in plaintiffs' favor on the verdict, from which this appeal was taken.

Mr. Charles Barber, with Messrs. Weed & Hollister, for appellant:

The allegations are inconsistent with and negative each other, and therefore state no cause of action.

Wilson v. Chippewa Valley Electric R. Co. 120 Wis. 636, 66 L. R. A. 912, 98 N. W. 536; *McClellan v. Chippewa Valley Electric R. Co.* 110 Wis. 326, 85 N. W. 1018.

There is no excuse for not looking and

listening, and no excuse for not hearing and seeing what is in plain sight and hearing.

Boerth v. West Side R. Co. 87 Wis. 288, 58 N. W. 376; *Little v. Superior Rapid Transit R. Co.* 88 Wis. 402, 60 N. W. 705; *Lockwood v. Belle City Street R. Co.* 92 Wis. 97, 65 N. W. 866; *Cawley v. La Crosse City R. Co.* 101 Wis. 145, 77 N. W. 179; *Johnson v. Superior Rapid Transit R. Co.* 91 Wis. 233, 64 N. W. 753.

If a traveler, by looking, could have seen the approaching train in time to escape, it will be presumed, in case he was injured by a collision, either that he did not look, or, if he did look, that he did not heed what he saw. Such conduct is negligence *per se*.

Cawley v. La Crosse City R. Co. 101 Wis. 145, 77 N. W. 179.

Contributory negligence of the plaintiff,

Co. 88 Mich. 633, 26 Am. St. Rep. 308, 50 N. W. 729.

But in *Richter v. Harper*, 95 Mich. 221, 54 S. W. 768, where the word "wilful" was employed in a declaration which charged that the defendant wilfully, wantonly, negligently, and unlawfully caused the fire to be set which was the cause of the injury complained of, it was held that if the word "wilful" stood alone, or was coupled with other words which implied a purpose to do a direct injury to the property of the plaintiff, a contention that it was necessary for the plaintiff to prove more than ordinary negligence would be of more force; but, where the word was used in connection with others imputing negligence, it was not the rule that the plaintiff must show the appropriateness of every adjective employed in his declaration. The court said, further, that it was true that language was employed in *Montgomery v. Muskegon Boom Co.* 88 Mich. 633, 26 Am. St. Rep. 308, 50 N. W. 729, in seeming conflict with this holding, but that the decision of that question was unnecessary to the determination of the case, and, in so far as it implied a holding in conflict with the views here expressed, it should not be followed. This decision was approved and followed in *Keating v. Detroit, B. C. & A. R. Co.* 104 Mich. 418, 62 N. W. 575.

In an action for digging up the soil of a lot contiguous to the plaintiff, the allegation in the declaration was that the defendant, maliciously intending to injure the plaintiff, and deprive him of the use and advantage of his message, dug up the soil of a certain lot contiguous, whereby the foundation walls were subverted, and a great part of the message foundered and fell, and the residue was greatly broken and shattered. The defendant moved at the trial for a nonsuit, on the ground that, the declaration being founded on the malfeasance, and not the misfeasance, of the defendant, the question of negligence or unskillfulness could not arise; and that the declaration was not supported by the evidence, inasmuch as it appeared that the defendant dug on his own ground, which was lawful in itself, and it did not appear that the act was done maliciously. The motion was denied, and on the writ of error the supreme court held 60 L. R. A.

that it was properly denied, and in doing so said that, if the plaintiff had stated, in his declaration, that the act was done maliciously, further proof would have been necessary. That it would then be a case of malfeasance, an inquiry distinct in its nature from a case where damages are claimed, either on the ground of negligence or unskillfulness, or that the act complained of does, of itself, subject the party to damages, although done with the greatest care. But that the allegation "maliciously intended" was not of the essence of the action or descriptive of the manner of doing the act which occasioned the injury, and might well be rejected as surplusage, still leaving a good declaration, to support which the proof was competent. *Panton v. Holland*, 17 Johns. 92, 8 Am. Dec. 369.

In an action for a recovery for an injury alleged to have been inflicted by the defendant upon the plaintiff, the complaint alleged that the defendant negligently, recklessly, and wilfully so drove and managed his horses as to force the plaintiff into the ditch and upset him. It was held that the words "recklessly and wilfully" were not necessary to make out a count for negligence; that they were surplusage, and were properly treated as such. *Moore v. Drayton*, 40 N. Y. S. R. 933, 16 N. Y. Supp. 723. And, as to the latter statement, see *Edgerton v. New York & H. R. Co.* 35 Barb. 389, *infra*, IV.

In an action against a highway commissioner for obstructing a natural water course which furnished the plaintiff water for his pasture, where the plaintiff's petition averred that the acts complained of were wilfully and maliciously done, it was claimed by the defendant that a recovery could not be had for careless and negligent acts, but only for such as were proved to have been wilful and malicious; but it was held that, if the defendant is liable for negligent and careless acts, recovery may be had against him upon the petition charging the acts to have been wilful and malicious, without proof of malice; and the court said that this was so under the old system of pleading, which was more strict in its requirements, that the proof should correspond with the allegations of the declaration, than is the present system. That it was held that the al-

however slight, precludes his recovering in an action grounded on the defendant's negligence, however great such negligence may have been.

Tesch v. Milwaukee Electric R. & Light Co. 108 Wis. 593, 53 L. R. A. 618, 84 N. W. 823; *Ryan v. La Crosse City R. Co.* 108 Wis. 122, 83 N. W. 770; *Wills v. Ashland Light, Power, & Street R. Co.* 108 Wis. 255, 84 N. W. 998; *Dummer v. Milwaukee Electric R. & Light Co.* 108 Wis. 589, 84 N. W. 853.

The motorman is not required to stop his car when a person is walking on the track or beside the track.

Joyce, Electric Law, § 575; *Eastwood v. La Crosse City R. Co.* 94 Wis. 163, 68 N. W. 651; *Lyons v. Bay Cities Consol. R. Co.* 115 Mich. 114, 73 N. W. 139; *Atchison, T. & S. F. R. Co. v. Schwindt*, 67 Kan. 8,

72 Pac. 573; *Nellis, Street Surface Railroads*, p. 319; *North Chicago Electric R. Co. v. Peuser*, 190 Ill. 67, 60 N. E. 78.

It is negligence for a person to walk on the track of a railroad, whether laid in the street or not.

Illinois C. R. Co. v. Hall, 72 Ill. 222; *Penman v. McKeesport, D. & W. R. Co.* 201 Pa. 247, 50 Atl. 973; *Warner v. People's Street R. Co.* 141 Pa. 615, 21 Atl. 737; *Gilmartin v. Lackawanna Valley Rapid Transit Co.* 186 Pa. 193, 40 Atl. 322; *Beem v. Tama & T. Electric R. & Light Co.* 104 Iowa, 563, 73 N. W. 1045; *Ryan v. La Crosse City R. Co.* 108 Wis. 122, 83 N. W. 770; *Shanks v. Springfield Traction Co.* 101 Mo. App. 702, 74 S. W. 386.

The facts that the plaintiff neither saw nor heard the coming car, and that his back was all the time turned toward the east,

legation of malice and wilfulness might be disregarded as surplusage, and proof given of negligence and carelessness. *McCord v. High*, 24 Iowa, 336; *Citing 1 Chitty*, Pl. 424; *1 Hillard, Torts*, 138; *Panton v. Holland*, 17 Johns. 92, 8 Am. Dec. 369,—*supra*.

Where the plaintiff mingled in his petition and in the same count different incongruous causes of action,—one for rent accrued, and one for injuries to a mill, alleged to have resulted from the defendant's wilful negligence,—an instruction that, unless the jury believed the plaintiff's mill was injured by the wilful negligence of the defendant, or someone in his employment, they should find for the defendant, as respected that branch of the case, was held to be clearly erroneous, as it might have seriously misled the jury, and the error in the instruction was not cured by the form of the allegation of negligence in the petition. That the allegation of "wilful" negligence in the pleading was wholly immaterial, and might have been struck out as surplusage. *Taylor v. Holman*, 45 Mo. 371.

In *Roberson v. Morgan*, 118 N. C. 991, 24 S. E. 667, the court said that the action seemed to have been brought and tried under §§ 52 and 53 of the Code, providing for the recovery of damages for setting a fire by which an adjacent landowner is injured, and that it was admitted in the statement of the case on appeal that the plaintiff and defendant were not adjacent landowners, and that, that being so, the sections did not apply, and the plaintiff's action could not be maintained: but that it was argued that it might be maintained at common-law, to which it was replied that the complaint did not allege a common-law liability, in that it failed to allege negligence, which the court held that it did not do in terms, but held, further, that negligence was in effect alleged in the allegation that the "defendant wilfully permitted" the fire to spread over and burn plaintiff's fencing, etc., and that, under the liberality of the Code practice, the complaint might be sustained as stating a common-law cause of action, as the court afterward held that the case was tried under the conception that the defendant was liable, if liable at all, under the sections of the Code mentioned, which was an error. The ef-

fect of the case would seem to be a *dictum* that an allegation that "defendant wilfully permitted" the fire to spread that injured the plaintiff would be sustained by proof of negligence on the part of the defendant.

The term "gross negligence" includes all lesser degrees of negligence, and a charge in a petition in an action against a railroad company for injury sustained by reason of the wheels of one of the cars of the company running over his foot, that the act of the company was done through gross negligence, will not limit the right of recovery, if otherwise entitled, to an injury inflicted by the wilful or intentional act of the servants of the company. *Hays v. Gainesville Street R. Co.* 70 Tex. 602, 8 Am. St. Rep. 624, 8 S. W. 491.

In an action against a railroad company by a brakeman on one of its trains, where the complaint alleged that the injury sustained was caused by the negligence of defendant in failing to provide good and safe brakes and appliances connected and used therewith, and by the defendant's negligently and carelessly omitting to keep its brakes on said train in good repair, and knowingly allowing the same to remain out of repair, it was contended, on the part of the defendant, that, having averred that the defendant "knowingly" suffered the brakes and appliances to remain out of repair, the plaintiff took upon himself the burden of proving that the corporation had knowledge of the imperfection,—in other words, that, having stated his alleged grievances with unnecessary particularity, his proof, to authorize recovery, must make out his cause of action as he already had chosen to allege it; but the court held that the complaint was not made up of one continuous, single ground, but contained several grounds, one following another, which might and should be construed distributively. That the language might be divided into the following separate words: "Caused by the negligence of the defendant in failing to provide good and safe brakes and appliances connected therewith," and, if the complaint had stopped here, it would have been manifestly good,—at least, in the absence of a demurrer; and, so framed, the question of knowledge of the imperfect condition of the brake and its appliances would not have been raised. That

are conclusive that he neither looked nor listened for it; and that certainly constituted negligence on his part.

Lockwood v. Belle City Street R. Co. 92 Wis. 97, 65 N. W. 866; *Stafford v. Chippewa Valley Electric R. Co.* 110 Wis. 331, 85 N. W. 1036; *Wills v. Ashland Light, Power, & Street R. Co.* 108 Wis. 255, 84 N. W. 998; *Dummer v. Milwaukee Electric R. & Light Co.* 108 Wis. 589, 84 N. W. 853; *Ryan v. La Crosse City R. Co.* 108 Wis. 122, 83 N. W. 770; *Tesch v. Milwaukee Electric R. & Light Co.* 108 Wis. 593, 83 L. R. A. 618, 84 N. W. 823; *Watermolen, v. Fox River Electric R. & Power Co.* 110 Wis. 153, 85 N. W. 863; *McClellan v. Chippewa Valley Electric R. Co.* 110 Wis. 326, 85 N. W. 1018; *Wilson v. Chippewa Val-*

ley Electric R. Co. 120 Wis. 636, 66 L. R. A. 912, 98 N. W. 536.

Messrs. Bouch & Hilton, A. E. Thompson, and John F. Kluwin for respondents.

Marshall, J., delivered the opinion of the court:

It seems that from the time of drawing the complaint to the entry of judgment there was want of appreciation of the broad distinction between ordinary negligence and intentional wrongdoing, the former being characterized by inadvertence and the latter by advertence, the one requiring intent, actual or constructive, to injure, and the other being inconsistent therewith. Under the decisions of this court, and by

there then followed another averment connected with the former by the conjunction "and," thus showing that it was an additional, or cumulative, charge or averment,—“and by the defendant's negligently and carelessly omitting to keep its brakes on said train in good repair,”—and then followed the words “and knowingly allowing the same to remain out of repair;” that the word “knowingly” only qualified the last clause of the complaint, or grievance charged; and that, in order to recover under the first clause, it was not necessary to show knowledge of the defendant. *Louisville & N. R. Co. v. Coulton*, 86 Ala. 129, 5 So. 458.

In an action against a railroad company by the parents of one who, it was alleged, had been killed by the derailment of an engine of a freight train on which the son of the plaintiff was head brakeman, and in which action the petition alleged that the deceased was killed, that his death was caused by the defective condition of the defendant's engine and track; and charged that this defective condition resulted, and the death was caused, by the gross negligence of the defendant,—it was held that the allegation of gross negligence in the petition included a charge of ordinary negligence, and was sufficient to support a verdict based upon the finding of the latter. *Texas & P. R. Co. v. Magrill*, 15 Tex. Civ. App. 353, 40 S. W. 188.

Where the complaint in an action against a railroad company alleged that the defendant and its servants, upon arriving at the station to which the plaintiff had paid his fare, carelessly, recklessly, wilfully, and wantonly refused to stop the car so that the plaintiff might safely alight therefrom, but obliged him to jump from the car while it was in rapid motion, in doing which he received the injury complained of, this was held to be a statement of two distinct causes of action, one for exemplary damages, and one for actual damages; and, the plaintiff, of his own motion, having elected to try his cause for actual damages, and there being some testimony responsive to such an issue, it was held not competent for the trial judge to withdraw the case from the jury on the ground that there was no injury shown responsive to the issues. *Thomas v. Charlotte, C. & A. R. Co.* 38 S. C. 485, 17 S. E. 226.

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III. Allegation of reckless or wanton negligence, or both.

Where a count in a complaint for injury caused by a railroad company alleged that it was caused “by the gross carelessness, wantonness, or recklessness” of the defendant, no recovery could be had thereon, except upon proof that the defendant was guilty of having wantonly inflicted the injury, or of such reckless negligence as to be the equivalent of having wantonly or intentionally inflicted the wrong. *Stringer v. Alabama Mineral R. Co.* 99 Ala. 397, 13 So. 75.

In *Kansas City, M. & B. R. Co. v. Crocker*, 95 Ala. 412, 11 So. 262, the supreme court of Alabama said: “The word ‘wilful’ imports that the act to which it refers is done intentionally, purposely. This is not necessarily so with the word ‘reckless.’ The latter word has a wide range of meaning. In its milder sense it may imply mere inattention to duty,—thoughtlessness,—indifference, carelessness, negligence, or import a heedless disregard of obvious consequences;” also, that a complaint which charges recklessness in general terms charges no more than mere negligence, thoughtlessness, or inadvertence, which cannot be regarded as the equivalent of intentional wrong, and the averments of such a complaint by no means necessarily import that the objectionable act was wilful. Quoted and followed in *Louisville & N. R. Co. v. Barker*, 96 Ala. 435, 11 So. 453; *Richmond & D. R. Co. v. Farmer*, 97 Ala. 141, 12 So. 86.

And, as has been seen, the Indiana supreme court has gone further, and added the term “wanton” to the category, holding that it, with “reckless,” simply imports ordinary negligence (*supra*, I.).

The word “recklessly,” employed in a complaint, in qualifying the act of the defendant's servants in an action against a railroad company for injuring the plaintiff, means no more than “negligently.” *Highland Ave. & Belt R. Co. v. Sampson*, 112 Ala. 425, 20 So. 566.

IV. Recovery on allegation of ordinary negligence, on proof of wilful or gross negligence.

Under a complaint alleging an ordinary trespass in wrongfully taking personal property, evidence may be given and a recovery may be had on account of the gross negligence

the better rule, it is believed, prevailing wherever the doctrine of comparative negligence does not prevail, as it does not here, that species of wrong, which has been denominated in this and some other jurisdictions "gross negligence," is impossible if there is mere want of ordinary care. Therefore to charge that an alleged wrongdoer was guilty of one species of wrongful conduct, and allow a recovery for guilt of the other, or to charge both as characterizing the same wrongful act and allow a general recovery, is wrong. A pleading with such an infirmity is indefinite and uncertain and open to a motion on that ground. The practice of charging that one caused injury to another by careless, negligent, wanton, and wilful misconduct, or of

using language of similar import in attempting to state a cause of action, is improper. This court so held, in effect, in *Bolin v. Chicago, St. P. M. & O. R. Co.* 108 Wis. 333, 81 Am. St. Rep. 911, 84 N. W. 446, and cases there referred to, and so held expressly in *Wilson v. Chippewa Valley Electric R. Co.* 120 Wis. 636, 66 L. R. A. 912, 98 N. W. 536. In the former this language was used: "Inadvertence, in some degree, is the distinguishing characteristic of negligence, while misconduct of a more reprehensible character, characterized by rashness, wantonness, and recklessness of a person as regards the personal safety of another, has been designated by this court as gross negligence." That involves "a suf-

of the defendant. *Wilkinson v. Searcy*, 76 Ala. 176. The question decided arose upon a charge of the court that, if the act was done wilfully (in its strong sense), or was the result of that reckless indifference to the rights of others which is equivalent to an intentional violation of them; or if the injury had been wanton, or malicious, or gross,—the jury might award punitive or exemplary damages; and, the defendant having asked a charge to the effect that exemplary damages could not be awarded, as they were not claimed in the complaint, the court, on appeal, said the charge was correctly refused, as exemplary damages are not special damages, but might be claimed in the complaint as a condition of their recovery.

In *Savannah & W. R. Co. v. Meadors*, 95 Ala. 137, 10 So. 141, the court said that, under the system of pleading in Alabama under a count for simple negligence, a recovery might be had upon proof of wanton negligence.

And in *Louisville & N. R. Co. v. Webb*, 97 Ala. 308, 12 So. 374, it was also held that the practice prevailing in Alabama authorizes the introduction of evidence of reckless, wanton, or wilful negligence on the part of the defendant under a complaint which avers only simple negligence.

Where a complaint counts upon simple negligence, a recovery can be had thereon if the proof shows that the injury was caused by the wanton, reckless, or intentional misconduct of defendant. *Richmond & D. R. Co. v. Farmer*, 97 Ala. 141, 12 So. 86. This was held to be the rule to rebut the defense of contributory negligence.

Where a count of a complaint against a railroad company for injury charged simple negligence as distinguished from wanton or wilful negligence, or its equivalent, it was proper to admit evidence to show that the defendant negligently failed to use preventive effort after discovering plaintiff's peril, and that such negligence caused the injury; the conclusion, of course, being that failing to use preventive effort after discovering plaintiff's peril was the equivalent of wanton or wilful negligence, and in deciding another question on another count the court said so in so many words. *Louisville & N. R. Co. v. Hurt*, 101 Ala. 34, 13 So. 130.

In *Louisville & N. R. Co. v. Markee*, 103 Ala. 160, 49 Am. St. Rep. 21, 15 So. 511, the court, after citing authorities showing that

the various propositions, namely,—that where the plaintiff counts upon wilful or wanton negligence, and the proof shows only simple negligence, there is that variance between the *allegata* and *probata*, which will defeat a recovery; that, if there is that variance between simple negligence and wanton or wilful injury that proof of the former will not sustain a complaint charging the latter, a replication to a plea of contributory negligence, averring wilful and intentional injury, would be a departure from a complaint charging simple negligence; and that a plea of contributory negligence is no answer to a complaint counting upon wilful or wanton negligence,—said further: "The practice which has obtained in this state, and to some extent justified by adjudications of this court, of proving wilful injury, or wanton negligence as its equivalent, under a complaint averring only simple negligence, should no longer prevail. It is not correct in principle or practice, and leads to confusion or injustice. . . . A plaintiff is presumed to know his cause of action when he brings his suit, and has the right to state it in as many counts as he may deem it necessary to meet the varying phases of the evidence; and it is his duty to fully inform the defendant by his declaration of all the grounds of complaint relied upon for a recovery. Having done this, the defendant is in a condition to prepare his pleas in defense. It is not just for the parties to go to trial, and after having entered upon the trial, upon issues shaped by the pleading to permit either party, against the objections of the other, unless specially authorized by statute, to inject a new issue, and allow the plaintiff to recover upon a cause of action not stated in his complaint; or the defendant to avail himself of a defense of which his adversary is not apprised by the plea." This case was cited and followed in *Alabama G. S. R. Co. v. Hall*, 105 Ala. 599, 17 So. 176, and *Jones v. Alabama Mineral R. Co.* 107 Ala. 400, 13 So. 30.

In *Rockford, R. I. & St. L. R. Co. v. Phillips*, 66 Ill. 548, the court said that the real gravamen of the original declaration, and which was adhered to and preserved in each of the amended declarations, was that the defendant was the owner of the railroad, and operating it by running locomotives and trains thereon; that plaintiff's horse strayed and got upon the

ficient degree of intent at least to be inconsistent with inadvertence."

In the last case cited this court said of the effect of the decision in the *Bolin Case* as to a wrong of this nature (one alleged to have been characterized by wantonness and wilfulness): "There is really no element of inadvertence, which is a necessary element of negligence, and hence the term 'gross negligence,' as applicable to this class of wrongs, is inaccurate. The conclusion is that when this kind of a wrong is charged, as in the present case, though it be called 'gross negligence,' it does not logically include ordinary negligence any more than a charge of ordinary negligence includes intentional wrong."

In *Decker v. McSorley*, 116 Wis. 643, 93

defendant's railroad, and the defendant, by its servants, so carelessly, negligently, and improperly ran, conducted, and directed the locomotive and train of the defendant as that the locomotive struck the plaintiff's horse with great force and violence, and killed it. The court held that proof of gross negligence would support this allegation, as it was a matter of common practice to allow plaintiff, who has simply averred negligence, and there is proof of contributory negligence on his part, to prove gross negligence in the defendant, and recover under such declaration.

In an action on the case against a railroad company for killing animals of the plaintiff, where a count in the declaration alleged that the animals were killed by the mere negligence and carelessness of the agents and servants of the defendants in operating their engines and cars on their railroad, it was held that gross negligence might be proved, as it was not necessary to aver it, but only to aver that the act was negligently and carelessly performed; and when the right of recovery depends upon the degree, as for wilful or gross negligence, it is a matter of proof, and not of pleading. *Chicago, B. & Q. R. Co. v. Carter*, 20 Ill. 390; Approved and Followed in *Chicago, B. & Q. R. Co. v. Mehlisack*, 44 Ill. App. 124.

In *Pennsylvania Co. v. Krick*, 47 Ind. 368, it was insisted by the defendant that, as the complaint only charged ordinary negligence, evidence could not be given under it of gross negligence, and that a verdict founded or found on such evidence was wrong; but the court held that this was not so; that a charge of negligence by the plaintiff against the defendant was broad enough to admit proof of any and all degrees of negligence, if any such degrees of negligence in law existed; that, while negligence should be charged in the complaint, it was the province of the evidence to show in what it consisted.

In *Ft. Wayne v. De Witt*, 47 Ind. 396, the court, in holding that the complaint, although containing the affirmative allegation that the injury resulted without the fault of the plaintiff, did not state facts showing the negligence of the defendant, and that the existence of such negligence must be averred, said: "But it is not necessary to set out the facts constituting such negligence. It is sufficient, when the act complained of is properly stated,

N. W. 808, it was said that "no degree of mere carelessness or inadvertence constitutes gross negligence or wilful misconduct." And in *Watermolen v. Fox River Electric R. & Power Co.* 110 Wis. 153, 85 N. W. 663, that "it is obvious that no degree of mere carelessness or inadvertence, however remote from the care customarily used, either by the ordinary careful man, or by the exceptionally careless one, constitutes gross negligence." The latter suggests necessarily intent, either actual or constructive, to cause injury, or "conduct evincing a total disregard for the safety of persons or property."

The doctrine above indicated is not supported by authorities universally, though the want of harmony will be generally

to aver generally that such act was negligently done; and, under this general averment, proof of any and every degree of negligence is admissible." *Ohio & M. R. Co. v. Selby*, 47 Ind. 471, 17 Am. Rep. 719, to the same effect.

In an action against a railroad company the complaint, after alleging a contract to carry the mails, by which contract the railroad company agreed with the government to carry a mail agent, and that the plaintiff, being a mail agent, became and was a passenger in the defendant's cars, then stated a bodily injury received by plaintiff, by the running of the car containing the plaintiff off the track and breaking it, through defectiveness of machinery, want of care, skill, etc. A demurrer to the complaint was overruled, and such ruling affirmed by the general term of the supreme court, and, in affirming that judgment, the court of appeals said: "Degrees of negligence are matters of proof, and not of averment. The allegations of negligence in this complaint are sufficient, whether the defendant is liable for ordinary, or only for gross, negligence." *Nolton v. Western R. Corp.* 15 N. Y. 444, 69 Am. Dec. 628.

Where two paragraphs in a petition in an action for an injury caused by the alleged fault of the defendant relate to the same occurrence and injury, and it is expressly so alleged, and the only difference between them is that the facts are set out more in detail in the one than in the other, and gross negligence is alleged in one and not alleged in the other, the plaintiff should be required to elect which of the paragraphs he will prosecute, as the evidence required to support one would support the other; and the allegation of negligence is sufficient to entitle the plaintiff to recover in an action like this for any degree of culpable negligence that may be established by the evidence. *Muldraugh's Hill, C. & C. Turnp. Co. v. Maupin*, 79 Ky. 101.

Where a petition in an action against a railroad company for an injury to the plaintiff stated that the action of the conductor in charge of the train, and that of the defendant in regard to operating it, were negligent and careless, and the defendant was guilty of negligence; and that the injury to the plaintiff occurred by reason of the negligence and want of reasonable care on the part of the defendant, and without any fault of the plaintiff,—it was held not to be an action under the

found to grow out of the fact that the doctrine of comparative negligence prevails in some jurisdictions and not in others. Authorities on both sides of the question are cited in *Wilson v. Chippewa Valley Electric R. Co.* 120 Wis. 636, 66 L. R. A. 912, 98 N. W. 536. The idea that gross negligence is inconsistent with ordinary negligence seems to be the logical result of such a distinction between the two species of wrongs as to render it impossible for the element of inadvertence to be common to both. It were better if the term "gross negligence," as suggesting inadvertence, had never been used in speaking of a wrong having the element of intent, actual or constructive, to injure. The supreme court of Indiana, in treating this subject in *Louisville, N. A.*

& O. R. Co. v. Bryan, 107 Ind. 51, 53, 7 N. E. 807, 808, used this language: "To constitute a wilful injury, the act which produced it must have been intentional, or must have been done under such circumstances as evinced a reckless disregard for the safety of others, and a willingness to inflict the injury complained of. It involves conduct which is quasi criminal. . . . The words 'wilful' and 'negligent,' used in conjunction, have not always been employed with strict regard for accuracy of expression. To say that an injury resulted from the negligent and wilful conduct of another is to affirm that the same act is the result of two exactly opposite mental conditions. It is to affirm in one breath that an act was done through in-

statute for a killing by wilful neglect, as, if it were, it would have been necessary, inasmuch as the statute creates and defines the injury, to allege that the negligence was wilful; but it was only an action at common law for negligence. That in such case the degree, whether wilful, gross, or ordinary, need not be stated, as it is a matter of proof, and not of averment. *Louisville & N. R. Co. v. Mitchell*, 87 Ky. 327, 8 S. W. 706, Citing *Nolton v. Western R. Corp.* 15 N. Y. 444, 69 Am. Dec. 623; *Muldrough's Hill, C. & C. Turnp. Co. v. Maupin*, 79 Ky. 101,—*supra*.

In *Louisville & N. R. Co. v. Rains*, 15 Ky. L. Rep. 423, 23 S. W. 505, the court said that it had held, and that such was the law, that, under the general allegation of negligence in common-law actions for injuries, you may establish the degree of proof; and it is not necessary to allege this degree, whether gross or ordinary, in order to make a cause of action, the averment of negligence being sufficient.

In an action against an express company for an injury inflicted upon the plaintiff by the servants of the company by driving over him a loaded express wagon, the court, after saying that it was well settled that a master is responsible in punitive damages for the wilful act or gross negligence of his servant engaged in his business, whether he did or did not know the servant to be incompetent or disqualified for the service in which he was engaged, said further, in answer to the position assumed by counsel for the defendant that the plaintiff could not recover punitive damages because not claimed in the declaration, that the position was not maintainable, as the plaintiff demanded damages for the negligent act of the defendant, under which it was competent to show the character of the negligence, and the extent of the injury inflicted. *Southern Exp. Co. v. Brown*, 67 Miss. 260, 19 Am. St. Rep. 306, 7 So. 318, 8 So. 425.

In an action against a railroad company for injury sustained by the plaintiff, it was held that where the complaint, although stating the occurrence with somewhat unnecessary particularity, and imputing negligence in one respect in which it might be said it could not be sustained, also contained a general allegation that the occurrence happened and the injuries of the plaintiff were received by him through the negligence and want of care of the defendants, and not through any want of care, neglect, or de-

fault on his part,—this is a sufficient allegation to include any negligence, and other allegations which are mere surplage will not have the effect of excluding the facts from the consideration of the court or jury. *Edgerton v. New York & H. R. Co.* 35 Barb. 389.

In *Shumacher v. St. Louis & S. F. R. Co.* 39 Fed. 174, which was an action brought against a railroad company by an employee thereof to recover for an injury sustained while in the employ of the company, the complaint charged that the injury was occasioned by the negligent act of the defendant, and it was held that, under such a complaint, any degree of negligence might be proved, and a recovery had therefore; that, when the injury is charged to have been occasioned by reason of the negligent act, the defendant must take notice that the plaintiff can rely upon his right to prove negligence in any degree.

In an action against a railroad company the court said that, as a matter of evidence, proof that the misconduct of the defendant was such as to evince an utter disregard of consequences, so as to imply a willingness to inflict the injury complained of, may tend to establish wilfulness on the part of the defendant; but, to authorize a recovery on such evidence, there must be suitable allegations in the complaint to which it is applicable. *Pennsylvania Co. v. Sinclair*, 62 Ind. 301, 30 Am. Rep. 185.

For an injury wilfully inflicted a recovery may be had, though the person injured did not use ordinary care to avoid the injury; but evidence of negligence of the defendant causing the injury, so gross as to imply a disregard of consequences, or a willingness to inflict the injury, cannot be treated as evidence authorizing a recovery by the plaintiff, who did not use ordinary care to avoid the injury, where the allegations of his pleading do not amount to a charge that his injury was purposely or wilfully caused by the defendant. Proof of recklessness or gross negligence on the part of the defendant, upon such an issue, cannot avail more against the defendant than would any satisfactory proof of the defendant's want of ordinary care. *Pennsylvania Co. v. Smith*, 98 Ind. 42.

Where the first count of a declaration alleged that the defendant carelessly, wrongfully, and unlawfully drove a team of horses attached to a vehicle over plaintiff with great force and violence, whereby he was knocked

attention, thoughtlessly, heedlessly, and at the same time purposely and by design. . . . It is only necessary to say that the distinction between cases falling within the one class or the other is clear and well defined, and cases in neither class are aided by importing into them attributes pertaining to the other."

In *Cleveland, C. C. & St. L. R. Co. v. Miller*, 149 Ind. 490-501, 49 N. E. 445, 449, that court said: "The two terms ['negligence' and 'wilfulness'] are incompatible. Negligence arises from inattention, thoughtlessness, or heedlessness, while wilfulness cannot exist without purpose or design. No purpose or design can be said to exist where the injurious act results from negligence, and negligence cannot be of such a

degree as to become wilfulness. . . . The doctrine of comparative negligence does not obtain recognition in this state . . . and when wilfulness is the essential element in the act or conduct of the party charged with the wrong, the case ceases to be one of negligence. Wilfulness and negligence are the opposites of each other; the former signifying the presence of intention, and the latter its absence." To the same effect are *Parker v. Pennsylvania Co.* 134 Ind. 673, 23 L. R. A. 552, 34 N. E. 504; *Highland Ave. & Belt R. Co. v. Winn*, 93 Ala. 306, 9 So. 509; *Louisville & N. R. Co. v. Johnston*, 79 Ala. 436; *Levin v. Memphis & C. R. Co.* 109 Ala. 332, 19 So. 395; *Wabash R. Co. v. Speer*, 156 Ill. 244, 40 N. E. 835; *Ruter v. Foy*, 46 Iowa, 132; *Mat-*

upon the ground and grievously hurt, the defendant cannot be called upon to come into court and meet a charge of wilful, wanton, or reckless negligence; and a charge that, if the plaintiff neglected to use ordinary care, and was injured by the defendant, he could not recover, even though the jury should find from the evidence that the defendant was also negligent, unless they should find from the evidence that the defendant saw the plaintiff in or approaching a place of danger, and knew, or had good reason to believe, that he was not aware of danger, and saw him in such a position of danger in time to prevent, by using ordinary care, the injury to him, and did not make use of care for that purpose,—was outside of the issues made by the pleadings. *Dennan v. Johnston*, 85 Mich. 387, 48 N. W. 565.

In an action against a railroad company the complaint simply charged negligence, and on appeal from a judgment of nonsuit at the trial the court held that the nonsuit was correct, as the evidence showed that the plaintiff was guilty of contributory negligence. The plaintiff then claimed that there was evidence in the case sufficient to show a case of wilful intent to injure, or that reckless or wanton disregard on the part of defendant's employees of the plaintiff's right and safety which is deemed equivalent to an intent to injure, and might be called a constructive intent, and which has been inaccurately termed gross negligence; but the court said, with regard to this claim, that it was sufficient to say that no such cause of action was stated, or attempted to be stated, in the complaint, which simply charged negligence; that if wilful misconduct was claimed, or a wanton and reckless act equivalent in law to wilful misconduct, the cause of action was a different one from a cause of action founded upon negligence simply, and that the defendant was entitled to know what the cause of action was upon which the plaintiff relied. *McClellan v. Chippewa Valley Electric R. Co.* 110 Wis. 326, 85 N. W. 1018.

V. Under statute or ordinance.

A statute of Kentucky in its first two sections provides for the maintaining of actions for the destruction of the life of persons or stock through the negligence or carelessness of agents or servants of railroad companies. 69 L. R. A.

The 3d section provides "that, if the life of any person or persons is lost or destroyed by the wilful neglect of another person or persons, company or companies, corporation or corporations, their agents or servants, then the personal representative of the deceased shall have the right to sue such person or persons, company or companies, corporation or corporations, and recover punitive damages for the loss or destruction of the life aforesaid." It will be noticed that the statute makes use of the term "wilful neglect" and, as has been seen, the courts of Indiana have invariably held that there can be no such thing, as the two words are of exactly opposite meaning. In *Chiles v. Drake*, 2 Met. (Ky.) 146, 74 Am. Dec. 406, in an action brought by the plaintiff against the defendant for shooting her husband, where the plaintiff alleged, in the first paragraph in her petition, that the defendant had unlawfully killed her husband by shooting him with a pistol, and in the second paragraph she alleged that the defendant, by means of his wilful neglect, shot and killed her husband, the court held that under the evidence the plaintiff could not recover on the first paragraph, and her right to maintain her action was thus restricted to the last. The court had charged the jury, at the instance of the defendant, that the plaintiff could not recover if the death was accidental, not premeditated, and not produced by wilful neglect, and this was held to be correct.

In an action based upon the 3d section of the same statute, the charge in the petition being wilful negligence, it is necessary to show this degree of negligence to recover; and, where the evidence fails to show any, there is no reason why a nonsuit should not be ordered. *Louisville & P. Canal Co. v. Murphy*, 9 Bush, 522.

In *Louisville, C. & L. R. Co. v. Case*, 9 Bush, 728, the court said that in actions against railroad companies, which are embraced by the provisions of both the 1st and 3d sections of the act, an averment of wilful negligence, resulting in the death of a person not an employee of the company, authorizes a recovery under either section, in case the proof warrants a recovery at all. That, if wilful negligence be established, punitive damages may be awarded; if mere culpable negligence, then such damages as the person injured might have recovered if death had not ensued. That as

thous v. Warner, 29 Gratt. 570, 26 Am. Rep. 396; *Denman v. Johnston*, 85 Mich. 387, 48 N. W. 565; *Menger v. Laur (State, Menger, Prosecutor, v. Lauer)* 55 N. J. L. 205, 20 L. R. A. 61, 26 Atl. 180, and 7 Am. & Eng. Enc. Law, 2d ed. p. 443.

From the foregoing it will be seen that in charging liability, either springing from the want of ordinary care or an intentional wrong, causing personal injury to one, nothing is to be gained by a multiplicity of adjectives or adverbs. When it is stated that the wrongdoer failed to exercise ordinary care in a case grounded on ordinary negligence, or that he acted wilfully in a case based on gross negligence, so called, nothing in any circumstances can be added by otherwise characterizing the wrong, ex-

cept by way of emphasis, which of course is immaterial to the liability, or the measure thereof. In confusing the two species of wrong, as if one was of the same character as the other, only greater in degree, there is liability of rendering the pleading indefinite, and leading to a fatal variance between it and the proof, and also to an inconsistent verdict.

There was an objection here to any evidence under the complaint because of uncertainty of the nature above spoken of. The theory of appellant's counsel seems to have been then, and to be still, that the charge of inadvertent conduct and of wilfulness neutralized each other, rendering the complaint insufficient to state any cause of action. We think otherwise. In a case

to railroad companies or proprietors, unless it be an employee who is killed, the two sections should be treated as one; and, when it is averred in the petition that the person killed was not an employee, and that the negligence was wilful, the action should be tried as an action to recover damages for personal injuries not resulting in death, except that instead of the common-law rule, by which the measure of the recovery is to be determined, the jury should be governed by the standard prescribed by the statute. That the allegation of wilful negligence necessarily includes all inferior grades, and the jury must determine from the proof whether the recovery is to be had, if at all, under the 1st or 3d section of the act, and then assess the damages according to the measures of recovery fixed by the provisions of the act itself. The court said, further, that they did not express a different opinion in the *Murphy Case*, where, the action not being against a railroad company, the canal company could not be held responsible under the act unless the negligence was wilful.

Where an original petition averred that the negligence was under the 1st section of the statute mentioned, and thereafter the court allowed the plaintiff to amend its petition by claiming that the injury was caused by the wilful negligence of the defendant under the 3d section of the statute, it was held that the court below erred in granting such permission, as the amended petition set up no new cause of action; and as, under the original petition, the plaintiff was entitled to no more than compensation, it was improper to allow him either to aver or prove circumstances of aggravation growing out of the conduct of the agents and employees of the railroad company after the fatal injuries had been inflicted. *Jacobs v. Louisville & N. R. Co.* 10 Bush, 263.

In an action instituted against a railroad company to recover damages under the provisions of §§ 1 and 3 of said statute, the plaintiff alleged that his intestate was killed by the defendant while pursuing its business as the proprietor of a railroad, and that the death was the direct result of the wilful negligence of its servants and agents. It appeared in evidence that, in addition to its corporate right to construct and operate a line of railway, the railroad company had a right to own real estate and mine coal and other minerals, 69 L. R. A.

and that the injury complained of was occasioned by a car loaded with coal becoming detached from its fastenings when on the incline, and but a few feet from the entrance to the mine, and running down the incline, being precipitated and running against the house of the plaintiff, and killing his wife and one of his children. Plaintiff brought the action as the administrator of the deceased child. The court, after approving what was decided in *Louisville, C. & L. R. Co. v. Case*, 9 Bush, 728, distinguished that case from this, and held that the 1st section of the statute does not apply to the facts of this case. That, while it was true that the defendant was the proprietor of a railroad, and it was also true that deceased was not in its employ at the time he was killed, the proof also shows that the work being carried on by the defendant at the time and place the accident or killing occurred was not in its nature or character incident to or part of the regular and usual business of the proprietor of a railroad. *Claxton v. Lexington & B. S. R. Co.* 13 Bush, 636.

In an abstract of the decision of *Rountree v. Stephens*, 8 Ky. L. Rep. 433, it is said that, in an action against a railroad company to enable either the widow, or the heir or the personal representative, of a decedent to recover under § 3 of the statute, it is necessary that the petition should allege, and that the proof should show, that the loss was caused by the wilful neglect of the company.

In *Forkner v. Kean*, 17 Ky. L. Rep. 654, 32 S. W. 265, which was an action against the receiver of a railroad company, it was held that, although the averments in the petition amount to an issue of wilful negligence, yet this would not defeat a recovery for ordinary negligence.

The result of these Kentucky cases would seem to be that by the statute referred to, under account in a petition for wilful neglect, in an action against a railroad company, a recovery may be had upon proof either of such wilful neglect or ordinary negligence; but that, under such a count of a petition in an action against a person or corporation other than a railroad company, no recovery can be had, except upon proof of what the courts by force of the statute are compelled to designate "wilful neglect."

of this kind, while it is true a charge of gross negligence will not warrant a recovery on the ground of ordinary negligence, even though accompanied by an allegation that plaintiff was in the exercise of ordinary care at the time of the occurrence complained of, it does not necessarily follow that a charge including both elements of wrongful conduct is meaningless. If very strict technical rules of pleading were applied it might be otherwise. Under the proper rule, every reasonable intendment is to be considered in favor of the pleading, and everything essential to the cause of action sought to be stated, reasonably inferable from the language used, is to be deemed as effectually pleaded as if expressly alleged. Rev. Stat. 1898, § 2668; *Morse v. Gilman*, 16 Wis. 505; *Flanders v. McVickar*, 7 Wis. 372; *Horn v. Ludington*, 28 Wis. 81; *Merrill v. Merrill*, 53 Wis. 522, 10 N. W. 684; *Miller v. Bayer*, 94 Wis. 123-126, 68 N. W. 869; *South Bend Chilled Plow Co. v. George C. Cribb Co.* 97 Wis. 230, 72 N. W. 749. Or as stated thus in some of the cases cited: "If the essential

facts can be gathered from the pleading, or may reasonably be inferred from the allegations, it is good though such allegations be in form uncertain and incomplete."

It is considered that a charge that an act was negligently, carelessly, and wilfully done, or done negligently, carelessly, and in disregard of consequences as to the personal safety of others, though open to a motion to make more definite and certain by removing the feature rendering it necessary to determine by construction what character of wrong is relied upon, may reasonably be said to charge gross negligence. Therefore the objection to evidence under the complaint was properly overruled. However, since the objection directed attention to a probability that the pleader may have intended to charge both ordinary negligence and gross negligence, to set forth two causes of action of a somewhat inconsistent character, the court, in overruling it, should have construed the complaint, and shaped the trial accordingly. In *Wilson v. Chippewa Valley Electric R. Co.* 120 Wis. 636, 66 L. R. A. 912, 98 N. W.

See also *Louisville & N. R. Co. v. Mitchell*, 87 Ky. 327, 8 S. W. 706, *supra*, IV.

A statute of Massachusetts provided that "if, by reason of the negligence or carelessness of a corporation operating a street railway, or of the unfitness or gross negligence or carelessness of its servants or agents, while engaged in its business, the life of a passenger, or of a person being in the exercise of due diligence and not a passenger or in the employment of such corporation, is lost, the corporation shall be liable in damages, . . .

to be assessed with reference to the degree of culpability of said corporation, or of its servants or agents, and to be recovered in an action of tort." In *Galbraith v. West End Street R. Co.* 165 Mass. 572, 43 N. E. 501, which was an action brought under the statute by the plaintiff, as administratrix of the estate of her husband, to recover damages for his death occasioned by injuries received by him while crossing the tracks of the defendant's railway, by the alleged gross negligence of the defendant's servants, the court instructed the jury that it was not easy to define the term "gross negligence," but, in a general way, they would have no difficulty in understanding what it meant; that it meant great carelessness, great negligence; and that they must find gross negligence on the part of the defendant's motorman, or else the action could not be maintained.

In an action to recover damages for the alleged death of the plaintiff's son, four and one half years of age, who was killed by the defendant's vicious horse while running at large in a public highway contrary to an ordinance of the city, which provided that no horse should be permitted to run at large in the city at any time, and that any person who should permit the same to run at large should be punished as therein prescribed, it was held that it was a case where the knowledge or intent of the defendant was in question, and 69 L. R. A.

that it was necessary for the plaintiff to show that the horse was at large with the knowledge and assent or permission of the owner, and that, therefore, the defendant could not properly be held liable under the ordinance for mere negligence. The complaint alleged that there was an ordinance of the city in force, prohibiting animals from running at large in the public streets, and also that the horse was vicious in his disposition, and known to be so by the defendant, and that the defendant negligently permitted the horse to run at large in the public streets, and that the death of the deceased was the result of such negligence. On a former appeal from a judgment for the plaintiff in the case (111 Wis. 91, 86 N. W. 554) it had been held that it was not only competent, but in fact necessary, for the plaintiff to show in some way that the horse was at large with the knowledge, assent, or permission of the owner. That it was a case where the knowledge or intent of the defendant was in question, or, perhaps, more accurately, where it was necessary to show that the act in question was not accidental. These statements of the court in the opinion delivered on the former appeal were quoted and approved by the court on the present appeal. *Decker v. McSorley*, 116 Wis. 643, 93 N. W. 808.

VI. Conclusion.

As stated in the beginning, the primary and chief difficulty in arriving at a correct conclusion as to the rights set forth in the title to the note is to ascertain just what meaning the ultimate courts of the several jurisdictions intend to convey by the use of the term "gross negligence." One can easily understand the distinction between a wilful injury and an injury occasioned by the negligence of the party causing it; but when the attempt is made, and—so far, at least, as the particular juris-

536, this court construed a complaint charging an alleged wrongful act to have been perpetrated negligently and wilfully as stating a cause of action involving gross negligence, and tested the sufficiency of the verdict thereby, holding that, upon such a complaint, there cannot be a recovery on the ground of ordinary negligence consistent with *McClellan v. Chippewa Valley Electric R. Co.* 110 Wis. 326, 85 N. W. 1018, where it was decided that in a complaint charging ordinary negligence there can be no recovery on the ground of gross negligence.

The practice adopted here of declining to construe the complaint as to the particular species of wrongdoing intended to be charged therein, and confining plaintiff thereto, and permitting a recovery upon the ground of ordinary and gross negligence as well, is very reprehensible. To allow such a practice to gain a foothold in our system would lead to prejudicial confusion and uncertainty in the administration of justice. The jury were directed to find as to issues appropriate to two distinct and somewhat inconsistent causes of ac-

tion, when the complaint should have been construed as charging but one. It should have been held to state a cause of action for gross negligence. We have a verdict finding that degree of wrong, and in effect finding that a lesser degree was the proximate cause of the injury. It may appear somewhat technical to hold that such a verdict presents a well-defined and fatal inconsistency, but the practice contemplated by the Code that the plaintiff shall state, understandingly to the defendant and the court, the facts as to the cause of action he relies upon, and, if there are two causes, that they shall not be inconsistent, and that the recovery shall be in harmony therewith, is so invaded by that adopted by the trial court that we feel constrained to condemn it, not overlooking § 2829, and the scope thereof, as declared by this court, in saving judicial decisions from disturbance regardless of errors not affecting the substantial rights of the adverse parties.

Since no recovery can be sustained under the complaint for ordinary negligence, all questions presented upon the appeal, appertaining to the subject of contributory

negligence is concerned—successfully carried out, to unite as identical injury committed through gross negligence with wilful negligence, and to segregate gross negligence from all other negligence, as was done in *RIDEOUT V. WINNEBAGO TRACTION CO.*, following other modern Wisconsin decisions, one is led to think that the process of bending the meaning of words to suit the immediate occasion is complete. A careful consideration, however, of all the cases on the subject, leads to the conclusion that, notwithstanding the careless use of language in stating or alluding to wilful, intentional, or negligent injury, the courts are in reality at one as to what is the true rule; which may be stated in the language of the court in *Belt R. & Stock Yard Co. v. Mann*, 107 Ind. 89, 7 N. E. 893, as to what the court deemed necessary to overcome the defense of contributory negligence: "To entitle one to recover for an injury to which his own negligence may have contributed, the injurious act or omission must have been purposely and intentionally committed, with a design to produce injury, or it must have been so committed under such circumstances as that its natural and probable consequence would be to produce injury to others. There must have been either an actual or constructive intent to commit the injury. The act must have involved conduct quasi criminal in character."

If this be true, it assists somewhat in arriving at a conclusion as to what is the doctrine as to the right to recover under an allegation alleging gross, or wilful, negligence on proof of mere, or ordinary, negligence, but does not entirely settle the question as to what the true rule is, as has been, and will be, seen by consulting cases in *supra*, I. In Indiana and Colorado an allegation that an injury was committed in a wanton, or reckless, or grossly negligent, manner is not an allegation that the same was wilful. And so in those states, un-

der an allegation that an injury was committed in that manner, recovery may be had on proof of ordinary negligence. In Florida an allegation of negligence which is wanton or reckless would seem to be held to be the equivalent of intentional or wilful. It is also held that such is not included in an allegation of gross negligence. Aside from this, however, it is believed that the consensus of judicial decision is that under an allegation setting forth that an injury was caused by an act or omission either wilfully and intentionally committed, or under such circumstances as that its natural and probable consequences would be to produce injury to others, and as evincing a reckless disregard for the safety of others and a willingness to inflict the injury complained of, a recovery cannot be had upon proof simply of ordinary negligence; and this is so whether the allegation designates the act or omission constituting the injury as wilful or intentional, or as gross, negligence. On the other hand, it seems to be settled that a recovery may be had upon an allegation of an injury committed by an act or omission involving ordinary negligence, on proof of any degree of negligence, including gross negligence, and also including an act or omission which might be considered wilful, intentional, reckless, or wanton. The latter doctrine, however, does not obtain in *RIDEOUT V. WINNEBAGO TRACTION CO.* or any other of the Wisconsin cases, the supreme court of that state having repudiated it. And, as has been seen, in Michigan a plaintiff will not be permitted to prove wilful, wanton, or reckless negligence to rebut the defense of his contributory negligence, under his declaration alleging ordinary negligence. *Denman v. Johnston*, 85 Mich. 387, 48 N. W. 565, *supra*, IV. Excepting these, however, the doctrine as stated is believed to prevail.

P. H. V.

negligence of Sarau, are immaterial, and will therefore not be considered. If the injury was caused by gross misconduct of appellant's servant, conduct involving at least constructive intent to do the act complained of, whether Sarau did or did not exercise ordinary care to protect himself does not affect the right of respondents to recover, either for the damages caused to the deceased or to the surviving relatives. *Bolin v. Chicago, St. P. M. & O. R. Co.* 108 Wis. 333, 81 Am. St. Rep. 911, 84 N. W. 446.

The point is made that there was no evidence of wilful misconduct on the part of appellant's servant who controlled the car, and therefore a verdict should have been directed in appellant's favor. It seems to us otherwise. There was evidence tending to show that when the car reached a point where the motorman was in full view of the marchers, and for a considerable period of time thereafter, he must have observed the danger those in its pathway were in and had ample opportunity to guard against it; that he must have seen that the marchers were proceeding entirely unconscious of the approach of his car; that with the noise of the band and other noises made by them it was quite improbable that they would, or might not, observe the car in time to give way for it to pass; that by repeated signals from the conductor he was directed to slacken the speed of the car, and if necessary stop it before reaching the space occupied by the marchers, and that, nevertheless, he made no effort to do so until it had traveled through a large part of such space and up to within a few feet of Sarau, at the rate of 15 miles per hour, or about 22 feet per second. A jury might well find under such circumstances conscious disregard of human life, rendering the wrongdoer in case of a destruction thereof guilty of manslaughter in a criminal action, and of wilful misconduct in a civil action. True, the car had the right of way, and it was the duty of the marchers to step aside so as not to interfere with its passage or speed. True, it was the duty of the marchers, as is ordinarily the case, to use their senses reasonably, to enable them to do that before the car came dangerously near them, and yet no excuse is seen for an assertion of a superior right in appellant by consciously running its car into the parade at a speed of 22 feet per second.

A person with Sarau at the place of the injury when he regained consciousness, in answer to this question, "What did he say, if anything, that would indicate pain and suffering?" said: "He raised his right leg, at that time he knew he was hurt, and he didn't know whether his leg was off or

whether it was cut, although he felt the pain, and he thought they were either squeezing it or doing something to it, and he wanted us to let go; seeing we didn't let go he raised his right leg and tried to kick us, and we held his right leg down."

It is easily seen that the answer is not responsive to the question. Error is assigned because the court refused to strike it out. Whether appellant was, or may have been, prejudiced thereby does not clearly appear. As a rule unresponsive answers by a witness should be promptly stricken out, upon a motion being seasonably made therefor. The orderly conduct of trials requires that litigants shall have a reasonable enforcement of that rule.

Several witnesses were permitted to testify to what they heard Sarau say, or do, or how he acted shortly after he was injured, some of the occurrences being while he was on the way to the hospital from the place of the injury, and some immediately upon, or soon after, his arrival at the hospital, indicating that he was conscious and suffering pain. That was proper. Exclamations and expressions such as commonly, under the circumstances, evince suffering, the conditions being such as to indicate reality, may be testified to by a person having knowledge thereof upon the ultimate fact which they suggest becoming a proper subject of inquiry. Such evidence falls within the rules allowing all parts of the *res gestæ* as to a subject of judicial inquiry to be given in evidence. *Hall v. American Masonic Accl. Assn.* 86 Wis. 518, 57 N. W. 366; *McKieigue v. Janesville*, 68 Wis. 50, 31 N. W. 298; *Quaife v. Chicago & N. W. R. Co.* 48 Wis. 513, 33 Am. Rep. 821, 4 N. W. 658; 1 Greenl. Ev. § 102; and *Jones*, Ev. § 352. The doctrine that a person's state of mind as to existing pain can be so established necessarily includes establishing consciousness. Both matters were material in this case. One could not really suffer pain without possessing some degree of consciousness. The indications of one would ordinarily evince the other. But independently of that, doubtless, the state of a person's mind as regards consciousness, when material, may be established by the species of evidence competent to establish the fact of suffering pain.

Evidence was permitted as to what the duties of a motorman were, operating a car manned by a conductor, as in this case. The question was evidently not aimed at what the duty of the motorman was, as a matter of law, but as to what the incidents of his position were in that regard under his contract of employment. Presumably, the purpose of the question was to show that

he was not required to do anything interfering with observing the situation of those upon the track in the pathway of his car on the occasion in question, and that he recklessly and consciously disobeyed the conductor's orders to stop the car before the event complained of. The bearing of the evidence was on the claim of wilful misconduct imputable to appellant. In that light we see no reason why the evidence was not proper.

Further complaint is made because evidence was permitted as to the schedule time for running cars the week before the accident. We are unable to see how appellant could possibly have been prejudiced by that. There was no claim that the speed of car on the day of the accident was greater than usual. The only difference in the schedule on that day and on the week prior thereto was that on the former, contrary to the latter, the cars were operated one way only, giving patrons the benefit of two opportunities to go in that direction in the time ordinarily occupied by a trip down the track and return. It was certainly proper to show the manner in which the cars were operated at the time of the injury, and that there was a special arrangement for the occasion for the better convenience of patrons.

Error is assigned because one, who was in the procession some distance behind Sarau, was permitted to testify that as the car passed him, he said, "For God's sake stop that car!" It was then in dangerous proximity to Sarau. The exclamation was made within hearing distance of the motorman. He may, or may not, have heard it. It was within the probabilities that he did. So the evidence, though not competent to show the speed of the car, or that it was going at a dangerous rate of speed, was competent as bearing on the question of whether the motorman operated the car in conscious disregard of the safety of others.

One of the marchers, who was some distance behind Sarau, having testified, without objection, that seeing the danger to those on the car track, he stepped forward to take hold of some of them, his idea being to run on to the track for that purpose, but that there was no show and he stepped back, was permitted to answer a question as to why there was no show. The answer was not strictly responsive thereto, but there was no motion to strike it out. The question merely asked for an explanation of previous evidence. No reason is suggested, or is perceived, why that was not proper. A number of other rulings on evidence adverse to appellant are referred to 69 L. R. A.

in the briefs of counsel. We have given such attention thereto as seems to be required without discovering any prejudicial error therein.

Complaint is made because the court did not submit the following questions to the jury, as requested: "Did the motorman sound the gong continuously while approaching Sarau—" "At what rate of speed was the car running when it ran into the Milwaukee Uniformed Rank, Knights of Pythias?" It is a sufficient answer thereto to say that the questions only involve evidentiary circumstances, not issues of fact raised by the pleadings, within the meaning of § 2858, Rev. Stat. 1898; *Baxter v. Chicago & N. W. R. Co.* 104 Wis. 307, 80 N. W. 644; *Mauch v. Hartford*, 112 Wis. 40, 87 N. W. 816; and *Patnode v. Westenhaver*, 114 Wis. 460, 90 N. W. 467. There is no allegation in the complaint or the answer as to whether the gong of the car was continuously sounded while the car was approaching Sarau, or at what rate of speed it was going at the time of the injury. The allegations of the complaint are to the effect that it was then moving at a dangerous rate of speed, and that due and sufficient warning was not given to persons in the pathway thereof to give way for its passage. These allegations were put in issue by denials, and in addition defendant answered that, as the car approached the point where the injury was inflicted, a sufficient warning of its presence was given by sounding the gong and bell on the car. So the real issue raised was whether the car, under the circumstances, was approaching at a negligent rate of speed, and whether sufficient warning was given to persons in its pathway to clear the track for its passage. These matters were, though not in the most approved form, included in the questions submitted.

Error is assigned because the court refused to instruct the jury that, had Sarau lived, his earning capacity would probably have decreased with advancing years. It would seem that appellant could not have been prejudiced by a failure to instruct on such a matter of common knowledge.

Further error is assigned for a refusal to instruct the jury that the probable earning capacity of Sarau should be considered with reference to his capacity in that regard, taking into consideration his personal expenses, income from property not being considered. The general instructions so informed the jury. That being the case, there was no error in refusing to specially instruct as to the same matter.

Some complaint is made of remarks by respondents' counsel during the argument

to the jury, which do not appear to merit special attention. The exceptions in regard thereto have been sufficiently examined to satisfy us that at least no prejudicial error was committed in respect to such matters.

The judgment must be reversed and the action remanded for a new trial of the cause of action for gross negligence, it being understood that the issues appropriate

thereto are the only ones which the complaint justifies submitting to a jury for determination. It is unfortunate that a verdict was taken which in effect found that such a wrong produced the death of Sarau, and that it was also produced by a wrong of an entirely different character.

The judgment appealed from is reversed, and the cause is remanded for further proceedings in accordance with this opinion.

MICHIGAN SUPREME COURT.

Richard TEMBY

v.

City of ISHPEMING, *Plff. in Err.*

(.....Mich.....)

1. A municipal corporation has no right to prevent the use by its owner, in a lawful way, of a paved strip between the street line and a building set a few feet back from the street, where there is nothing to show that the strip has ever become a part of the highway, or that the municipality has so treated it.
2. A municipal corporation is not liable for injuries to a traveler upon a sidewalk through the fall of a billboard insecurely placed by an abutting owner upon his own property near the edge of the street, under a statute requiring it to keep its streets reasonably safe and fit for travel.

(May 12, 1905.)

ERROR to the Circuit Court for Marquette County to review a judgment in favor of plaintiff in an action brought to recover damages for personal injuries for which defendant was alleged to be responsible. *Reversed.*

The facts are stated in the opinion.

Mr. W. T. Potter, for plaintiff in error:

The sign or billboard in question was a mere incident to the building to which it was attached, and was in no sense related to or a part of the sidewalk.

Williams, Mun. Liability for Tort, p. 152; *McLoughlin v. Philadelphia*, 142 Pa. 80, 21 Atl. 754; *Jones v. Boston*, 104 Mass. 75, 6 Am. Rep. 194; *Hume v. New York*, 74 N. Y. 273.

NOTE.—As to liability of city for drowning of child in pond on private property, see, in this series, *Omaha v. Bowman*, 40 L. R. A. 531.

As to liability for drowning of child in pond situated partly on street and partly on private premises, see *Arnold v. St. Louis*, 48 L. R. A. 291.

As to liability of city for negligence of private parties in piling lumber in street, see *Evansville v. Senhenn*, 41 L. R. A. 728.

As to liability for damage caused by the storing in a street of a wagon by a private individual, with permission of the city authorities, see *Cohen v. New York*, 4 L. R. A. 406.

Those objects in a highway which have no necessary connection with a roadbed, or relation with the public travel thereon, and the danger from which arises from mere casual proximity, and not from the use of the road for the purpose of traveling thereon, will not, as a general rule, render the road defective.

Hewison v. New Haven, 34 Conn. 136, 91 Am. Dec. 718; *Hixon v. Lowell*, 13 Gray, 59; Williams, Mun. Liability for Tort, p. 109.

The liability in Michigan is purely statutory, and this case is neither within the language nor the intention of the statute.

Williams, Mun. Liability for Tort, p. 181; *Detroit v. Putnam*, 45 Mich. 263, 7 N. W. 815; *Kennedy v. Lansing*, 99 Mich. 518, 58 N. W. 470; *Gavett v. Jackson*, 109 Mich. 408, 32 L. R. A. 861, 67 N. W. 517; *McArthur v. Saginaw*, 58 Mich. 357, 55 Am. Rep. 687, 25 N. W. 313.

Reasonable, and not absolute, safety is all that is required.

Weisse v. Detroit, 105 Mich. 482, 63 N. W. 423.

Messrs. Button & Heffernan, for defendant in error:

A board which was liable to blow down whenever a proper wind blew was allowed by the city to be in use for about two years, resting on the sidewalk, a menace to all travelers. It was the active approval of the use of the sidewalk for the purpose of the signboard. This rendered the municipality liable.

Joslyn v. Detroit, 74 Mich. 458, 42 N. W. 50; *Hayes v. West Bay City*, 91 Mich. 418; 51 N. W. 1067; *Hutchinson v. Ypsilanti*, 103

dividual, with permission of the city authorities, see *Cohen v. New York*, 4 L. R. A. 406.

As to liability generally for dangerous condition of premises lying open beside a highway or frequented path, see *note to Lepnick v. Gaddis*, 26 L. R. A. 686, and the subsequent cases in this series of *Pekin v. McMahon*, 27 L. R. A. 206; *Moran v. Pullman Palace Car Co.* 33 L. R. A. 755; *Dobbins v. Missouri, K. & T. R. Co.* 38 L. R. A. 573; *Stendal v. Boyd*, 42 L. R. A. 288; and *Cooper v. Overton*, 45 L. R. A. 591.

Mich. 12, 61 N. W. 279; *McEvoy v. Sault Ste. Marie* (Mich.) 10 Det. L. N. 1036, 98 N. Y. 1006.

The sidewalk was all of it under the control of the municipality, and the fact that it extended over the line of the street could make no difference.

Elliott, Mun. Corp. § 326, pp. 293, 294; *Drake v. Lowell*, 13 Met. 292.

Hooker, J., delivered the opinion of the court:

The plaintiff was injured by a billboard which Butler was in the habit of using in front of the doors of his opera house, in the city of Ishpeming, to advertise prospective attractions. This billboard was 88 inches in length, 44 inches in width, and weighed over 40 pounds. On each edge, about a foot from the top of the board, a screw hook was placed to fasten into eyes or staples on the beam over the double doors. The lower end rested upon the sidewalk 18 inches or 2 feet from the building. The building is 3 feet back from the street line, but the walk extends to the door. The plaintiff, while passing, was hit and injured by the board, which was blown by the wind against him. There was some testimony indicating that it was not fastened on this occasion. A verdict and judgment for the plaintiff resulted from the trial, and the defendant has appealed. The only question arises over the refusal of the circuit judge to direct a verdict for the defendant.

The undisputed evidence in this case shows that the billboard was wholly outside of the highway and upon private ground. Before the defendant can be held liable to pay for this injury, it must be shown that it "neglected to keep its sidewalk in reasonable repair and in condition reasonably safe and fit for travel." No complaint is made that the street or sidewalk was not in proper condition and in a reasonably safe and fit condition for travel, so far as the same was dependent upon the condition of the street itself. Plaintiff's claim rests on the proposition that, to avoid liability under the statute, the municipality must protect the traveler against dangers from beyond the limits of the highway which make traveling unsafe.

The only theories upon which defendant can be held liable in this case are: (1) That all of the sidewalk was a portion of the highway, or (2) that the billboard was a nuisance, which the city might and should have abated.

There is no testimony tending to show that the 3 feet of ground upon which the billboard stood was a part of the highway, or that the city so treated it. Nothing indicates that it exercised any control over it, 69 L. R. A.

or that said 3 feet was covered by any walk that it built or ordered. This area in front of the opera house appears to have been an exception, other buildings extending to the line of the highway. It is not unreasonable to suppose that it was left for the accommodation of the owner's patrons, and it is shown that the owner exercised dominion over it by the use made of the billboard, if in no other way. The city had no lawful right to require its use for a street, or to prevent the owner from using it in connection with his opera house in any lawful way. We cannot say from the record that the city should be estopped from denying that this strip was a part of its sidewalk, to be kept in repair, etc., by it.

We must then inquire whether the liability can be sustained upon the ground that it failed to abate a nuisance. In its construction of the statute (Comp. Laws, § 3441), which has been somewhat liberal, this court has never gone so far as to hold that it requires the municipality to protect a traveler against dangers which result entirely from the use made of abutting premises by their owners, and which cannot be avoided by barriers or some other effective mode of construction of the highway. It may be reasonably said that a highway is not reasonably safe which has no barriers separating it from a pit or cellar on adjoining premises, and in such a case the liability rests not on a failure to abate a nuisance, but an inadequate highway. The city may, and should, perhaps, build the barrier, but it has no authority to trespass upon the abutter and fill up his cellar. In *Hixon v. Lowell*, 13 Gray, 61, this subject is discussed by Mr. Justice Hoar. The statute provided that "all highways, town ways, causeways, and bridges within the bounds of any town" are required to "be kept in repair at the expense of such town, so that the same may be safe and convenient for travelers, with their horses, teams, and carriages, at all seasons of the year." [Rev. Stat. chap. 25, §1.] That was a case where snow and ice fell from a building, having gathered there until it overhung the street. The court distinguished the case from the fall of an awning projecting over the street and supported by posts resting upon the sidewalk. The learned jurist said: "It may not be easy to perceive and state distinctly the difference between the two cases in regard to the liability of the town, but we are all of opinion that there is such a distinction, and that the facts which were proved on the trial will not sustain this action. In most cases the town has discharged its duty when it has made the surface of the ground over which the traveler passes sufficiently smooth, level, and guarded by

railings to enable him to travel with safety and convenience by the exercise of ordinary care on his own part. There may be many causes of injury, to which he might be exposed in traveling upon such a way, which would not constitute any defect or want of repair in the way itself. In *Vinal v. Dorchester*, 7 Gray, 421, it was held that a town was not responsible for an injury caused to the plaintiff by the running of the cars of a railroad company across a public highway, although the railroad was constructed in a manner not allowed by law, and the trains run thereon in a manner dangerous to the travelers on the highway. The town, if it has done its duty in making the way safe and convenient in all the proper attributes of a way, is not obliged to insure the safety of those who use it. The traveler may be subjected to inconvenience and hazard from various sources, none of which would constitute a 'defect, or want of repair,' in the way, for which the town would be responsible. He might be annoyed by the action of the elements,—by a hailstorm, by a drenching rain, by piercing sleet, by a cutting and icy wind,—against which, however long continued, a town would be under no obligation to furnish him protection; he might be obstructed by a concourse of people, by a crowd of carriages; his horses might be frightened by the discharge of guns, the explosion of fireworks, by military music, by the presence of wild animals; his health might be endangered by pestilential vapors or by the contagion of disease; and these sources of discomfort and danger might be found within the limits of the highway, and continue for more than twenty-four hours, and yet that highway not be, in any legal sense, defective or out of repair. It is obvious that there may be nuisances upon traveled ways for which there is no remedy against the town which is bound by law to construct and maintain the way. If the owner of a distillery, for example, or of a manufactory, adjoining the street of a city, should discharge continuously from a pipe or orifice opening toward the street a quantity of steam or hot water, to the nuisance and injury of passersby, they must certainly seek redress in some other mode than by an action for a defective way. If the walls of a house adjoining a street in a city were erected in so insecure a manner as to be liable to fall upon persons passing by, or if the eaves trough or water conductor was so arranged as to throw a stream from the roof upon the sidewalk, there being in either case no structure erected within or above the traveled way, it would not constitute a defect in the way. It is true that the present case finds that the snow had slid from the eaves, so that for more than twenty-four

60 L. R. A.

hours before it fell it hung above the sidewalk; but we can see no good reason why the plaintiff should therefore have a claim against the city, any more than if it had fallen directly from the roof without the intermediate suspension. The liability of towns for injuries caused by defective ways is created by statute, and is not to be extended, by construction, beyond the limits which a reasonable interpretation of the statute establishes. We are of the opinion that in *Drake v. Lowell*, 13 Met. 292, one of those limits was reached, and that where there is no structure, such as, if inconsistent with the safety of travelers, would be an encroachment upon the street, and the way itself is properly constructed, the descent of snow or water from the roof of a building, whether sudden or gradual, does not give a right of action against the town to recover compensation for the injury which it may occasion. It is not, within the meaning of the law, a 'defect or want of repair in the highway.'"

It is doubtless true that a municipality having the control of the highways and the duty of keeping them in repair, must at its peril remove or guard against perils growing out of defects and obstructions within the highway limits. It has the necessary authority and possession to summarily remove obstructions and other public nuisances therefrom, and the statute imposes a liability for a failure to do so. It has, however, neither the possession nor the authority to invade private premises to summarily remove such things belonging to the proprietor which may be thought dangerous. If nuisances exist on private premises, it is, in most cases, necessary that legal proceedings be instituted to abate them, and we are of the opinion that meantime the city cannot be held liable for the consequences of their maintenance. Redress in such cases must be sought against the owner. In the present case it may be that the landowner is liable. Certainly, if there is any actionable negligence, it is his, and no good reason suggests itself for bringing this action against the city rather than against him.

We are cited to several cases which are supposed to support plaintiff's contention. The one most relied on was *Cason v. Ottumwa*, 102 Iowa, 99, 71 N. W. 192. In that case there is nothing to indicate that the billboard was upon private property. Apparently it was in the street, as it clearly was in the case of *Oak Harbor v. Kallagher*, 52 Ohio St. 185, 39 N. E. 144. *Grove v. Ft. Wayne*, 45 Ind. 429, 15 Am. Ren. 280, was where a cornice overhanging the street fell. It apparently rests upon a statute making it a municipal duty to abate nuisances. It is recognized as an extreme case

if not discredited, in the case of *Anderson v. East*, 117 Ind. 128, 2 L. R. A. 712, 10 Am. St. Rep. 35, 19 N. E. 726. It cites the case of *Parker v. Macon*, 39 Ga. 725, 99 Am. Dec. 486, where a liability was predicated on a failure of the city to remove a dangerous ruin upon private property, but on the line of the street,—a duty imposed by statute. Another case (a billboard, by the way) is found in *Langan v. Atchison*, 35 Kan. 322, 57 Am. Rep. 165, 11 Pac. 38. This also rests upon a statute, quoted in the opinion, which made it a municipal duty to take down and remove dangerous structures. It distinguished the case of *Taylor v. Peckham*, 8 R. I. 349, 91 Am. Dec. 235, 5 Am. Rep. 578, which held the contrary, upon the grounds, first, that the city had no such authority, and, second, that the liability was statutory only in Rhode Island. The same distinction may be made in the present case. In *Mc Loughlin v. Philadelphia*, 142 Pa. 80, 21 Atl.

754, a city was held not liable for injury occasioned by the falling of screens upon a child, although left habitually upon the sidewalk.

We are of the opinion that this cause is not within the statute, the accident resulting from no default of the city in keeping its highway in a condition reasonably safe and fit for travel. We think that it was not the legislative intention to impose upon municipalities the duty of supervising the use of abutting premises by their owners, and that sufferers from the negligence of such must look to them for redress, where such negligence has been confined to private premises, and not previously affected the physical condition of the highway in such a way as to give notice and require action by the officials of the city.

The judgment is reversed and a new trial ordered.

MINNESOTA SUPREME COURT.

M. J. GINTER, *Respt.*,

v.

Rector, etc., of St. MARK'S CHURCH,
Appt.

(.....Minn.....)

*The owners of improved property located adjacent to an adequate sewer or drainage system in a city are required to connect therewith the water gutters and spouts upon their buildings, and not permit the rain water to collect and discharge at a point in a public alley, where, by reason of the volume and force thus attained, it enters adjoining premises, provided such connection with the drainage system can reasonably be made.

(*Jaggard, J., dissents.*)

(May 26, 1905.)

APPEAL by defendant from an order of the District Court for Hennepin County denying a motion for new trial after verdict in plaintiff's favor in an action brought to recover damages for injury to plaintiff's property by surface water. *Affirmed.*

The facts are stated in the opinion.

*Headnote by LEWIS, J.

Mr. A. B. JACKSON, for appellant:

Surface water is a common enemy, to be disposed of by each proprietor as he sees fit in the improvement of his own premises, with the qualification that he must exercise ordinary care to so use his own as not unnecessarily to injure his neighbor.

Philips v. Taylor, 93 Minn. 28, 100 N. W. 649; *Oftelie v. Hammond*, 78 Minn. 275, 80 N. W. 1123; *Gilfillan v. Schmidt*, 64 Minn. 29, 31 L. R. A. 547, 58 Am. St. Rep. 515, 66 N. W. 126; *Sheehan v. Flynn*, 59 Minn. 443, 26 L. R. A. 632, 61 N. W. 462; *Cow v. Hannibal & St. J. R. Co.* 174 Mo. 588, 74 S. W. 859.

One urban proprietor, who, by his building, has dammed and confined the natural flow of surface rain water from the higher lands of his adjoining neighbor, thus causing it to flow into a public alley in, perhaps, a more concentrated stream than before, has no right of action against his neighbor when the waters of the alley find their way, either by surface flow by burrowing through soft and loosened earth in the alley about a newly set telegraph pole, into a pit or area, 3 feet deep, dug by plaintiff out into the

NOTE.—As to rights and liabilities in respect to surface waters generally, see, in this series, *Gray v. McWilliams*, 21 L. R. A. 593, and *note*; *Willitts v. Chicago, B. & K. City R. Co.* 21 L. R. A. 608; *St. Paul & D. R. Co. v. Duluth*, 23 L. R. A. 88; *Edwards v. Charlotte, C. & A. R. Co.* 22 L. R. A. 246; *Sheehan v. Flynn*, 26 L. R. A. 632; *Albany v. Sikes*, 26 L. R. A. 653; *Jacobson v. Van Boening*, 32 L. R. A. 229; *Churchill v. Beethe*, 35 L. R. A. 442; *Fremont*, 69 L. R. A.

E. & M. Valley R. Co. v. Harlin, 36 L. R. A. 417; *Jordan v. Benwood*, 36 L. R. A. 519; *North Point Consol. Irrig. Co. v. Utah & S. L. Canal Co.* 40 L. R. A. 851; *Carland v. Aurin*, 48 L. R. A. 862; *Brandenberg v. Ziegler*, 55 L. R. A. 414; *McAskill v. Hancock*, 55 L. R. A. 738; *Chicago, R. I. & P. R. Co. v. Shaw*, 56 L. R. A. 341; *Franklin v. Dudgee*, 58 L. R. A. 112; *Todd v. York County*, 66 L. R. A. 581; and *Baldwin v. Ohio Twp.* 67 L. R. A. 642.

alley, about a basement window which plaintiff has seen fit to place under his building.

Phillips v. Waterhouse, 69 Iowa, 199, 58 Am. Rep. 220, 28 N. W. 539; *Vanderviele v. Taylor*, 65 N. Y. 341; *Young v. Leedom*, 67 Pa. 351; *Sentner v. Tees*, 132 Pa. 216, 18 Atl. 1114; *Weis v. Madison*, 75 Ind. 241, 39 Am. Rep. 135; *Hoffman v. Muscatine*, 113 Iowa, 332, 85 N. W. 17; *Simpson v. Keokuk*, 34 Iowa, 568; *St. Paul & D. R. Co. v. Duluth*, 56 Minn. 494, 23 L. R. A. 88, 45 Am. St. Rep. 491, 58 N. W. 159; *Lee v. Minneapolis*, 22 Minn. 13; *Alden v. Minneapolis*, 24 Min. 254.

The right or immunity of the city is in no wise different from that of any other proprietor, as to surface water.

Flagg v. Worcester, 13 Gray, 601; *Parks v. Newburyport*, 10 Gray, 28; *Oftelie v. Hammond*, 78 Minn. 275, 80 N. W. 1123; *Gilman v. Laconia*, 55 N. H. 130, 20 Am. Rep. 175; *Hoyt v. Hudson*, 27 Wis. 656, 9 Am. Rep. 473.

Messrs. Lancaster & McGee, for respondent:

The common-enemy doctrine is not applicable in cities.

O'Brien v. St. Paul, 25 Minn. 331, 33 Am. Rep. 470; *Vanderviele v. Taylor*, 65 N. Y. 341; *Bentz v. Armstrong*, 8 Watts & S. 40, 42 Am. Dec. 265.

The exercise by appellant of its legal right to change the natural surface of its property at the same time imposed upon it a corresponding duty to respect the rights of the adjoining property owner.

Belious v. Sackett, 15 Barb. 96; *O'Brien v. St. Paul*, 25 Minn. 331, 33 Am. Rep. 470.

Liability of a landowner for diverting surface water proper, to the injury of another, depends upon the necessity and reasonableness of his act.

Oftelie v. Hammond, 78 Minn. 275, 80 N. W. 1123; *Sheehan v. Flynn*, 59 Minn. 436, 26 L. R. A. 632, 61 N. W. 462; *Giltman v. Schmidt*, 64 Minn. 29, 31 L. R. A. 547, 58 Am. St. Rep. 515, 66 N. W. 126; *Jungblum v. Minneapolis, N. U. & S. W. R. Co.* 70 Minn. 153, 72 N. W. 971; *Burnett v. Great Northern R. Co.* 76 Minn. 461, 79 N. W. 523; *Fossum v. Chicago, M. & St. P. R. Co.* 80 Minn. 9, 82 N. W. 979; *Schuett v. Stillwater*, 80 Minn. 287, 83 N. W. 180; *Beach v. Gaylord*, 43 Minn. 476, 45 N. W. 1095; *Lee v. Minneapolis*, 22 Minn. 13; *Jordan v. St. Paul, M. & M. R. Co.* 42 Minn. 172, 6 L. R. A. 573, 43 N. W. 849; *Bentz v. Armstrong*, 8 Watts & S. 40, 42 Am. Dec. 265.

The mode by which the plaintiff was injured, whether by casting water directly upon his premises by artificial means after it had been gathered up, or by collecting, conducting, and discharging it upon defendant's land so near the imaginary line which separates

its lot from that of the plaintiff that an increased and injurious quantity in volume upon the latter must necessarily be the result, is wholly immaterial.

Beach v. Gaylord, 43 Minn. 476, 45 N. W. 1095; *Pye v. Mankato*, 36 Minn. 373, 1 Am. St. Rep. 671, 31 N. W. 863; *Bellows v. Sackett*, 15 Barb. 96; *Hawkesworth v. Thompson*, 98 Mass. 77, 93 Am. Dec. 137.

Lewis, J., delivered the opinion of the court:

The complaint alleges that plaintiff was damaged by defendant in wrongfully and unlawfully permitting the rain falling upon the roof of its church building and parish house to be collected by means of gutters and discharged through conductors in unusual and destructive quantities against plaintiff's building, through its basement windows, and upon the adjoining ground, so that it formed large pools, and percolated through the soil and area walls into the basement, causing injury to merchandise therein located. The answer alleges that the gutters and conductors upon defendant's church building had been in use for a period of time exceeding fifteen years; that in erecting the building occupied by plaintiff certain basement windows upon the easterly side were provided, and, in order to secure light therefor, excavations were made on defendant's adjoining property, in which area walls were constructed; that the water falling from defendant's premises, if any, entered plaintiff's basement through such windows, and on account of the wrongful and unlawful trespass of plaintiff, or his grantor, in so constructing the same upon defendant's premises; that there were several other buildings located upon the alley in the rear of the premises in question, and that during heavy rain storms water was collected in the alley to a depth of several inches, rushed past plaintiff's building, and entered the basement through the areas and windows in the rear thereof on a level or below the surface of the alley. It is alleged that from the 1st of May to the 1st of October, 1902, there occurred in the city of Minneapolis several very severe, extraordinary, and unusual rain storms, during which time rain fell with such force and in such volume as could not, by the exercise of ordinary prudence, have been anticipated or provided for, and that, if any waters from defendant's premises entered plaintiff's basement, it was due to such unusual and unforeseen circumstances.

The court found that the building occupied by plaintiff was erected in 1901, prior to October 1st; that it covered the entire lot, and extended from the sidewalk on Sixth street to the alley in the rear: that a base-

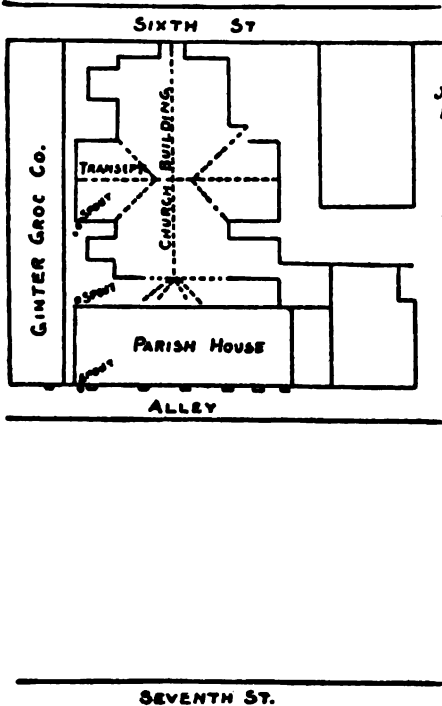
ment extended over the entire distance, 50 feet of the front being two stories high, and the rear 170 feet one story; that on the easterly side there were constructed three basement windows in the basement wall, 42 inches in width and 36 inches in height, the tops of which windows were just above the level or surface of the ground; that for the purpose of admitting light to the basement an excavation was made opposite each window and an area wall erected rising 2 inches above the level of the surface; that in June, 1902, the area wall opposite each of the windows was raised about 4 inches by the construction of a cement coping, making the total height above the grade about 6 inches; that the construction of the building with the basement windows in the manner aforesaid were facts at all times known to the defendant corporation and its officers, as well as to plaintiff, and no objection was ever made thereto either by plaintiff or defendant; that the lot in question, prior to the time of the erection of the store building, was 3 to 4 inches lower than the adjacent premises occupied by defendant's church building, and the natural slope or descent of block No. 222 from the rear of the premises occupied by plaintiff and defendant at the time complained of was towards Seventh street and Hennepin avenue, especially towards the southwesterly portion of the block, and was about 24 inches to each 100 feet; that the premises occupied by defendant church are immediately east of plaintiff's premises, and consist of a tract 158x160 feet, fronting on Sixth street, the rear upon an alley; that the church was erected upon the front three-fourths, more or less, of this tract, and had been so constructed for the period of fifteen years; that in 1901 there was erected on the rear portion of the tract, on a line with the alley way in the rear of the church, a parish house; that these buildings were equipped with metal gutters, down spouts, and conductors extending to or near the ground; that one half of the church building faces the east and the other half the west; that half of the parish-house roof slopes towards the public alley and the other half slopes towards the north; that all of the gutters and down spouts attached to the eaves of the easterly half of the two roofs covering the parish house facing and sloping southerly and northerly were connected with the city sewer extending along Sixth street, and prior to the time the building occupied by plaintiff was constructed the rain water falling upon the easterly sloping roof of the church and the easterly half of the two roofs of the parish house was by means thereof conducted into the sewer, and the water falling upon the westerly half of the

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church and parish house were, by means of gutters attached to the eaves and conductors leading to the ground, discharged in large or small amounts, according to the extent of the rain, upon the ground near the southeasterly line of plaintiff's premises, and by natural descent flowed over and upon the lot now occupied by plaintiff; that defendant's church building is located about 36 to 72 inches distant from the easterly side of plaintiff's building. The court further found that May 23 and 24 and August 30, 1902, very heavy rain storms occurred in the city of Minneapolis, and large quantities of water were carried by the gutters and conductors upon the westerly one-half of the buildings, and by means thereof were transferred and discharged in large and destructive quantities upon the ground at one or more points within close proximity to the easterly wall of plaintiff's building, and more especially within 3 or 4 feet of the rear basement window at the southeasterly corner of plaintiff's building; that the waters so falling during the May storm flowed over the rear area wall into the basement, and the waters from the August storm worked down beside and through such wall into the basement, causing damage to plaintiff's merchandise to the extent of \$600. The court also found that the rain falling upon the roofs of the other buildings situated upon or near the public alley during the time specified, in so far as was not carried away by the sewer, fell upon or near the alleyway, and, by reason of the natural slope, ran off towards Seventh street and the southwesterly side of the alley. The court further found that prior to 1902 there was built and constructed along Sixth street a public sewer for the use of abutting owners; that it was of proper dimensions, and had general connection with the sewer system of the city; that it was in a receptive working order, suitable and adequate for the purpose intended; that the cost of connecting the conductors above mentioned with the sewer system during the spring or summer of 1902 would not have exceeded the sum of \$68; that the making of such connection was entirely feasible, and easily accomplished; and the court specifically found, by its twentieth finding of fact, that had defendant, prior to May 23, 1902, by means of sewer pipes properly laid, connected the westerly half of its church-building gutters and down spouts with such city sewer, all the rain so falling upon the westerly half of defendant's building would have been transferred and discharged into the sewer, and would have flowed away from plaintiff's premises, and no injury would have been caused thereby. The court further specifically found that if,

at the time specified, no gutters, eave troughs, or down spouts had been erected upon the westerly portion of defendant's building, and the waters had been allowed to drop down from the eaves to the ground, it would have spread out and flowed away from plaintiff's building by the natural decline towards Seventh street and Hennepin avenue, without causing the injuries complained of.

The assignments of error challenge certain of the findings of fact upon the ground that they are not supported by the evidence. It was conclusively shown that the southerly portion of the west transept and the west slope of the south half of the church roof, together with the north slope of the southerly half of the parish-house roof, were connected with gutters and two spouts, which discharged their collection of water into the open space between the buildings upon defendant's premises, and that a gutter was constructed under the southerly eaves of the parish house, the east end of which was connected with the sewer, but the west end of the gutter was connected with a spout at the southwesterly corner of the parish house, and the water discharged into the alley. The accompanying plat will assist in explaining the situation, as it shows the relative positions of the building occupied by plaintiff, the church building with its transepts, and the parish house.



The evidence is ample to support the finding of the court that the waters thus collected and discharged into the disconnected spouts in the open space between the church and the store building ran out through the 3-foot space between it and the parish house into the alley, there meeting the water discharged from the spout on the southwesterly corner of the parish house. Several witnesses testified that the waters thus coming together washed out the soil to some extent, creating a pool, described by one of the witnesses as 10 feet wide during heavy rains; and that the water so formed could find no other outlet because of the grade, and consequently was raised to such a height that during the May storm it flowed over the area wall and into the grocery-store basement, and during the August storm it worked down outside of and through the area wall into the basement; and that the quantity of water so collected was very heavy, and created such pressure as to force its way through the area wall. A plat was introduced, which had been made under the direction of competent engineers, upon which were marked the grades of the premises at various points and the location of other buildings upon the alley and in the vicinity. From the evidence of the civil engineer and other witnesses the court was justified in finding that the natural lay of the land from defendant's premises sloped towards Seventh street and southwesterly, and from an examination of the plat it appears that there was a depression at the point where the waters met, so that before the water could pass in any direction it would have to rise 5 or 6 inches. The grade shows that at a point a few feet east of the southwesterly spout on the parish house there was a rise in the surface of the ground allowing no opportunity for the water to flow east, but from that point the grade fell to the east and south; consequently most of the water falling on the southerly slope of the parish house roof, had the gutter not been placed under the eaves, would have flowed away from plaintiff's premises. As to the water coming through the disconnected spouts upon the southwesterly portion of the church building, while there was no other outlet for the same except into the alley through the narrow space mentioned, yet according to the evidence, the court was justified in holding that the volume was unnecessarily increased by thus collecting the water and discharging it at the points stated. There is evidence to support the finding that the sewer constructed in Sixth street was connected with the sewer system of the city, and was of sufficient capacity to carry away enough water to avoid injury under the circumstances, and that defendant might

reasonably have connected the spouts with the sewer. We are also of the opinion that the finding to the effect that the damage would have been avoided had such connection been made prior to the storms is sustained by the evidence. It was testified by certain witnesses for plaintiff that, after the sewer connections were made in October, 1902, no water had collected in a pool at the rear of the parish house, nor entered plaintiff's basement. Other testimony to the same effect was given, but stricken out,—whether rightly or not we need not consider. It was also conclusively shown that the water falling on the roof of plaintiff's building was during the entire time connected with the sewer system, and that water from the buildings upon the alley and vicinity could not find its way into the basement by reason of the surface grade. And the evidence tends to show that the only water other than that delivered from defendant's premises was such as fell from the clouds into the open space between the two buildings and a small portion of the alley adjacent to the basement window, and from the disconnected spout on the parish house. There was a dispute as to whether the gutters all overflowed, and some evidence was submitted by defendant tending to prove that the storms were of such extraordinary character that the sewers would not have taken care of it had the spouts been connected; that a wind was blowing from the south, and some water must have been thus driven into the basement window. All this has been considered, and the conclusion of the trial court must be accepted. Under the evidence the court was justified in finding that sufficient of the rain falling during the storms of May and August would have been carried off by the sewer system had the connection been made, and so have prevented the damage in question.

Having determined that the facts as found by the court are supported by the evidence, we come to the consideration of the legal questions involved. As we understand defendant's position, conceding the facts to be as found by the court, under the law of this state, an owner has the right to dispose of surface water in any manner incidental to the improvement; that defendant had a right to construct the church and parish house upon its premises, to erect a roof thereon, and it was no concern of defendant where the waters were thereby incidentally discharged; that, if plaintiff's improvement was made subsequently, it was his duty to protect himself. Plaintiff abandoned all claim for damages caused by water entering the basement through the windows on the east side of his building, and confines himself to damages arising from water entering

the rear window. So far as the excavation at the rear of the building and area wall are concerned, the evidence is ample to refute the charge that plaintiff did not use reasonable care to protect his premises. The area wall was constructed in the alley, made of brick and cement, inclosing an excavation about 18 inches wide and 2 feet deep, and prior to the May storm was 2 inches above the surface of the ground. The evidence shows that the water entered the basement on that occasion by flowing over the area wall, which it would not have done except for the fact that defendant caused such volume of water to be concentrated in a depression in the alley that its first natural outlet was over the area wall. Upon discovering the fact that the area wall was not of sufficient height, in June following the May storm plaintiff caused his landlord to raise the area walls of all the windows by adding a 4-inch cement coping. This, under the evidence and findings of the court, was a reasonable exercise of care to protect plaintiff's premises. During the August storm the waters collected with such force as to wash out the porous, sandy soil and brick of the area wall, thereby flowing through and under it, entering the basement window in a large stream. Plaintiff cannot be held negligent in failing, under the circumstances, to protect himself by constructing an area wall of sufficient strength and character to withstand the pressure of water collected in the manner stated.

The rule with reference to surface water, as stated in *Brown v. Winona & S. W. R. Co.* 53 Minn. 259, 39 Am. St. Rep. 603, 55 N. W. 123, has been followed in subsequent cases, and is as follows: When an owner improves his land for the purpose for which such land is ordinarily used, doing only what is necessary for that purpose, and being guilty of no negligence in the manner of doing it, he is not liable because, as an incident of so improving, surface waters accumulate and flow in streams upon the lands of others. This rule was recently applied in the case of *Werner v. Popp* (Minn.) 102 N. W. 366, where it was held that the upper proprietor did not necessarily cause damage to a lower proprietor by digging a ditch which shortened the route of surface waters falling upon his land. In the case of *Philips v. Taylor*, 93 Minn. 28, 100 N. W. 649, it was stated that the party was required to exercise due care, but not, under all circumstances, to protect his neighbor. In *Sheehan v. Flynn*, 59 Minn. 436, 26 L. R. A. 632, 61 N. W. 462, the rule is stated thus: The common-law rule is modified in this state by the rule that the party getting rid of surface water in the improvement of his own premises

must so use his own as not unnecessarily or unreasonably to injure his neighbor. In *Ofetie v. Hammond*, 78 Minn. 275, 80 N. W. 1123, attention was called to the fact that the doctrine of reasonableness was adopted in *Sheehan v. Flynn*, 59 Minn. 436, 26 L. R. A. 632, 61 N. W. 462; *Gilfillan v. Schmidt*, 64 Minn. 29, 31 L. R. A. 547, 58 Am. St. Rep. 515, 66 N. W. 126; *Jungblum v. Minneapolis, N. U. & S. W. R. Co.* 70 Minn. 153, 72 N. W. 971; and *Burnett v. Great Northern R. Co.* 76 Minn. 461, 79 N. W. 523. There is no distinction in the principle applicable to cases of surface water in the country, where lands are left largely in their natural state, and in cities, where the land is cut up into small lots for the purpose of improvement; but there may be a vast difference in the application of the principle. It all depends upon the circumstances of the particular case as to what degree of care is required of a party attempting to get rid of surface water upon his premises. It does not follow that because in the country an upper proprietor may be permitted to aid the surface water on his field in its exit through a natural channel upon a lower proprietor, thereby enabling large volumes of water in a rainy period to accumulate, that the same thing can be done in a city in thickly settled portions, where improvements are general, and a common drainage system has been provided. Such a system of drainage to carry off surplus water is calculated to avoid the very difficulties which give rise to so much conflict between upper and lower proprietors in the country. The very object of constructing sewers along public streets adjacent to premises is to afford parties making improvements opportunity to connect therewith; and, if such connections can reasonably be made, upon what rule of law has a party the right to maintain an improvement and refuse to avail himself of this means of getting rid of a common enemy, instead of turning it upon his neighbor's premises? The doctrine of reasonableness and due care applies to this case, and under the facts found defendant should have availed itself of the means at hand to prevent injury to plaintiff's property. It is immaterial that defendant first made its improvement. It is not seriously contended that defendant did not have notice of the change in conditions caused by the improvement of the adjacent lot. It was open to casual observation, and one of defendant's officers frankly admitted that he was familiar with the situation. Under such circumstances defendant was required to take notice of the effect liable to be occasioned by allowing the waters to run at large. While hardly necessary, it may be observed that defendant cannot take advantage

of the fact that the area wall in question was extended about 18 inches into the alley. If in so constructing the building plaintiff's landlord infringed upon any of the rights surrendered to the public when the alley was dedicated as a highway, those questions are not here involved. Presumably, defendant acquired no right, as against an adjacent proprietor, to use the alley as a sewer to carry off water, other means being reasonably attainable.

Order affirmed.

Jaggard, J., dissenting:

1. The facts in this case, as found by the trial court, and as set forth in the opinion of the majority of this court, appear to me to contain demonstrable and vital error. The first of the major propositions upon which the plaintiff's case rests in those findings and in that opinion is "that the sewer constructed in Sixth street was connected with the sewer system of the city, and was of sufficient capacity to carry away enough water." The only evidence in any wise sustaining this is the stipulation of counsel to the effect that for ten or fifteen years past there has been a public sewer on Sixth street opposite this property, and that certain conductors of the church building are connected therewith. On the contrary, there was testimony that in some storms that sewer system was not sufficient to take off all the water, and that at the corner of Sixth street and Hennepin avenue the water was running 3 inches deep in the center of Hennepin avenue, because the sewers would not "take it."

The second major proposition of plaintiff's case is even more clearly without support of fact, *viz.*: "We are also of the opinion that the finding to the effect that the damages would have been avoided had such connection been made prior to the storms is sustained by the evidence. It was testified by certain witnesses for plaintiff that after the sewer connections were made in October, 1902, no water had collected in the pool at the rear of the parish house nor entered plaintiff's basement." The principal of three fatal objections to these propositions is that this testimony of the plaintiff and all of the same character was stricken out by the trial court. The record shows that the plaintiff's counsel, like good lawyers, realized that they must prove this part of their case, and to that end introduced testimony of a number of witnesses tending to show this effect of the subsequent connection of church conductors with the sewers. To this class of testimony the defendant at a number of places duly objected. The court made its findings without disposing of these objections. On the defend-

ant's motion for corrected findings it ruled on this class of testimony, sustained the objection, and excluded the evidence; essentially because—and this is the second fatal objection—it is the well-settled rule in this, and practically in all other, states that subsequent acts of a defendant in repairing or changing a situation which had previously wrought damage “are not to be admitted under any circumstances.” *Morse v. Minneapolis & St. L. R. Co.* 30 Minn. 465, 16 N. W. 358. In his memorandum on this point the trial judge said: “The witness was allowed to answer with the understanding on the part of the court, as I now distinctly recall, that that class of testimony would be received and its materiality argued by counsel, and then be passed upon by the court.

. . . It follows from this that the same disposition of this testimony (*viz.*, that it be stricken from the record) as in the former instances should be made, and a settled case here amended accordingly.” It would seem to be immaterial that the defendant may not have raised the objection to every question on this subject asked every witness. His objection and exception covered this class of testimony, and in good faith the ruling of the court must be held to have excluded it all. The testimony, however, has to my mind no significance—and this is the third fatal objection to it—because the photographs received in evidence and other testimony conclusively show that the situation had changed in material respects.

The third major proposition of fact in which error is susceptible of almost mathematical demonstration is this: That a substantial part of the water doing the damage came from plaintiff's own premises. The spout on the rear of plaintiff's building drained into the sewer surface water from 3,900 square feet of roof surface. The plaintiff himself testified that the eaves troughs overflowed from a part of defendant's roofs, which drained an area of 1800 square feet. The eaves troughs and conductors on this part of defendant's premises are larger than those on the plaintiff's own premises next to the alley. It follows that the eaves on the plaintiff's premises were not sufficient to carry off the water. There is abundant testimony in addition to photographs to that effect. The trial court recognizes this: “It is true that in heavy rains the eaves troughs and conductors attached to the rear of plaintiff's building have not at all times conducted and carried off into the sewer all the water falling upon its roof, and hence there has been at times more or less of an overflow from these roofs.” The overflowing eaves of plaintiff's building for at least one fourth of its width clearly must have gone into this area, for the area wall began about 3 feet

from the easterly end of the building and the windows were 42 inches wide. In obedience to the law of gravitation, the water from the plaintiff's building must have joined the water which fell into the area. It is only as to the remaining three fourths of defendant's overflow to which the court's argument could possibly apply, *viz.*, that the slope of the alley would have carried these overflowing waters away from the area towards Seventh street. But the testimony of the plaintiff's own engineer shows that the grade at the spout was 99.9 while the grade at the center of the space between plaintiff's and defendant's building was 99.67. The spout was more than 12 feet away from this space. Accordingly it appears that at least one half of the overflow from the plaintiff's own building went into the area. The wind was blowing at a tremendous rate, driving the water falling from plaintiff's building directly toward the area.

In vain one looks to find either in the memoranda of the trial court or in the opinion in this case any satisfactory disposition of the defendant's further contention that the testimony conclusively shows the plaintiff to have been the author of his own harm to an indeterminate extent. Originally he claimed damages for goods destroyed by water coming through area windows which plaintiff had made on defendant's own land without defendant's consent. His audacity abated. No claim is now made for the recovery on this ground. The court, finding for the plaintiff, was faced with the task of showing that the testimony did not mix these damages up. There has been no attempt to justify the conclusion reached so far as this vital question is concerned. The dissenting opinion, however, for sake of harmony is not based on any assertion as to what the record discloses on this point, but will rest only upon the facts involved in the opinion of the majority.

The fourth major proposition of fact in this case concerns the exceptional violent character of the storms which the majority opinion has not denied, but ignored. The testimony on this point shows that in the May storm at one time the rain was falling at the rate of nearly 6 inches per hour, and .60 of an inch in ten minutes. A gale of wind blew 42 miles per hour from the south. In the August storm the rainfall was 2.14 inches; 1.92 falling within forty-five minutes. The wind was again blowing hard from the south.

2. So far as the law of the case is concerned, I am at right angles with the majority of the court. The opinion proceeds: “The very object of constructing sewers along public streets adjacent to premises is to afford parties making improvements op-

portunity to connect therewith, and, if such connections can reasonably be made, upon what rule of law has a party the right to maintain an improvement and refuse to avail himself of this means of getting rid of a common enemy, instead of turning it upon his neighbor's premises?" The answer is simple: Upon every relevant and recorded rule of law which existed before the majority opinion was written.

(1) On the one hand the authorities which the court cite in part sustain in a negative way only, and in part deny, its conclusions. (a) They consist principally of the *Sheehan v. Flynn* group of cases, which lay down this vague generalization, namely: "A party must so use his own as to not unreasonably or unnecessarily injure his neighbor." This sounds well, but works confusion. 3 Farnham, Waters, § 889c, p. 2598. It purports much, but prescribes little. On its face it appears to be just, but it may become with undisturbed consistency the basis of as many directly opposite conclusions from the same state of facts as there may happen to be advocates opposing or proposing. In this case it would justify with equal aptness the affirmance or reversal of the trial court. But it cannot be determined from within the four corners of the rule how this case should be decided. (b) Three specific cases are cited as authority for the conclusions here reached. Of these *Werner v. Popp*, so far as the facts are concerned, is very similar to the case at bar. There the owner of land on which a considerable body of surface water gathered at times dug a trench on his own land through which that water passed to a ditch on an ordinary highway, and then through a culvert by a dry run into a depression on the plaintiff's land. It is to be observed that this decision, which, in effect, carries the common-enemy theory to a conclusion extreme, if not unjust, was reached by a majority of the court only. The facts here are much stronger for the defendant. Not only did the defendant here turn less than one third of the water which naturally flowed onto defendant's premises, but the natural use of his own premises cast such water on a public alley connected with city system of drainage, and therefore like a case of draining rural surface water on a road having a general state-ditch system. Moreover, in the *Popp Case* the waters ran onto plaintiff's premises through a natural channel; here they got in through the plaintiff's own act in digging an excavation into an alley and in insufficiently protecting his premises against the water entering through that area. The flexibility and danger of the rule in the *Sheehan v. Flynn* case is well illus-

trated by its citation as authority for holding the defendant harmless there for an obvious trespass, and here liable for breach of duty to insure against damage. The second specific case—*Philips v. Taylor*—is much more nearly in point in logic. Water was carried from roof of a warehouse by conductors to a drain, thence ran through a culvert to sandy soil, where ordinarily it was absorbed. By an extraordinary and unusual storm the premises of both parties were flooded. So the waters here were drained into an alley, which was ordinarily porous enough to absorb them. Because of the phenomenal nature of the storm in both cases the premises of both plaintiff and defendant were damaged. The rule in both cases should be as Judge Brown said in the *Philips Case*, that the damage must be deemed incidental to the use and ownership of private property. And see *Miller v. Wilson*, 104 Ill. App. 557. (For statement of similar facts, see page 558.) The third specific case—*Brown v. Winona & S. W. R. Co.*—has little direct significance. What is quoted from it is fairly inconsistent with the proposition it is cited to sustain.

(2) On the other hand, the authorities which the court does not cite, but to most of which its attention has been called, are affirmatively inconsistent with its conclusion. (a) The only case upon the duty of draining surface water into a sewer denies the existence of such legal duty. *Sentner v. Tees*, 132 Pa. 216, 18 Atl. 1114, approved in *Hall v. Rising* (Ala.) 37 So. 586. (b) The overwhelming weight of authority is to the effect that in a city adjoining property owners have a right to drain surface water onto public streets and alleys, subject to municipal control. In *Phillips v. Waterhouse*, 69 Iowa, 199, 58 Am. Rep. 220, 28 N. W. 539, defendant drained surface water from his building to an alley in its rear, whence it flowed to the plaintiff's premises below grade. In holding that the defendant was not liable to consequent damage the court said: "The . . . [owner of a lot] had the undoubted right to erect a building covering his whole lot. Water falling thereon must be discharged therefrom; and, subject only to municipal control, the . . . [owner] had the right to discharge such water on the street or alley. He had precisely the same right in this respect as he had the right to walk on the street or alley. He had the further right to so construct the building as to cause the water to flow and be discharged at one or more places. Of necessity this must be so." This case was expressly followed in *Hall v. Rising* (1904; Ala.) 37 So. 587. And see *Young v. Leedom*, 67 Pa. 351; *Nelson v. Fehd*, 104 Ill. App. 114; *Vanderwiele v. Taylor*, 65 N. Y. 341.

The same principles of liability and immunity on this immediate subject which apply to individuals apply also to cities. *Flagg v. Worchester*, 13 Gray, 601; *Parks v. Newburyport*, 10 Gray, 28; *Oftelie v. Hammond*, 78 Minn. 275, 80 N. W. 1123; *Gilman v. Laconia*, 55 N. H. 130, 20 Am. Rep. 175; *Hoyt v. Hudson*, 27 Wis. 656, 9 Am. Rep. 473. The city has a right to construct and maintain its streets, alleys, and sewers so as to solve municipal problems, including this one of surface water, according to its own judgment; and if in grading or maintaining a street it casts such water on the premises of an adjoining owner, he cannot recover damages therefor. Such owner may protect himself by building an adequate embankment, by filling his lot high enough to prevent overflow, by constructing a sufficient building, or otherwise so as in actual fact to keep out the offending waters. In *Alden v. Minneapolis*, 24 Minn. 254, Cornell, J., said: "This he could lawfully have done, as he possessed the common-law right of use and enjoyment in respect to his lot as fully and to the same extent as the city did in respect to its streets. Each had the right to use and improve for any legitimate purpose and in such manner as would protect against the incursion or accumulation of mere surface water." And see *Lee v. Minneapolis*, 22 Minn. 13; *St. Paul & D. R. Co. v. Duluth*, 56 Minn. 494, 23 L. R. A. 88, 45 Am. St. Rep. 491, 58 N. W. 159; *Stewart v. Clinton*, 79 Mo. 603; *Morris v. Council Bluffs*, 67 Iowa, 343, 56 Am. Rep. 343, 25 N. W. 274; *Hoffman v. Muscatine*, 113 Iowa, 332, 85 N. W. 17; *Simpson v. Keokuk*, 34 Iowa, 568; *Bangor v. Lansil*, 51 Me. 521.

(3) The plaintiff would have been fully justified in protecting himself against all incursions of surface water. *Blakely Twp. v. Devine*, 36 Minn. 53, 29 N. W. 342; *Mid-*

dlesee Co. v. McCue, 149 Mass. 103, 14 Am. St. Rep. 402, 21 N. E. 230. He was the judge as well as the author of his own devices. Neither his success nor his failure, nor his diligence nor negligence, can alone be made the basis of his neighbor's liability. As to the design of, selection of materials for, and the construction of, his area wall and its coping, his neighbor had no choice and no voice. The latter is not responsible for the consequences of the plaintiff's own instrumentalities. If the plaintiff kept the surface water out, he would have suffered no damage; if he did not, he ought to endure the harm he did not prevent. *Macon v. Dannenberg*, 113 Ga. 1111, 39 S. E. 446. And see *Gutherie v. Nix*, 5 Okla. 555, 49 Pac. 917. The mere fact that he may not have been negligent in constructing his area wall does not make the defendant his insurer against damage by surface water. Defendant took no better care of himself than of his neighbor, and took the same care of both, which was shown by the testimony to have been usual and customary in that neighborhood.

(4) The fact that the plaintiff's own overflowing eaves contributed largely, although to an indeterminate extent, to the damage for which he seeks recovery, puts him conclusively out of court upon the record in this case. *Sloggy v. Dilworth*, 38 Minn. 179, 185, 8 Am. St. Rep. 656, 36 N. W. 451.

Since this dissent was filed, the majority opinion was changed in this respect, viz.: So as to rest the proposition of fact that sewer connections would have prevented damage, not on plaintiff's testimony, as appeared in the original opinion, but on the other testimony. "All testimony of that class" was, however, stricken out by the trial court.

Petition for rehearing denied.

NEW HAMPSHIRE SUPREME COURT.

James M. USHER

v.

John D. DANIELS.

SAME

v.

Arthur T. HOLMES.

(73 N. H. 206.)

Parol evidence is admissible to show

NOTE.—As to admissibility of parol evidence to show that maker of note signed only as agent, see, in this series, *Keldan v. Winegar*, 20 L. R. A. 705, and note as to admissibility of extrinsic evidence to show who is liable as the maker of a note; also *Shuey v. Adair*, 39 L. R. 60 L. R. A.

that the one who signed a memorandum for the sale of goods necessary to satisfy the statute of frauds acted as agent for the one who is seeking to enforce the contract, so as to permit him to maintain the action.

(March 7, 1905.)

EXCEPTIONS by plaintiff to rulings of the Superior Court for Rockingham County made during the trial of actions

A. 473, and Second Nat. Bank v. Midland Steel Co. 52 L. R. A. 307.

As to admissibility of parol evidence to show relation which parties to non-negotiable instrument bear to each other, see *Young v. Schon*, 62 L. R. A. 499.

brought to enforce contracts for the purchase of certain goods and merchandise. *Sustained.*

Defendants contracted with an agent of plaintiff to purchase goods to such an amount that the contract would, under the statute of frauds, have been invalid unless in writing. A sufficient memorandum was signed by each defendant to satisfy the statute, and also by the agent, but the fact of the agency or the name of the plaintiff was not disclosed. The court below ruled that the memorandum was insufficient to enable the plaintiff to enforce the contracts, and granted nonsuits.

Further facts appear in the opinion.

Mr. John T. Bartlett for plaintiff.

Messrs. Ernest L. Guptill and Page & Bartlett, for defendants:

The memorandum did not comply with the statute of frauds because it did not contain all the essentials of the contract. It did not contain the name of the plaintiff, who now sues on the alleged contract. The name of a party is essential.

Sherburne v. Shaw, 1 N. H. 157, 8 Am. Dec. 47; *Brown v. Whipple*, 58 N. H. 229.

Nonsuit was properly ordered.

Webster v. Clark, 60 N. H. 36.

Bingham, J., delivered the opinion of the court:

As both contracts are for sales of goods at prices exceeding \$33, they are within the statute of frauds, and the question arises whether the memorandum in each case is sufficient to satisfy the requirements of the statute, the plaintiff not being named or described in either of them. In *Chandler v. Coe*, 54 N. H. 561, 576, it was held "that, where there is a written contract not under seal, executed in the name of an agent, parol evidence is admissible for the purpose of charging an unknown principal;" that the admission of parol testimony for such a purpose and under such circumstances does not contradict or vary the terms of the written instrument, and is not admitted for that purpose, but for the purpose of applying and giving effect to an established rule of law, to wit, that the act of the agent in signing the agreement in pursuance of his authority is in law the act of the principal,—the agent's signature is the principal's signature. The doctrine that an undisclosed principal may sue in his own name upon a written as well as an oral contract made by an agent in his own name, and that parol evidence is admissible to prove the plaintiff's interest, is well established in this state and in other jurisdictions. *Elkins v. Boston & M. R. Co.* 19 N. H. 337, 341, 342, 51 Am. Dec. 184; *Chandler v. Coe*, 54 N. H. 561, 576; *Bryant* 69 L. R. A.

v. Wells, 56 N. H. 152; *McIntire v. Evans*, 59 N. H. 237; *Boudreau v. Eastman*, 59 N. H. 467; *Tainter v. Lombard*, 53 Me. 369, 87 Am. Dec. 552; *Huntington v. Knox*, 7 Cush. 371; *Barry v. Page*, 10 Gray, 398; *Winchester v. Howard*, 97 Mass. 303, 93 Am. Dec. 93; *Sims v. Bond*, 5 Barn. & Ad. 389; *Wilson v. Hart*, 7 Taunt. 295. Does the statute of frauds prevent the enforcement of this principle of agency by excluding oral evidence to prove the facts to which it may be applied? As we have already seen, such evidence is admissible in the case of a written contract, and it would seem that it should be equally admissible in the case of a memorandum of an oral contract within the statute of frauds, unless the statute clearly excludes it. In *Chandler v. Coe*, 54 N. H. 574, it is stated that "it has been conceded, in the argument for the defendants, that the statute of frauds interposes no obstacle to the maintenance of an action against a principal, although the note or memorandum required by the statute is signed by his agent, and the name of the principal nowhere appears in it." If this is a correct interpretation of the act, the converse proposition must be equally true, which would permit an undisclosed principal to enforce the provisions of the contract by a suit upon it. In *Lang v. Henry*, 54 N. H. 57, 60, the court, in speaking of this question, said that "parol evidence is admissible to apply the contract to the parties, as to show that one of the signers acted as agent for the plaintiff or the defendant;" citing *Trueman v. Loder*, 11 Ad. & El. 589, and *Higgins v. Senior*, 8 Mees. & W. 834, 835. In these cases it was held that parol evidence was admissible "to show that one or both of the contracting parties were agents for other persons, and acted as such agents in making the contract, so as to give the benefit of the contract, on the one hand, to, and charge with liability, on the other, the unnamed principals; and this whether the agreement be or be not required to be in writing by the statute of frauds." The same reasoning was applied in these cases, with reference to a memorandum under the statute of frauds, as was applied in *Chandler v. Coe* to a written contract. There is without doubt a conflict of authority upon the question, but the most reasonable view seems to be that as to a memorandum of a contract for a sale of goods the statute does not change the law regulating the rights and liabilities of principals and agents, either as between themselves or as to third parties; that the provisions of the statute are complied with if the names of competent contracting parties appear in the memorandum; and that, if a party be an

agent, it is not necessary that the name of the principal be disclosed in the memorandum. See *Kingsley v. Siebrecht*, 92 Me. 30, 69 Am. St. Rep. 486, 42 Atl. 249; *Williams v. Bacon*, 2 Gray, 387; *Lerned v. Johns*, 9 Allen, 419; *Sanborn v. Flagler*, 9 Allen, 474; *Gowen v. Klous*, 101 Mass. 449; *Brodhead v. Reinbold*, 200 Pa. 618, 86 Am. St. Rep. 735, 50 Atl. 229; *Thayer v. Luce*, 22 Ohio St. 62; *Salmon Falls Mfg. Co. v. Goddard*, 14 How. 446, 14 L. ed. 493; *Benjamin, Sales*, 7th ed. §§ 208, 219; 3 *Parsons*, Contr. 9th ed. 10-13; *Browne*, Stat. Fr. §§ 373, 375. *Sherburne v. Shaw*, 1 N. H. 157, 8 Am. Dec. 47, is not in conflict with the above cases. In that case the subject-matter of the contract was land, and it was held that the auctioneer, by placing his name upon the memorandum, did not intend to have it understood that he was acting as vendor; that no one was named or disclosed in the writings as vendor; and that, if the auctioneer had intended to act as agent for the owners, his authority to do so could not be shown by oral evidence, as our statute regulating contracts for the sale of land expressly requires the agent's authority to be in writing. *Laws*, ed. 1815, p. 191, § 3; *Pub. Stat.* 1901, chap. 215, § 1. *Grafton v. Cummings*, 99 U. S. 100, 25 L. ed. 366, and *McGovern v. Hern*, 153 Mass. 308, 10 L. R. A. 815, 25 Am. St. Rep. 632, 26 N. E. 861, are cases of the same nature, and the decisions are placed upon like grounds. *Salmon Falls Mfg. Co. v. Goddard*, 14 How. 446, 14 L. ed. 493, has been cited with

approval in our decisions, in so far as it held that it was competent to show by parol testimony that one who signed the memorandum in his own name acted as agent for an undisclosed principal. *Chandler v. Coe*, 54 N. H. 571. But to the extent that it allowed oral evidence to be introduced to show which of the parties signing the memorandum was vendor and which was purchaser it has been disapproved. *Brown v. Whipple*, 58 N. H. 229, 231. If in *Brown v. Whipple* the memorandum is to be considered as signed by the defendant, and as designating him as purchaser, it failed to name or describe the plaintiff as a party to the contract, or to refer to any writings in which he was so named. In *Rafferty v. Lougee*, 63 N. H. 54, the memorandum of sale was not signed by any one, and it made no reference to any writings signed by the parties to the contract, or in which they were named or described. In *McDonald v. Fernald*, 68 N. H. 171, 38 Atl. 729, the memorandum was signed by the defendant, and the plaintiff, though not named, was held to be sufficiently described as one of the contracting parties by the clause, "all men such as are now at work for B. R. Condon, subcontractor." These decisions do not conflict with the result we have reached, and we know of no case in this state in which a contrary view has been entertained. The order, therefore, in each case is:

Exceptions sustained.

All concur.

NORTH CAROLINA SUPREME COURT.

B. C. BROWN and Wife
v.

ASHEVILLE ELECTRIC COMPANY *et al.*,
Appts.

(138 N. C. 534.)

1. Authority given to a municipal corporation to permit the erection of telegraph and electric-light wires and poles in the streets does not include power to violate private rights.
2. Municipal authority to place poles for the support of electric-light wires upon the sidewalk of a certain street does not relieve the one so doing from liability to

the owner of the fee for the value of trees removed to make room for the poles.

3. Punitive damages may be allowed for the cutting of trees upon the sidewalk for the accommodation of electric-light wires, in entire disregard of the rights of the abutting owner, and against his protest.

(May 26, 1905.)

APPEAL by defendants from a judgment of the Superior Court for Buncombe County in favor of plaintiffs in an action brought to recover damages for the alleged

NOTE.—For other cases in this series as to cutting of trees in highway to make room for electric wires, see *Bradley v. Southern New Eng. and Teleph. Co.* 32 L. R. A. 280; *Southern Bell Teleph. & Teleg. Co. v. Francis*, 31 L. R. A. 193; *Wyant v. Central Teleph. Co.* 47 L. R. A. 497; *Bronson v. Albion Teleph. Co.* 66 L. R. A.

60 L. R. A. 426; *Hazlehurst v. Mayes*, 64 L. R. A. 805.

As to right of street railway company to remove shade trees in the construction of its road, see *Miller v. Detroit, Y. & A. A. R. Co.* 51 L. R. A. 955.

wrongful destruction of trees belonging to them. *Affirmed.*

The facts are stated in the opinion.

Messrs. J. C. Martin and F. A. Sandley, for appellants:

The removal of the tree complained of in this action was, in truth, the act of the city of Asheville. The city had delegated the control of the streets and matters relating thereto to a street committee. It had the right to do this, and such a course was entirely lawful and regular.

Tate v. Greensboro, 114 N. C. 392, 24 L. R. A. 671, 19 S. E. 767.

The city could ratify such an act, even if it had not directed it in the first instance.

Wolfe v. Pearson, 114 N. C. 621, 19 S. E. 264.

The city had the right to remove shade trees in the street.

Tate v. Greensboro, 114 N. C. 392, 24 L. R. A. 671, 19 S. E. 767; *Chase v. Oshkosh*, 81 Wis. 313, 15 L. R. A. 553, 29 Am. St. Rep. 898, 51 N. W. 560; 2 Dill. Mun. Corp. § 688; 2 Bench, Pub. Corp. § 1234; 1 Beach, Pub. Corp. § 568; *Gaylord v. King*, 142 Mass. 495, 8 N. E. 596; *Brainard v. Clapp*, 10 Cush. 6, 57 Am. Dec. 74.

The action of the city in directing the removal of the trees, as well as its action in subsequently ratifying such removal, is not subject to review at the hands of the court.

Tate v. Greensboro, 114 N. C. 392, 24 L. R. A. 671, 19 S. E. 767; *Chase v. Oshkosh*, 81 Wis. 313, 15 L. R. A. 553, 29 Am. St. Rep. 898, 51 N. W. 560; 1 Lewis, Em. Dom. p. 319; 2 Beach, Pub. Corp. § 1234.

Land condemned for a street is so condemned for all purposes to which a street is properly put.

Elliott, Roads & Streets, 529, 530; 2 Dill. Mun. Corp. §§ 656b, 663, 688.

Electric poles are among these uses.

Smith v. Goldsboro, 121 N. C. 350, 28 S. E. 479; *Mordhurst v. Ft. Wayne & S. W. Traction Co.* (Ind.) 66 L. R. A. 105, 71 N. E. 642; *McCann v. Johnson County Teleph. Co.* 69 Kan. 210, 66 L. R. A. 171, 76 Pac. 870; *Eustis v. Milton Street R. Co.* 183 Mass. 586, 67 N. E. 663; *New England Teleph. & Teleg. Co. v. Boston Terminal Co.* 182 Mass. 397, 65 N. E. 835; *White v. Blanchard Bros. Granite Co.* 178 Mass. 363, 59 N. E. 1025; *Austin v. Detroit, Y. & A. R. Co.* 134 Mich. 149, 96 N. W. 35.

Such uses of a street do not constitute an additional servitude upon the land occupied thereby.

Smith v. Goldsboro, 121 N. C. 350, 28 S. E. 479; 1 Lewis, Em. Dom. §§ 160-162; *Raleigh & G. R. Co. v. Davis*, 19 N. C. (2 Dev. & B. L.) 451.

Trees in a street may be cut or removed

for the purpose of erecting electric poles and wires.

1 Lewis, Em. Dom. pp. 318, 320; *Miller v. Detroit, Y. & A. R. Co.* 125 Mich. 171, 51 L. R. A. 955, 84 Am. St. Rep. 569, 84 N. W. 49; *Wyant v. Central Teleph. Co.* 123 Mich. 51, 47 L. R. A. 497, 81 Am. St. Rep. 155, 81 N. W. 928; *Dodd v. Consolidated Traction Co.* 57 N. J. L. 482, 31 Atl. 980; *Southern Bell Teleph. Co. v. Francis*, 109 Ala. 224, 31 L. R. A. 193, 55 Am. St. Rep. 930, 19 So. 1; *Hazlehurst v. Mayes*, 84 Miss. 7, 64 L. R. A. 805, 36 So. 33; *Georgetown & L. Traction Co. v. Mulholland*, 25 Ky. L. Rep. 578, 76 S. W. 148.

For these purposes the sidewalk is a part of the street.

Tate v. Greensboro, 114 N. C. 392, 24 L. R. A. 671, 19 S. E. 767; *Chase v. Oshkosh*, 81 Wis. 313, 15 L. R. A. 553, 29 Am. St. Rep. 898, 51 N. W. 560; 2 Beach, Mun. Corp. § 1234; 2 Dill. Mun. Corp. §§ 614, 686.

The municipality has the right to confer upon a public-service corporation the privilege of using any portion of the condemned street, whether it has been used for any other street purpose or not.

Miller v. Detroit, Y. & A. R. Co. 125 Mich. 171, 51 L. R. A. 955, 84 Am. St. Rep. 569, 84 N. W. 49; *Dodd v. Consolidated Traction Co.* 57 N. J. L. 482, 31 Atl. 980; *Southern Bell Teleph. Co. v. Francis*, 109 Ala. 224, 31 L. R. A. 193, 55 Am. St. Rep. 930, 19 So. 1; *Georgetown & L. Traction Co. v. Mulholland*, 25 Ky. L. Rep. 578, 76 S. W. 148.

Messrs. Frank Carter and H. C. Chedester, for appellees:

The question as to whether the tree was in fact taken for public purposes, or for the private gain and advantage of defendants, was for the jury.

Stratford v. Greensboro, 124 N. C. 127, 32 S. E. 394; *Seattle & M. R. Co. v. State*, 7 Wash. 150, 22 L. R. A. 222, 38 Am. St. Rep. 866, 34 Pac. 551; *Cooley, Const. Lim.* 763, 764, 774, 775.

The abutting owner has a remedy in trespass for wrongful destruction of shade trees in the street.

Elliott, Roads & Streets, §§ 690, 708; Dill. Mun. Corp. §§ 656a, b, 663, p. 791, note.

The courts are authorized to interfere where there is an abuse of discretion by the municipal authorities in removing valuable shade trees without any reasonable necessity therefor.

Lewis, Em. Dom. § 132a; *Atlanta v. Holliday*, 96 Ga. 546, 23 S. E. 509.

Connor, J., delivered the opinion of the court:

For the purpose of disposing of the questions presented upon this record, we may

take certain propositions as settled: The land over which are the street and sidewalk upon which plaintiff resides was the property of the grantor of the plaintiff. By condemnation proceedings duly had, the city of Asheville acquired an easement over said land for the purpose of enabling it to open and maintain a public street and sidewalk for the use of the citizens of Asheville. That the fee to said land remained in the owner, and was granted to plaintiff, together with the lot, to the outer edge of the sidewalk. The tree, cut down by the defendants, stood upon the sidewalk, on the outer edge, and was not a nuisance to, or interference with the public use of, the sidewalk. That the city, by its charter and amendments thereto, had control of the street and sidewalk, with all of the powers in regard to the use thereof and of removing obstructions therefrom necessary and convenient to that end. That such powers included the right to cut down and remove this or any other tree on the street or sidewalk which, in the judgment of the city authorities, was a nuisance to, or an obstruction of, the public in the use of the street and sidewalk. That said tree afforded shade to the premises and residence of plaintiff, and its removal depreciated the value of plaintiff's property to the extent of \$499, as found by the jury. In view of His Honor's instruction to the jury, we must assume that the jury found, and we find ample reason to justify such finding, that the defendant electric light company, with the permission of the superintendent of streets of the city of Asheville, afterwards approved by the board of aldermen, removed the tree for the purpose of more conveniently erecting its poles and stringing its electric wires along the street. His Honor thus stated the contention on the part of the defendants: "The defendants contend that they had the right to cut down this tree on account of the fact that the land was condemned for a street, that they had the right to cut it down for any purpose, and especially that they had the right to cut it down for the purpose of allowing electric-light wires to pass there, which they say was for the benefit of the public. The court charges you that if that was the purpose, and the city allowed the corporations that ran the electric-light wires and the railroad company to do so more conveniently, then it would be your duty to answer the first issue, 'Yes.' The city would not have the right, as the court views the matter, to cut down that tree for the purpose of appropriating that part of the land for the use of the defendants unless the condemnation was for the purpose of the city, and they would not have the right to go there and cut down the tree 69 L. R. A.

unless they were going to use it for the purpose for which it was condemned." Before discussing the exceptions which challenge the correctness of this and other instructions involving the same principle, it is proper to say that, by an amendment to the charter of the city made subsequent to the condemnation of the land for a street and sidewalk, the city authorities were given power to permit the erection of telegraph, electric light, poles and wires, etc., on and over the public streets of said city. This power, of course, in no manner affects the rights of abutting owners. The legislature could not have intended, because it had no authority, to confer such power, to be exercised in violation of such private rights. It simply empowered the aldermen to grant the franchise over the streets of the city, subject, of course, to the rights of the citizen in respect to his private property. The legislature had no power itself to empower corporations to appropriate private property without compensation, and, of course, could not authorize the city to do so. *Chesapeake & P. Teleph. Co. v. Mackenzie*, 74 Md. 36, 28 Am. St. Rep. 219, 21 Atl. 690.

There are a large number of exceptions to His Honor's charge, both in respect to instructions given and refused. We do not deem it necessary to pass upon all of them, because, in our view of the case, assuming the facts to be as contended by defendants, we find no error in the record. Conceding to the city of Asheville the largest possible powers in respect to opening and controlling its public streets, they must all be construed and exercised within the well-defined limitation that they are held and to be used as a public trust for the benefit of the citizens of Asheville, and not for the convenience, or even the necessities, of private persons or corporations. In speaking of the exercise of this power, the New York court says: "But we think it cannot, under guise of exercising this power, appropriate a part of a street to the exclusive, or practically to the exclusive, use of a railroad company, so as to cut off abutting owners from the use of any part of the street, . . . without making compensation for the injury sustained." *Reining v. New York, L. & W. R. Co.* 128 N. Y. 168, 14 L. R. A. 133, 28 N. E. 640.

As the question is one of much practical importance to the people of the state, we will endeavor to mark the line which limits the power of municipal and quasi public corporations, or private corporations engaged in public service, in interfering with the rights of abutting owners upon streets and highways. This court has in *Tate v. Greensboro*, 114 N. C. 392, 24 L. R. A. 671, 19 S. E. 767, defined the power which the

duly constituted city authorities have in opening, widening, using, and controlling public streets. That this power, when exercised for the purpose and objects for which it is granted, and in good faith, is not subject to the supervision of the courts, is well decided in that case. We have no disposition to bring that decision, or anything said therein, into question. We adopt what is said by Mr. Justice Burwell as stating the principle upon which our decision is based: "It is not to be denied that the abutting proprietor has rights as an individual in the street in his front, as contradistinguished from his rights therein as a member of the corporation or one of the public. The trees standing in the street along the sidewalk are, in a restricted sense, his trees. If they are cut or injured by an individual who has no authority from the city to cut or remove them, he may recover damages of such individual. His property in them is such that the law will protect it from the act of such a wrongdoer and trespasser." Where it is said "who has no authority from the city," it is meant no lawful authority, because, as we shall see, the city has no power to confer authority except in the manner and for the purpose for which it may do the act itself. Many of the decisions discussing the right of abutting owners upon streets and highways make a distinction between owners holding the fee in the land, and those who have only such rights as accrue from their location on the side of the street. It is conceded that the fee to the land upon which the sidewalk is located and the abutting lot is in the plaintiff. We shall discuss the case from that view. The condemnation for a street and sidewalk therefore gave to the city an easement, the limit and extent of which, both in respect to the use and the time of its enjoyment are measured by the public necessity. "Where an easement [only] is taken for a public highway, the public acquire a paramount right to use and improve the land taken for highway purposes, which includes not only the right of passage, but such other incidental uses as have been immemorially accustomed to be made of public highways, such as the laying of sewers, gas and water pipes, and the like." 2 Lewis, Em. Dom. § 589; *Barney v. Keokuk*, 94 U. S. 324, 24 L. ed. 224. This court has uniformly held that the right acquired by condemnation is confined to the public necessity, and to the uses for which property is taken or burdened with the easement; that, for any additional burden placed upon the servient tenement, compensation must be made. *Story v. New York Elev. R. Co.* 90 N. Y. 122, 43 Am. Rep. 146; *White v. Northwestern North Carolina R. Co.* 113 N. C. 610, 22 L. R. A. 627, 37 Am. St. Rep. 69 L. R. A.

639, 18 S. E. 330; *Phillips v. Postal Teleg. Cable Co.* 130 N. C. 513, 89 Am. St. Rep. 868, 41 S. E. 1022; *Hodges v. Western U. Teleg. Co.* 133 N. C. 225, 45 S. E. 572. Such conflict as may be found in the decisions arises out of the application of the principle. It is uniformly held that an easement acquired for one purpose, either by grant, dedication, or condemnation, cannot be appropriated to another purpose. "It is certainly well settled that, where a grant is made or trust created for a specific and defined purpose, the subject of the grant or trust cannot be used for another and foreign purpose without the consent of the party from whom it was derived, or for whose benefit it was created. . . . We are not considering the right of the corporation to part with whatever interest it possessed under the dedication and trust, but the power of the corporation under the legislature to deprive the owner of a lot fronting on land so dedicated. . . . It cannot be successfully contended either that the dedication of land for a highway gives to the public an unlimited use, or that the legislature have the power to encroach upon the reserved rights of the owner by materially enlarging or changing the nature of the public easement." *New York Elev. R. Co.'s Case*, 90 N. Y. 122, 43 Am. Rep. 146.

In respect to an easement acquired by condemnation, the reason is obvious: In assessing compensation the commissioners are restricted to such damages as are incident to the specific use for which the condemnation is made. While the city authorities had ample power to confer upon the defendants a franchise to lay their tracks, erect their poles, and string their wires along the streets or sidewalks, if such franchise did not materially restrict or interfere with the public use for which it was held in trust, such power could not affect the right of abutting owners to demand compensation for any additional burden imposed upon their property. The fact that the defendant corporation was operating a public utility does not affect the question; the only difference being that, if the city conferred the privilege upon a private citizen or a corporation operating a private business, and its enjoyment interfered with the right of an abutting owner, no right to continue the use of the privilege could be acquired except by grant: whereas, if the person or corporation is conducting a business concerning the public,—one conferring the right of eminent domain,—the right to use the franchise or privilege may be acquired by condemnation, and paying the abutting owner compensation for the additional burden. The doctrine is well stated in *Reining v. New York, L. & W. R. Co.* 128 N. Y. 168, 14 L. R. A. 133, 28 N.

E. 640; "It is quite probable that the general interests of Buffalo and of the larger public are promoted by this appropriation of the street, but it by not means follows that a lot owner whose property is injured should bear the loss for the public benefit. . . .

The power conferred by the charter of Buffalo upon the common council to 'permit the track of a railroad to be laid in, along, or across any street or public ground,' . . . must be construed as subject to the qualification that no property rights of abutting owners are thereby invaded." In the same case Gray, J., concurring said: "Here the object was to subserve the railroad use, and the appropriation . . . of this embankment is practically exclusive. The street was subjected to a new use, with consequences as direct, in the permanent deprivation of the abutting property owners' appurtenant easement, as though the railroad was operated in front of his premises upon a structure physically incapable of other uses." In *Eels v. American Teleph. & Teleg. Co.* 143 N. Y. 133, 25 L. R. A. 640, 38 N. E. 202, Peckham, J., says: "We think neither the state nor its corporation can appropriate any portion of the public highway permanently to its own special, continuous, and exclusive use by setting up poles therein, although the purpose to which they are to be applied is to string wires thereon, and thus to transmit messages for all the public at a reasonable compensation. It may be at once admitted that the purpose is a public one, although for the private gain of a corporation, but the Constitution provides that private property shall not be taken for public use without compensation to the owner. Where land is dedicated or taken for a public highway, the question is, What are the uses implied in such dedication or taking? Primarily there can be no doubt that the use is for passage over the highway. The title to the fee of the highway generally remains in the adjoining owner, and he retains the ownership of the land, subject only to the public easement." To impose any different or additional burden without compensation cannot be done by the legislature, either directly, or by granting the power to a city. We cannot assume that it was intended to do so. Such intent is not to be gathered from the statute. *White v. Northwestern North Carolina R. Co.* 113 N. C. 610, 22 L. R. A. 627, 37 Am. St. Rep. 639, 18 S. E. 330. The question is exhaustively discussed in *Story v. New York Elev. R. Co.* 90 N. Y. 122, 43 Am. Rep. 146.

There is some conflict of judicial opinion in respect to what constitutes an additional burden. The supreme court of Maryland, in *Chesapeake & P. Teleph. Co. v. Mackenzie*, 69 L. R. A.

74 Md. 36, 47, 28 Am. St. Rep. 219, 21 Atl. 690, 693, says: "And so the condemnation of private property for a highway subjects the land so taken merely to an easement in favor of the public, and does not divest the owner of the fee. . . . Planting telephone or telegraph posts upon a public highway in the country is an appropriation of private property, and unlawful, unless the right to do so is acquired by contract or condemnation." After discussing the rights of the public in the street, the court proceeds to say: "Subject to these and other like rights of the municipality and the public to the use of a street for street purposes, the owner of the fee in the bed of the street possesses the same right to demand compensation for additional servitudes placed thereon that the owner of the bed of a highway in the country is entitled to. If, then, the fee in the bed of the street be in the appellee, the planting of the pole was an additional servitude imposed upon her land, for which she could claim compensation, and the act of assembly could not deprive her of it." In *Broome v. New York & N. J. Teleph. Co.* 42 N. J. Eq. 141, 7 Atl. 851, the chancellor says: "In order to justify the defendants in setting up the poles, it is necessary for them to show that they have acquired the right to do so, either by consent or condemnation, from the owner of the soil. The designation by the city or town authorities of the streets where the poles may be set up is not enough." The same view is held in *Board of Trade Teleph. Co. v. Barnett*, 107 Ill. 507, 47 Am. Rep. 453. That was an action of trespass, as the one before us. It appeared that, in addition to putting the poles upon the highway, in which plaintiff owned the fee, the employees of the company "cut away the hedge because it was in their way, and they also cut down two hedge trees." The court said: "The position taken by defendant is that the state can rightfully, as it has done, authorize the county board to permit defendant to construct its line of telegraph upon the highway without the consent of the abutting landowner; that it imposes no new or additional burden thereon, and that when the public acquire an easement over land, for a compensation fully made, the public obtain all the rights the landowner had, and the state may authorize any use of it not inconsistent with its use as a highway." After stating the contention of the landowner, the court says: "The latter position is the one best sustained by authority, and rests on sounder principles. . . . The principle is, neither the state nor a municipal corporation has any rightful authority, under the Constitution, to grant away the private property of the citizen; and if corporations

quasi public, in the exercise of the right of eminent domain with which they are clothed by the sovereign power of the state, seek to appropriate it so that they may have a benefit therefrom, every principle of justice demands that they should make just compensation, whether the property taken . . . is of little or great value. But, aside from all considerations of right and justice, the Constitution has so declared, and its mandate in that respect may not be disregarded." *Indianapolis, B. & W. R. Co. v. Hartley*, 67 Ill. 439, 16 Am. Rep. 624; *Willis v. Erie Teleg. & Teleph. Co.* 37 Minn. 347, 34 N. W. 337; *Stowers v. Postal Teleg. Cable Co.* 68 Miss. 559, 12 L. R. A. 864, 24 Am. St. Rep. 290, 9 So. 356; *Joyce, Electric Law*, § 321. That shade trees may not be removed, except when necessary for the use of the street by the public, is well settled. *Lewis, Em. Dom.* § 132. There are some authorities to the contrary, but we think the view taken by those cited the sound one.

We have no hesitation in holding that, assuming that the board of aldermen of the city of Asheville had met and formally granted to the defendants authority to remove the tree, finding that its removal was necessary to put up its poles and wires either for the electric light or street railway upon and along the sidewalk, such action would not have justified the act of defendants. It was not within the power of the city to deprive the plaintiff of his property for such purpose without compensation. We find, however, no averment or evidence that it was necessary to remove the tree. It is suggested that it was more convenient to place the poles and string the wires with the tree out of the way. This falls far short of the essential conditions upon which private property may be taken, or burdens imposed upon it. The right of eminent domain has been so freely conferred upon corporations, upon the mere suggestion that their business is in some way connected with service to the public, that we are in danger of forgetting that it is one of the most delicate and dangerous powers conferred by the people upon their government. Public franchises have been so generously and lavishly conferred and so freely used without compensation that those who wish to enjoy them forget that one of the chief ends for which government is created and taxes paid is the protection of private property, and then only with compensation. The record in this case shows that a valuable right of property, affecting the comfort, health, and welfare of the citizen and his family, has been taken, upon the suggestion of a private corporation to the superintendent of streets, without inquiry by the board of aldermen, notice to the plaintiff, or any op-

portunity to be heard in defense of his rights. No person shall be deprived of his property, except by the law of the land, or due process of law, which has been defined to mean the right to be heard before he or his property is condemned. This sacred right is binding upon every department of the government, and all of its agencies, including municipal and private corporations.

While it is held in *Tate v. Greensboro*, 114 N. C. 392, 24 L. R. A. 671, 19 S. E. 767, that the power to remove shade trees, where their removal is necessary for the use of the street as a public highway, may be conferred upon the street committee, it would be more in accordance with due and orderly procedure to do so only after due notice to the owner, and a hearing before the legislative body of the city. The tree was cut on March 21, 1901. This action was brought on July 5, 1901. On September 16, 1904, the board of aldermen adopted a resolution reciting that the action of three corporations named, "or one or more of them, in cutting down and removing the tree in front of the place then owned and occupied by B. C. Brown," etc., "some years ago, in putting a line of street railway and appurtenances upon said street in front of said property, or replacing thereon certain light wires, he and is hereby ratified and confirmed, said tree having been so cut and removed by direction of the proper authorities of the said city." It is evident that at the time of the passage of this resolution the board were not certain to what corporation the power was given to cut the tree, or for what purpose it was conferred. It is not suggested in the resolution that it was necessary to remove the tree, or that it interfered with the street railway or the light wires. Indeed, it is apparent that the board knew but little about the matter which they "ratified and confirmed."

We have discussed the case upon the assumption that the tree was on the sidewalk. The testimony shows that, while the condemnation took place in 1892, the land had never been used as a sidewalk. The plaintiff testified without contradiction that he had at the time the tree was cut lived at the place six years, and "there had never been any sidewalk there." The tree was removed in March, 1901, and the hole out of which it was taken, "about 10 feet square," was open at the time of the trial. The testimony further shows that the tree was cut by the superintendent of the defendant companies while Mr. Brown was away from home; that, when his wife phoned him, and he directed her to forbid the removal of the tree, the parties gave no heed to her request; and that in some way the wires connecting the phone were cut.

We are impressed with the wisdom of the words of Judge Peckham in concluding his opinion in *Eels v. American Teleph. & Teleg. Co.* 143 N. Y. 133, 25 L. R. A. 640, 38 N. E. 202. Referring to the argument that cases of this character should be decided with reference to the wants of an advancing civilization, which is doing so much to render life more comfortable and attractive, he says: "Let the defendant pay the owners for the value of the use it makes of the land outside and beyond the public easement in the highway, and the necessity of the broader decision is done away with. It has the power to take the land upon making compensation, and hence the refusal of an owner will not stop the proposed undertaking."

We have carefully examined the record and the exceptions to His Honor's rulings. We find no error of which the defendants

can complain. We are of the opinion that the allegations were sufficient to entitle the plaintiff to demand exemplary and punitive damages, and the testimony shows ample ground upon which to base the claim. In the entire transaction there was on the part of the defendants a painful disregard of the rights of the plaintiff. While extensive powers and wide discretion are given municipal authorities for the discharge of their duty to the public, it should always be borne in mind by those who serve in public positions that in our system of government there is no room or place for arbitrary power. The law which is a rule of action for the citizen is equally so for the official. Every man, when his right of person or property is invaded, has a right, and it is his duty, to demand "quo warranto."

The judgment must be affirmed.

PENNSYLVANIA SUPREME COURT.

YOUGHIOGHENY RIVER COAL COMPANY, *Appt.*,

v.

ALLEGHENY NATIONAL BANK *et al.*

(211 Pa. 319.)

The leaving of surface supports is not within a provision in a sale by the owner of coal in place of the vein, which is held subject to the duty of supporting the surface, by which he undertakes to indemnify the purchaser for any liability for any damage which may result to the surface "by reason of the skilful and careful mining and taking away of the coal," but the words refer solely to the manner of working the vein.

(*Brown and Dean, JJ., dissent.*)

(April 10, 1905.)

A PPEAL by plaintiff from a judgment of the Court of Common Pleas, No. 2, for Allegheny County in favor of defendants in an action brought to enforce a contract of indemnity. *Reversed.*

The facts are stated in the opinion.

Mr. John O. Petty, for appellant:

The words "skilful and careful mining" refer only to the manner of working the coal.

The general rule for the reading of the words of a contract is that they are to be taken in their ordinary and primary sense.

Jones, *Construction of Contracts*, § 16; *Merriam v. United States*, 107 U. S. 437,

NOTE.—As to liability for damages to surface owner from the removal of the support of his land by mining operations, see, in this series, *Noonan v. Pardee*, 55 L. R. A. 410.

27 L. ed. 531, 2 Sup. Ct. Rep. 536; *Buchanan v. Andrew*, L. R. 2 H. L. Sc. App. Cas. 296.

The object of the bond was to indemnify plaintiff against liability for damages, and it should be interpreted so as to give that indemnity, unless the words prevent such construction.

Jones, *Construction of Contracts*, pp. 355, 359.

To enable the court to say that the words "skilful and careful mining," which have a definite, certain meaning of their own, contemplate surface support, it must have evidence of usage giving them such meaning.

Lewis v. Fothergill, L. R. 5 Ch. 103; *Buchanan v. Andrew*, L. R. 2 H. L. Sc. App. Cas. 296.

In construing grants or reservations of lands and minerals, the fact that the surface owner is entitled to support for his lands in their natural state is a controlling circumstance.

Coleman v. Chadwick, 80 Pa. 81, 21 Am. Rep. 93; *Jones v. Wagner*, 66 Pa. 429, 5 Am. Rep. 385; *Pringle v. Vesta Coal Co.* 172 Pa. 441, 33 Atl. 690; *Humphries v. Brogden*, 1 Eng. L. & Eq. 241; *Hill v. Pardee*, 143 Pa. 101, 22 Atl. 815; *Carlin v. Chappel*, 101 Pa. 351, 47 Am. Rep. 722; *Matulys v. Philadelphia & R. Coal & I. Co.* 201 Pa. 70, 50 Atl. 823.

Messrs. John D. Brown and Shiras & Dickey for appellees.

Mestrezat, J., delivered the opinion of the court:

The defendants were the owners of cer-

tain coal lands in Westmoreland county, conveyed to their predecessor in title in 1862, by the following grant: "All the main working vein of coal underlying the farm on which party of the first part resides, situate in Sewickley township, Westmoreland county, Pennsylvania; etc. . . . With the right to take and carry away said coal, with the privilege to air and drain his openings while taking out, and for any other purpose that he, or his assigns, may need said openings for." After the conveyance of the coal, the owner of the land, by deed dated March 24, 1871, conveyed the tract to one R. G. Greenawalt, with the following reservation: "The said parties of the first part reserve all of the now worked 6-foot vein of stone coal, also the right and privilege for themselves, their heirs, and assigns, of digging, mining, and carrying away said stone coal." In 1892 the defendants sold and conveyed said coal to the Youghiogheny River Coal Company, the plaintiff, and gave to the company an obligation, dated February 29, 1892, conditioned, *inter alia*, that they would "well and truly protect and indemnify said Youghiogheny River Coal Company from any liability for any damage which may result to the surface of the tracts of lands overlying the coal land purchased by said coal company from said obligors and others, or to improvements thereon, by reason of the skilful and careful mining and taking away of the said coal." Soon after the purchase of the coal land, the Youghiogheny River Coal Company took possession of it and began mining operations. Subsequently R. G. Greenawalt, the owner of the tract of land, except the coal conveyed to the coal company, brought an action against the coal company for damages, alleging that it had so carelessly, negligently, and unskilfully conducted its mining operations as to cause the surface of his land to break and subside, resulting in injury to the land, the clay, and upper coal vein therein, and improvements thereon. The case was tried, and resulted in a verdict and judgment in favor of Greenawalt. Thereupon the present action was brought by the Youghiogheny River Coal Company on the obligation of the defendants, referred to above, to recover the damages and expenses which the coal company was compelled to pay by reason of the suit brought against it by Greenawalt. The statement avers that the "Youghiogheny River Coal Company entered into possession of the same [coal], and proceeded in a careful and skilful manner, according to the usual and customary methods of mining practised in the bituminous coal district, to mine and

remove said coal in the manner contemplated by said agreement, which mining and removal caused a subsidence of certain surface lands, owned by one Richard Greenawalt, overlying a part of the same, and by reason of such subsidence certain springs on the surface land of said Greenawalt were injured, an upper vein of coal damaged, and certain buildings thereon cracked;" that the verdict against it in favor of Greenawalt was "recovered upon the allegation and proof that the Youghiogheny River Coal Company had not supported the surface lands of the said Greenawalt in its mining operations." The defendants demurred to the statement, on the grounds that the declaration admits the lack of due care and skill in the mining performed by plaintiff, and that "the admission in said declaration that there had been a recovery against the plaintiff for failing to afford support to the overlying surface is an admission that the plaintiff in this action had not used all ordinary precautions in giving proper support to said surface." The court below sustained the demurrer, and the plaintiff has appealed.

In support of its appeal, the plaintiff company contends that the words "skilful and careful mining and taking away of the said coal," in the obligation or agreement on which this suit was brought, refer to the method and manner of working the coal, and that failure to leave sufficient coal in place to support the overlying surface is not unskilful and careless mining. The defendants' position is that "skilful and careful mining and taking away of the said coal," as used in the obligation of the defendants, is referable to the support of the surface, and that "the proper support of the surface is a part of the skilful and careful mining and taking away of said coal." It is therefore claimed by the defendants that the averment in the statement that the plaintiff company had failed to support the surface is an admission of lack of care and skill in mining and removing the coal under the Greenawalt surface.

There may be a horizontal division of land resulting in the ownership of the surface by one person and the ownership of the subjacent vein or seam of coal by another person. When there has been a severance of ownership of the surface and the coal, the owners of the respective estates hold them as estates in land, and, of course, the title and rights of each depend upon his conveyance. If the owner of the whole fee conveys the coal in the land in general terms, as in this case, retaining the residue of the tract, the purchaser acquires the coal with the right to mine and remove it, provided he does so without injury to the

superincumbent estate. His estate in the coal, like that of the owner of the surface, is governed by the maxim, *Sic utere tuo ut alienum non ladas*. The owner of the surface is entitled to absolute support of his land, not as an easement or right depending on a supposed grant, but as a proprietary right at common law. *Carlin v. Chappel*, 101 Pa. 348, 47 Am. Rep. 722; 2 Snyder, Mines, § 1020. Support for the superincumbent estate is of natural right, and is part of the estate reserved to the owner of the surface. *Coleman v. Chadwick*, 80 Pa. 81, 21 Am. Rep. 93. And this right which the servient estate owes to the dominant estate does not depend upon whether the mining operations are conducted skilfully or negligently and carelessly. *Pringle v. Vesta Coal Co.* 172 Pa. 438, 33 Atl. 690; *Noonan v. Pardee*, 200 Pa. 474, 55 L. R. A. 410, 86 Am. St. Rep. 722, 50 Atl. 255. In the *Pringle Case* it is said: "If the owner of the coal undertakes to mine and remove it,—as he has an undoubted right to do,—and damage results to the surface, either (a) from negligence in conducting his mining operations, or (b) from failure to properly and sufficiently support the surface, or (c) from both these causes combined, the surface owner is entitled to recover compensation for such injury as he may show he has sustained." And this is the law of England, whose decisions we have followed in holding the surface owner entitled to absolute support for his estate. *Harris v. Ryding*, 5 Mees. & W. 60; *Humphries v. Brogden*, 1 Eng. L. & Eq. 241. In this last case, Lord Campbell, Ch. J., delivering the opinion of the Queen's bench, remarks: "It seems to have been the unanimous opinion of the court [in *Harris v. Ryding*] that there existed the natural easement of support for the upper soil from the soil beneath, and that the entire removal of the inferior strata, however skilfully done, would be actionable if productive of damage by withdrawing that degree of support to which the owner of the surface was entitled; the duty of the owner of the servient tenement forbidding him to do any act whereby the enjoyment of the easement could be disturbed." Under the titles of the respective parties, it is clear that Greenawalt was entitled to absolute support for surface overlying the plaintiff's coal, and that, if the company deprived him of it in mining the coal, it was liable for the consequent injury to him, regardless of whether the mining operations were conducted skilfully or negligently and carelessly. His right to actual support for the surface of his land was a natural and property right, and did not depend upon the manner in which the subjacent coal was removed.

69 L. R. A.

The defendants being required "to leave every pound of coal untouched under the land" if necessary to support the surface (*Noonan v. Pardee*, 200 Pa. 474, 55 L. R. A. 410, 86 Am. St. Rep. 722, 50 Atl. 255), what was the purpose and intention of the parties in giving and receiving the obligation in question? We must assume—what the experience of everybody teaches—that the parties were prompted by the motive of self-interest in this transaction. The price which the defendants would demand and the plaintiff would agree to pay would necessarily depend upon the amount of coal which could be mined and removed from the land. When, therefore, the defendants agreed to sell and convey the coal, the basis upon which they fixed the selling price was the quantum of workable coal. This, in turn, would depend upon the depth of the coal under the surface, and the character of the strata of stone and earth overlying it. It was under these circumstances that the defendants executed and delivered to the plaintiff the obligation in question at or about the time of the delivery of the deeds. The defendants, believing and relying upon the sufficiency of the superincumbent strata to afford absolute support to the surface, were willing to assume responsibility for the breakage of the surface in mining and removing all the coal. This made certain the amount of coal accessible for mining and necessarily greatly enhanced the value of the tract to the purchaser. By their deeds the defendants conveyed to the plaintiff company the coal but, under the servitude imposed on their title by the laws of the state, the purchaser was restricted as to the quantity he could mine and remove to an uncertain amount, or possibly, to no part of the entire body of the mineral. To remove this uncertainty and contingency, and to secure to the purchaser "all the main working vein of coal underlying the farm," the defendants executed and delivered the obligation in question, and thereby obligated themselves to protect and indemnify the plaintiff company "from any liability for any damage which may result to the surface of the tracts of land overlying the coal land purchased by the said coal company from said obligors and others, or to improvements thereon, by reason of the skilful and careful mining and taking away of the said coal." The purpose and effect of this obligation is therefore most obvious and manifest. The title of the coal company, acquired by its deeds, gave it the entire body of coal, subject, however, to the absolute support of the surface, or, in the language of the obligation in question, to "any liability for any damage which may result to the surface of the tracts of land overlying the

coal land" caused by mining and removing the coal. This obligation indemnifies the coal company against this liability, provided it exercises skill and care in mining and taking away the coal. Observing this single provision of the obligation, the defendants' protection permitted the coal company to remove all the coal without leaving any supports for the surface. It necessarily follows that the skill and care required to be exercised by the plaintiff in operating the coal referred to the manner of working the vein conveyed to the plaintiff company. Any other construction would produce an absurdity, and render the obligation nugatory and impotent to carry out the manifest purpose for which it was executed and delivered. The only protection the coal company needed to enable it to mine all the coal was indemnity against injury resulting to the surface in removing the coal required for supports. If, therefore, skilful and careful mining" in the defendants' obligation requires the coal company to leave in place coal sufficient to support the surface, the instrument affords the company no protection whatever against the only liability it could incur, which is to the surface owner, by removing the supports and thereby breaking the surface. If, on the other hand, we give these words their usual and primary signification, keeping in view the manifest purpose to be attained, the defendants' obligation will supplement their deeds, and place in the grantee the entire body of coal, freed and discharged from the only obstacle or impediment in mining and removing it, which is the duty of absolute support owed to the surface owner. If we omit from the condition of the obligation the words "skilful and careful," it will then require the defendants to "protect and indemnify said Youghiogheny River Coal Company from any liability for any damage which may result to the surface of the tracts of land overlying the coal land purchased by said coal company from said obligors and others, or to improvements thereon, by reason of the . . . mining and taking away of the said coal." Such an obligation would unquestionably protect the obligee from liability in removing all the coal. That is manifest, and must be conceded. If we insert the omitted words in the condition, how does it affect the obligors' liability? This, we think, is apparent. It does not prevent the obligee company from removing all the coal, but simply imposes upon it the duty of care and skill in the mining operations. By virtue of its deeds from the defendants, all the coal belongs to the plaintiff company, as is conceded, and this obligation indemnifies the company as against the surface owner in removing all

of it. If, however, by the careless use of explosives, or the negligent or unskilful use of any other means in mining the coal, the company's employees, regardless of the quantity of coal they may remove or leave in place, should break the surface, the defendants' obligation will afford the obligee no protection, and the company would be compelled to stand the loss. Hence it is manifest that the words "skilful and careful" in the obligation refer to the manner or method of working the stratum or vein of coal, and not to the quantum of coal which the owner may remove or leave in place to support the surface.

Our own cases, and also the English decisions, recognize a distinction between a failure to support the surface and negligence in conducting the mining operations. In *Horner v. Watson*, 79 Pa. 242, 21 Am. Rep. 55, an action for not supporting the surface, whereby the plaintiff's mines adjoining those of the defendants were flooded, the ruling of the trial court was affirmed by this court in refusing to charge that the defendants were not liable if the jury found the injuries were not occasioned by any wanton or wilful acts and that the defendants had conducted their mining operations according to the approved, established, and customary course and practice of mining in the region, and without any negligence in the operation of mining. In *Carlin v. Chappel*, 101 Pa. 348, 47 Am. Rep. 722, the late Chief Justice Green, delivering the opinion, referred to this ruling in the *Horner Case*, and recognized the same distinction, by saying that it was there held that "the defendants would be responsible . . . without any reference to actual negligence or want of skill in the miners." He also says that "it will here be seen [referring to a quotation from a text-book] that the right of the surface owner is declared to be a right to absolute support, and that when such a right exists it is of no consequence with what degree of skill and prudence the mine owner conducts his operations." And in *Pringle v. Vesta Coal Co.* 172 Pa. 438, 33 Atl. 690, this court recognizes the distinction, and says that the owner of the coal is responsible for failing to support the surface, whether the injury results "from negligence in conducting his mining operations, or from failure to properly and sufficiently support the surface." The English cases cited above also recognize the distinction between negligent and careless mining operations and failure to leave sufficient coal in place to support the overlying surface. The declaration in those cases laid the cause of action as having been "wrongfully, carelessly, negligently, and improperly, and

without leaving any proper or sufficient pillars or supports in that behalf." Lord Campbell in *Humphries v. Brogden*, in commenting on *Harris v. Ryding*, says, in addition to the excerpt from his opinion quoted above: "The Barons, in the very comprehensive and masterly judgments which they delivered seriatim, seem all to have thought that the reservation of the minerals would not have justified the defendant in depriving the surface of a complete support, however carefully he might have proceeded in removing them."

We are of opinion that the words "skilful and careful mining," used in the defendants' obligation of February 29, 1892, relate to the manner of working the coal, and do not impose upon the plaintiff company, in operating the coal, the duty of leaving proper and sufficient supports for the surface. If, therefore, the plaintiff exercise care and skill in its mining operations, it may mine and remove all the coal, and the defendants must indemnify the company against any damage resulting from injury to the surface which it may be compelled to pay the surface owner.

In explanation of the apparent delay in handing down this opinion, the writer may be permitted to say that the case has been but recently assigned to him.

The assignments of error are sustained, and the judgment is reversed with a *procedendo*.

Brown, J., dissenting:

The judgment below in favor of the defendants was on their demurrer to the plaintiff's statement. When it was negotiating with the appellees and two others, now deceased, for the purchase of certain coal lands, the ownership of the surface was in third parties, and it "declined to purchase unless it, the said Youghiogheny River Coal Company, was properly protected and indemnified from any liability for damage which might result to the surface lands overlying said tract of coal, or to the improvements thereon, in the skilful and careful mining and taking away of said coal without surface support." Immediately following this averment is one that the appellees, "to induce the said Youghiogheny River Coal Company to purchase said coal lands, stipulated with it that they would make and execute an agreement in writing to well and truly protect and indemnify it, the said Youghiogheny River Coal Company, from any liability or damage which might result to the surface land overlying the said tract of coal, or to the improvements thereon, by reason of the skilful and careful mining and taking away of said coal." The agreement in writing sub-

sequently given by the vendors was that they would "well and truly protect and indemnify said Youghiogheny River Coal Company from any liability for any damage which may result to the surface of the tracts of land overlying the coal land purchased by said coal company from said obligors and others, or to improvements thereon, by reason of the skilful and careful mining and taking away of the said coal." It will at once be observed that, though the averment of the appellant is that it had insisted upon indemnity against liability for damage done to the surface in not giving the same support, the admission is that the indemnity given and received by it was from liability for damages to the surface owner simply from the skilful and careful mining and taking away of coal. There is no agreement to indemnify it if the surface should subside in consequence of the vendee's failure to furnish sufficient support. Though such an indemnity had been asked for, it was not given, and it is not reasonable to suppose it would have been given by the appellees if the appellant had persisted in making it a condition of the sale. In the suit brought against it by R. G. Greenawalt, the surface owner, there was a recovery against the appellant, and the averment of its cause of action against the appellees is that he had recovered upon his allegation and proof that it had not supported his surface lands in its mining operations. For what he recovered from it, it now seeks to recover from the appellees on what it terms the indemnity agreement.

The situation to my mind is entirely free from difficulty. Though appellant's averment is that it had mined "in a careful and skilful manner," its distinct admission is that the injuries sustained by Greenawalt were due entirely to its failure to support his surface. If, as the surface or upper owner, he had sustained injury in connection with what may have been the appellant's careful and skilful mining,—if, by way of illustration, an upper vein of coal belonging to him had been damaged in such mining,—the right of the appellant to recover from the appellees what it had been compelled to pay him could not be questioned; but when the injuries sustained were due solely to its failure to observe the absolute duty owed by it to the surface owner, and from the consequences of a disregard of which it had not been indemnified by the appellees, though they had been asked for such indemnity, it is equally clear that there is no liability from them to it. Its skilful mining is not involved in its claim as set forth in the statement of its cause of action. The owner of a mineral estate, in the absence of any agreement to the con-

trary between him and the upper owner, owes a servitude to the superincumbent estate of sufficient support, and a failure to sufficiently support that estate is negligence. *Jones v. Wagner*, 66 Pa. 429, 5 Am. Rep. 385. The duty of furnishing sufficient support is an absolute one, and the rule enforcing it is not only rigid, but has long been well known through many of our cases, one of the latest being *Noonan v. Pardee*, 200 Pa. 474, 55 L. R. A. 410, 86 Am. St. Rep. 722, 50 Atl. 255, in which our Brother Dean not only clearly, but forcefully, says: "Where there has been a horizontal division of the land, the owner of the subjacent estate, coal or other mineral, owes to the superincumbent owner a right of support. This is an absolute right arising out of the ownership of the surface. Good or bad mining in no way affects the responsibility; what the surface owner has a right to demand is sufficient support, even if, to that end, it be necessary to leave every pound of coal untouched under his land. *Berwind v. Barnes*, 13 W. N. C. 541; also the English case, *Harris v. Ryding*, 5 Mees. & W. 60, in which Baron Parke uses this language: 'I

do not mean to say that all the coal does not belong to the defendants, but they cannot get it without leaving sufficient support.' We have followed rigidly this rule, as thus tersely suggested, in all our decisions on the subject, and they have been many. Of course, defendant had a right to all the coal under this lot, but he had no right to take any of it if thereby necessarily the surface caved in. The measure of his enjoyment of his right must be determined by the measure of his absolute duty to the owner of the surface. So there is nothing gained by adducing evidence of good or bad mining, or by a discussion of that subject."

Sufficient support was not given to Greenawalt by the appellant, and, as the terms of the agreement to indemnify do not extend to its admitted negligence, no right of action to recover from the appellees is disclosed in its statement, and the judgment on the demurrer ought to be affirmed. I am utterly at a loss to understand how any other conclusion can follow an examination of the pleadings.

Dean, J., joins in this dissent.

NEBRASKA SUPREME COURT.

Michael Francis CLANCY, *Plff. in Err.*,
v.

George E. BARKER *et al.*

(.....Neb.....)

*1. In receiving a guest into his hotel, a hotel keeper impliedly undertakes that such guest shall be treated with due consideration for his comfort and safety.

*Headnotes by ALBERT, C.

NOTE.—*Liability of innkeeper for injury to guest by servant.*

The cases which have considered the liability of an innkeeper for an injury by his servant to a guest are very few. Though there are many loose statements in the books that the liability of an innkeeper for the safety and comfort of his guests is the same as that of a carrier, no court which has had the question before it for decision has extended the liability thus far, except in the Nebraska case of *CLANCY v. BARKER*, holding an innkeeper liable for an injury to a guest by the servant whether the latter was actively engaged in the discharge of his duties or not, such injury being held a breach of the innkeeper's implied contract that the guest shall be treated with due consideration for his safety and comfort. In a case brought in the Federal court to recover for this same injury this holding is disapproved of, and it is held that the limit of the liability of an innkeeper is the exercise of reasonable care for the safety, comfort, and entertainment of his guests. And this the court states 69 L. R. A.

2. A trespass committed upon the guest in the hotel by a servant of the proprietor, whether actively engaged in the discharge of his duties at the time or not, is a breach of such implied undertaking, for which the proprietor is liable in damages.

3. It is not within the scope of the authority of a hired manager of a hotel to bind his employer by admissions concerning such trespass after it had been committed.

4. When such admissions are made a day after the trespass, and only remote-

was the general rule of law governing the liability of innkeepers before the decision in the Nebraska case, which had received the approval of every court which had ever decided the question.

Before the decision of the Nebraska case it had been held, however, that an innkeeper must respond in damages for the malicious act of his servant in wantonly and ruthlessly assaulting a guest. *Overstreet v. Moser*, 88 Mo. App. 72. And there is nothing in the opinion to show that the court intended to limit this liability to an assault committed by the servant while engaged in the execution of his duty toward the master, though it was alleged in the argument of counsel that the servant was acting within the line of his duties, and that he was to use his judgment as to when it was necessary to expel people from the hotel, and what force should be used. In the statement it is also said that the evidence showed that the servant was a burly, strong man with a violent temper, and that this fact was known to the master, and one of the instructions in the lower court was to the effect that the jury must find

ly connected therewith, they are not admissible in evidence as a part of the *res gesta*.

On Rehearing.

†5. The relation of master and servant does not render the master liable for the torts of the servant, unless connected with his duties as such servant or within the scope of his employment.

6. It is the duty of a hotel keeper to protect his guests while in his hotel against the assaults of employees who assist in the conduct of the hotel and in the care and accommodation of the guests. If damages result from such assault, the hotel keeper is liable therefor.

(*Barnes, J., dissents.*)

(February 4, 1904.)

ERROR to the District Court for Douglas County to review a judgment in favor of defendants in an action brought to recover damages for injuries to plaintiff's son for which defendants were alleged to be responsible. *Reversed except as to defendant Barker.*

The facts are stated in the opinion.

†Rehearing headnotes by SEDGWICK, J.

for the plaintiff if they believed that he went to the hotel as a guest, and that the servant, while acting as the agent or employee of the innkeeper, and in the execution of the duties which he had been employed to perform, made the assault upon the plaintiff. Taking all the facts into consideration, it may be that the court intended to limit its decision to cases where the wrongful act was committed while the servant was engaged in the performance of his duties; but the language of the opinion is broad enough to cover cases where an innkeeper is attempted to be held liable for acts of his servants outside the scope of their duties.

In *Rommel v. Schambacher*, 120 Pa. 579, 6 Am. St. Rep. 732, 11 Atl. 779, there is a *dictum* that where one enters a saloon or tavern open for the entertainment of the public the proprietor is bound to see that he is properly protected from the assaults or insults, as well of those who are in his employ, as of the drunken and malicious men whom he may choose to harbor. The declaration in this case charged a liability of the defendant as a tavern keeper to the plaintiff as his guest, but the wrongful act was committed not by a servant, but by another guest, and the facts of the case are such as to render it of no value on the question which is the subject of this note.

In *Dickson v. Waldron*, 135 Ind. 507, 24 L. R. A. 483, 41 Am. St. Rep. 440, 34 N. E. 506, 35 N. E. 1, it is also said, *obiter*, that common carriers, innkeepers, and others who invite the public to become their patrons and guests, owe a special duty to those who may accept such invitations; and that such patrons and guests have a right to ask that they shall be protected from injury while present on such invitation, and particularly that they shall not suffer wrong from the agents and servants of those who have invited them.

In *Wade v. Thayer*, 40 Cal. 578, it is held that an innkeeper is liable for the actual damage suffered by a guest through an assault com-

mitted upon him by servants in the performance of their duties as servants, even though the master was not present and in no manner consented to, or aided in, the assault; but that he is not liable for their wanton and malicious acts committed without his consent or approval.

So, an innkeeper is not responsible for a malicious assault upon a guest while seated at the dining table, by a dining-room waiter, where the master was not negligent either in employing or retaining the waiter in his service. *Rahmel v. Lehnndorff*, 142 Cal. 681, 65 L. R. A. 88, 100 Am. St. Rep. 154, 78 Pac. 659. It is said in this case that an innkeeper is no doubt guilty of negligence if he admits to his hotel, or permits to remain there, whether as guest or servant, a person of known violent and disorderly propensities, who will probably assault or otherwise maltreat his guest, and that for the consequence of such negligence he may be liable in damages; but that the plain ground of his liability in such case would be his negligence in harboring persons dangerous to the peace and comfort of those persons for whose comfort he is bound to provide.

And an innkeeper is not liable to a guest for an assault committed upon him by a servant, which is the result of a personal altercation or quarrel between the servant and the guest, and is not done in carrying out the master's business, nor by his consent, and is not ratified by him after its occurrence. *Curtis v. Dinneen*, 4 Dak. 245, 30 N. W. 148.

In *Calye's Case*, 8 Coke, 32a, 33b, it is said that if a guest be beaten in the inn, the innkeeper shall not answer for it; and this statement has been frequently cited as authority for holding that an innkeeper is not liable for an assault committed upon a guest by a servant. But the statement is a mere *dictum*, the case not involving the question of liability for personal injury to a guest at all.

F. H. L.

Mr. John O. Yelzer, for plaintiff in error:

Innkeepers, common carriers, and similar institutions are governed by the same principles of law.

Craker v. Chicago & N. W. R. Co. 36 Wis. 671, 17 Am. Rep. 504; *Bass v. Chicago & N. W. R. Co.* 36 Wis. 459, 17 Am. Rep. 495; *Mastad v. Swedish Brethren*, 83 Minn. 42, 53 L. R. A. 803, 85 Am. St. Rep. 446, 85 N. W. 913; *Dickson v. Waldron*, 135 Ind. 507, 24 L. R. A. 483, 41 Am. St. Rep. 440, 34 N. E. 510, 35 N. E. 1; *Norcross v. Norcross*, 53 Me. 169; *Pinkerton v. Woodward*, 33 Cal. 585, 91 Am. Dec. 657; *Com. v. Power*, 7 Met. 601, 41 Am. Dec. 465; *Russell v. Fagan*, 7 Houst. (Del.) 396, 8 Atl. 258; *Hulett v. Swift*, 42 Barb. 254; *Pullman Palace Car Co. v. Lowe*, 28 Neb. 239, 6 L. R. A. 809, 26 Am. St. Rep. 325, 44 N. W. 226.

Common carriers, innkeepers, and such public hosts are liable to their guests for misconduct of their servants, resulting in personal injury or abuse of such persons, who are entitled to special care and attention.

Russell v. Fagan, 7 Houst. (Del.) 392, 8 Atl. 258; *Mason v. Thompson*, 9 Pick. 283, 20 Am. Dec. 471; *Pinkerton v. Woodward*, 33 Cal. 557, 91 Am. Dec. 657; *St. Louis, A. & C. R. Co. v. Dalby*, 19 Ill. 367.

The identical reasons exist for holding a hotel keeper liable for such conduct which are assigned for holding common carriers and other public servants liable to the same extent. Innkeepers, like the other various hosts are under a common-law contract of hospitality. This contract guarantees that the innkeeper will do all in his power to prevent any harm, injury, or insult from befalling his guests from any fellow guest or stranger, and absolutely guarantees that he and his servants will not themselves mistreat them.

It would be ridiculous to say that the innkeeper would be liable if his servants saw a guest being mistreated and injured in the inn, and did not prevent it, being able to do so, and yet to say that the servants charged with this duty on behalf of the innkeeper could themselves do what they could not suffer a third person to do.

Common carriers are under this liability.

Duinelle v. New York C. & H. R. R. Co. 120 N. Y. 122, 8 L. R. A. 224, 17 Am. St. Rep. 611, 24 N. E. 319; *Pittsburgh, Ft. W. & C. R. Co. v. Hinds*, 53 Pa. 515, 91 Am. Dec. 224; *Goddard v. Grand Trunk R. Co.* 57 Me. 214, 2 Am. Rep. 39; *Jeffersonville R. Co. v. Rogers*, 38 Ind. 126, 10 Am. Rep. 103; *Chamberlain v. Chandler*, 3 Mason, 245, Fed. Cas. No. 2,575; *Pendleton v. Kinsley*, 3 Cliff. 417, Fed. Cas. No. 10,922; *Bryant v. Rich*, 106 Mass. 188, 8 Am. Rep. 311; *Chicago & E. R. Co. v. Flezman*, 103 Ill. 548, 42 Am. Rep. 33; *Fick v. Chicago & N. W. R. Co.* 68 Wis. 471, 60 Am. Rep. 878, 32 N. W. 527; *Milwaukee & M. R. Co. v. Finney*, 10 Wis. 388; *Weed v. Panama R. Co.* 17 N. Y. 364, 72 Am. Dec. 474; *Terre Haute & I. R. Co. v. Jackson*, 81 Ind. 21; *Spohn v. Missouri P. R. Co.* 87 Mo. 74; *Nieto v. Clark*, 1 Cliff. 145, Fed. Cas. No. 10,282; *Stewart v. Brooklyn & C. T. R. Co.* 90 N. Y. 592, 43 Am. Rep. 185; *St. Louis, A. & C. R. Co. v. Dalby*, 19 Ill. 370; *Mallach v. Ridley*, 24 Abb. N. C. 182, 9 N. Y. Supp. 922.

Also sleeping car companies.

Pullman Palace Car Co. v. Lowe, 28 Neb. 239, 6 L. R. A. 809, 26 Am. St. Rep. 325, 44 N. W. 226; *Campbell v. Pullman Palace Car Co.* 42 Fed. 485; *Williams v. Pullman Palace Car Co.* 40 La. Ann. 421, 8 Am. St. Rep. 538, 4 So. 85; *Heenrich v. Pullman Palace Car Co.* 20 Fed. 104; *Nevin v. Pullman Palace Car Co.* 106 Ill. 230, 46 Am. Rep. 688.

Also proprietors of theaters and shows.

Dickson v. Waldron, 135 Ind. 507, 24 L. 69 L. R. A.

R. A. 483, 41 Am. St. Rep. 440, 34 N. E. 510, 35 N. E. 1.

Also proprietors of saloons as taverns or inns.

Rommel v. Schambacher, 120 Pa. 579, 6 Am. St. Rep. 732, 11 Atl. 779; *Mastad v. Swedish Brethren*, 83 Minn. 42, 53 L. R. A. 803, 85 Am. St. Rep. 446, 85 N. W. 913.

Also proprietors of stores, express companies, and such public places.

Swinerton v. LeBoutillier, 7 Misc. 640, 28 N. Y. Supp. 53; *Mallach v. Ricley*, 24 Abb. N. C. 181, 9 N. Y. Supp. 922; *Richberger v. American Exp. Co.* 73 Miss. 170, 31 L. R. A. 390, 55 Am. St. Rep. 522, 18 So. 922; *Missouri P. R. Co. v. Divinney* (Kan.) 69 Pac. 352.

Also innkeepers.

Overstreet v. Moser, 88 Mo. App. 72; *Tousey v. Roberts*, 21 Jones & S. 446; *Wade v. Thayer*, 40 Cal. 578; *Gilbert v. Hoffman*, 66 Iowa, 206, 55 Am. Rep. 263, 23 N. W. 632; *Weeks v. McNulty*, 101 Tenn. 499, 43 L. R. A. 185, 70 Am. St. Rep. 693, 48 S. W. 809.

Even under the principle of master and servant, defendants are liable for the injuries of which complaint is made.

Evans v. Davidson, 53 Md. 248, 36 Am. Rep. 400; *Ellegard v. Ackland*, 43 Minn. 352, 45 N. W. 715; *Gilmartin v. New York*, 55 Barb. 245; *Baxter v. Chicago, R. I. & P. R. Co.* 87 Iowa, 495, 54 N. W. 350; *Heenrich v. Pullman Palace Car Co.* 20 Fed. 100, *Dickson v. Waldron*, 135 Ind. 507, 24 L. R. A. 483, 41 Am. St. Rep. 440, 34 N. E. 510, 35 N. E. 1; *Goff v. Great Northern R. Co.* 3 El. & El. 673.

The real question is, Was the person inflicting the injury a servant, subject to control, and intending to serve his master, instead of acting for himself?

St. Louis, I. M. & S. R. Co. v. Hackett, 58 Ark. 388, 41 Am. St. Rep. 105, 24 S. W. 881; *Gunderson v. Northwestern Elevator Co.* 47 Minn. 163, 49 N. W. 694; *Garretzen v. Duencel*, 50 Mo. 107, 11 Am. Rep. 405; *Hardegg v. Willards*, 12 Misc. 18, 33 N. Y. Supp. 25; *McKinley v. Chicago & N. W. R. Co.* 44 Iowa, 318, 24 Am. Rep. 748; *Toledo, W. & W. R. Co. v. Harmon*, 47 Ill. 298, 95 Am. Dec. 489; *Philadelphia & R. R. Co. v. Derby*, 14 How. 486, 14 L. ed. 509; *Northwestern R. Co. v. Hack*, 66 Ill. 238; *Cohen v. Dry Dock, E. B. & B. R. Co.* 69 N. Y. 170; *Bryant v. Rich*, 106 Mass. 1c8, 8 Am. Rep. 311; *Missouri, K. & T. R. Co. v. Edwards* (Tex. Civ. App.) 67 S. W. 891; *Dupre v. Childs*, 52 App. Div. 308, 65 N. Y. Supp. 179; *Fowler v. Holmes*, 24 N. Y. S. R. 299, 3 N. Y. Supp. 816; *Noblesville & E. Gravel Road Co. v. Gause*, 76 Ind. 142, 40 Am. Rep. 224.

With the evidence showing that the porter

or bell boy was in the hotel where he was a menial servant, and using language which would indicate that he was protecting his master's property, a prima facie case is made.

Cleveland v. Newsom, 45 Mich. 62, 7 N. W. 222; *Doherty v. Lord*, 8 Misc. 228, 28 N. Y. Supp. 720; *Edgeworth v. Wood*, 58 N. J. L. 463, 33 Atl. 940; *McCoun v. New York C. & H. R. R. Co.* 66 Barb. 338; *Mott v. Consumers' Ice Co.* 73 N. Y. 548; *Richberger v. American Exp. Co.* 73 Miss. 169, 31 L. R. A. 390, 55 Am. St. Rep. 522, 18 So. 922.

Mr. William A. Redick, for defendants in error:

Even common carriers are not held to the liability of an insurer. They are required to exercise the highest degree of care and skill, but they are not insurers.

Hazard v. Chicago, B. & Q. R. Co. 1 Biss. 503, Fed. Cas. No. 6275; *Chicago & A. R. Co. v. Byrum*, 153 Ill. 131, 38 N. E. 578, *Louisville, N. A. & O. R. Co. v. Pedigo*, 108 Ind. 481, 8 N. E. 627; *Gilson v. Jackson County Horse R. Co.* 76 Mo. 282; *Missouri P. R. Co. v. Baier*, 37 Neb. 235, 55 N. W. 913.

The liability of innkeepers has not been enlarged. It remains what it has always been. Liability with reference to the property of the guest is that of an insurer, on grounds of public policy.

Pullman Palace Car Co. v. Lowe, 28 Neb. 248, 6 L. R. A. 809, 26 Am. St. Rep. 325, 44 N. W. 226.

But this strictness of liability has never been held with respect to the personal safety of the guest, for the obvious reason that the guest is not put in charge of the innkeeper, but retains control of his own movements.

The duty of an innkeeper is not to insure the persons of his guests against injury, but merely to take reasonable care of their persons, so that they shall not be injured by anything happening to them through his negligence while they are his guests.

Weeks v. McNulty, 101 Tenn. 499, 43 L. R. A. 185, 70 Am. St. Rep. 693, 48 S. W. 809; *Sandys v. Florence*, 47 L. J. C. P. N. S. 598.

The liability of the innkeeper is based solely upon the principles applicable to the relation of master and servant.

Curtis v. Dinneen, 4 Dak. 245, 30 N. W. 148.

Liability exists only when the servant is acting within the scope of his employment.

Wade v. Thayer, 40 Cal. 578; *Com. v. Pover*, 7 Met. 601, 41 Am. Dec. 465; *Davis v. Houghtellin*, 33 Neb. 582, 14 L. R. A. 737, 50 N. W. 765; *Curtis v. Dinneen*, 4 69 L. R. A.

Dak. 245, 30 N. W. 148; *Grimes v. Young*, 51 App. Div. 239, 64 N. Y. Supp. 859.

Where the servant, for his own purposes, does a wrong without the direction or authority of the master, and not for the purpose of executing his orders or doing his work, the master is not liable.

Rowell v. Boston & M. R. Co. 68 N. H. 358, 44 Atl. 448; *Keating v. Michigan C. R. Co.* 97 Mich. 154, 37 Am. St. Rep. 328, 56 N. W. 346; *Cofield v. McCabe*, 58 Minn. 218, 59 N. W. 1005; *Turley v. Boston & M. R. Co.* 70 N. H. 348, 47 Atl. 261; *Marion v. Chicago, R. I. & P. R. Co.* 59 Iowa, 428, 42 Am. Rep. 36 note, 13 N. W. 415; *Golden v. Neubrand*, 52 Iowa, 59, 35 Am. Rep. 257, 2 N. W. 537; *Chicago Consol. Bottling Co. v. McGinnis*, 86 Ill. App. 38; *Byrne v. Kansas City, Ft. S. & M. R. Co.* 24 L. R. A. 693, 9 C. C. A. 666, 22 U. S. App. 220, 61 Fed. 605; *Reaume v. Newcomb*, 124 Mich. 137, 82 N. W. 806; *Shearm & Redf. Neg.* 4th ed. p. 148; *Stone v. Hills*, 45 Conn. 44, 29 Am. Rep. 635; *Western U. Teleg. Co. v. Mullins*, 44 Neb. 732, 62 N. W. 880; *Dolan v. Hubinger*, 109 Iowa, 408, 80 N. W. 514; *Johnson v. Pioneer Fuel Co.* 72 Minn. 405, 75 N. W. 719; *Guille v. Campbell*, 200 Pa. 119, 55 L. R. A. 111, 86 Am. St. Rep. 705, 49 Atl. 938; *Winkler v. Fisher*, 95 Wis. 355, 70 N. W. 477; *McOlenaghan v. Brock*, 5 Rich. L. 17; *Douglass v. Stephens*, 18 Mo. 362; *Mogk v. Chicago City R. Co.* 80 Ill. App. 411.

The burden of proof to show that the employee was acting within the scope of his employment is upon the plaintiff.

Randall v. Chicago & G. T. R. Co. 113 Mich. 115, 38 L. R. A. 666, 71 N. W. 450; *Raming v. Metropolitan Street R. Co.* 157 Mo. 477, 50 S. W. 791, 57 S. W. 268; *Rahn v. Singer Mfg. Co.* 26 Fed. 917.

Albert, C., filed the following opinion:

The plaintiff, in his petition filed in the district court, alleges, in effect, that the defendants were the proprietors of and operated a hotel in the city of Omaha; that on the 12th day of January, 1902, he entered such hotel with his wife and infant son for a temporary sojourn therein; whereupon he and the said members of his family were received as guests in said hotel by the defendants; that afterward, and while they were thus guests in said hotel, the plaintiff's infant son entered a room of the hotel, to speak or play with a porter or servant of the defendants, who at the time was in said room. Then follow these allegations: "That the said porter and servant of defendants in said hotel in said capacity at said time violated all obligations of hospitality and patience due from said defendants, through said servants, to said

infant guest, and the defendants thereby violated their agreement, duty, and obligation of law with and to the plaintiff, by the following conduct, to wit: The said porter, in attempting to have said infant son of plaintiff leave said room and corridor where defendants did not want him, as instructed, and retire to his mother's room, and to have said infant cease his childish play and pretended annoyance, carelessly, imprudently, rashly, unnecessarily, negligently, and foolishly picked up a revolver, and, pointing it at said infant, said, 'If you handle anything, this is what I will do to you,' or similar words, calculated to frighten the said infant out of his natural and childish playfulness and prevent his touching any of defendants' property, or being about said room or the halls. That the said infant threw up his hands when thus frightened and assaulted, and, by some means unknown to this plaintiff, the said pistol was carelessly and negligently discharged by the said defendants' servant as aforesaid. . . . " The petition contains the usual allegations as to damages. The defendants, by their answers, admit that the defendant administrator and corporation were the proprietors of the hotel, and were operating it, as alleged in the petition; that the plaintiff and his wife and infant son were received into said hotel as guests at the date alleged in the petition; and that, while the plaintiff and the said members of his family were thus guests at the hotel, the son was seriously injured. But they specifically deny that the person described in the petition as their porter or servant was in their employ at the time the injury occurred, and that he was on duty, or in the performance of any duty, as porter or servant of the defendants, at such time. They also specifically deny that the defendant George E. Barker was one of the proprietors of the hotel, or in any way interested in the same, or the operation thereof, save as president of the defendant corporation. The evidence adduced by the plaintiff sufficiently shows that the plaintiff, his wife, and infant son became guests at the hotel, intending to remain but a short time; that about three days after they were received in the hotel, and while they were guests therein, a servant of the proprietors of the hotel, who had waited upon the plaintiff and the members of his family during their stay at the hotel, was playing a harmonica in a room which was not one of those assigned to the plaintiff or any member of his family; that the plaintiff's infant son, attracted by the music, entered the room, the door of which was open; that thereupon the servant who had been playing the harmonica took up a revolver, and

pointed it at the boy, saying, "See here, young fellow, if you touch anything this is what you get." The revolver by some means was then discharged, the ball striking the boy, destroying one of his eyes, and inflicting upon him other serious injuries. While there is no direct evidence that the person who inflicted the injuries was in the employ of the proprietors of the hotel, the evidence shows that he waited on the guests, carried water to their rooms, and rendered such other services as are usually rendered by servants of a certain class about a hotel, and is amply sufficient to warrant a finding that he was a servant of the proprietors, and, for the purposes of this case, would have made him such, perhaps, in the absence of a contract of employment. There is no evidence tending to connect the defendant George E. Barker with the operation of the hotel. At the close of plaintiff's case the court directed a verdict for the defendants, and from a judgment rendered on such verdict the plaintiff brings the record here for review.

The defendants insist that, the plaintiff having failed to allege that the servant wilfully or maliciously inflicted the injury, it was incumbent on him to show that the injuries were the result of negligence on the part of the servant in the performance of some duty for which he was employed, or in the discharge of some duty which the defendants owed the plaintiff. We think they overlook the theory upon which this action was brought and prosecuted. The plaintiff, by his petition and evidence, obviously intended to commit himself unreservedly to the theory that this cause of action is *ex contractu*. A contract is alleged in the petition. The wrongful acts of the servant, which resulted in injury to the boy, are alleged, not for the purpose of stating a cause of action *ex delicto*, but for the purpose of showing a breach of contract, and consequent damages.

This brings us at once to the question whether the act of the servant resulting in the injuries complained of constitutes a breach of the implied contract between the plaintiff and the proprietors of the hotel for the entertainment of the former and his family. By the implied contract between a hotel keeper and his guest, the former undertakes more than merely to furnish the latter with suitable food and lodging. There is implied on his part the further undertaking that the guest shall be treated with due consideration for his safety and comfort. *Rommel v. Schambacher*, 120 Pa. 579, 6 Am. St. Rep. 732, 11 Atl. 779. In *Jencks v. Coleman*, 2 Sumn. 221, Fed. Cas. No. 7,258, Story, J. [Shaw, Ch. J., in *Com. v. Pover*, 7 Met. 601, 41 Am. Dec. 465], said: "An

owner of a steamboat or railroad, in this respect, is in a condition somewhat similar to that of an innkeeper, whose premises are open to all guests. Yet he is not only empowered, but he is bound, so to regulate his house, as well with regard to the peace and comfort of his guests who there seek repose, as to the peace and quiet of the vicinity, as to repress and prohibit all disorderly conduct therein; and, of course, he has a right and is bound to exclude from his premises all disorderly persons, and all persons not conforming to regulations necessary and proper to secure such quiet and good order." The foregoing language is quoted with approval in *Bass v. Chicago & N. W. R. Co.* 36 Wis. 459, 17 Am. Rep. 495. Substantially the same language is employed by the court in *Dickson v. Waldron*, 135 Ind. 507, 24 L. R. A. 483, 41 Am. St. Rep. 440, 34 N. E. 510, 35 N. E. 1. See also *Norcross v. Norcross*, 53 Me. 169; *Pinkerton v. Woodward*, 33 Cal. 585, 91 Am. Dec. 657; *Com. v. Power*, 7 Met. 601, 41 Am. Dec. 465; *Russell v. Fagan*, 7 Houst. (Del.) 396, 8 Atl. 258; *Pullman Palace Car Co. v. Lowe*, 28 Neb. 239, 6 L. R. A. 809, 26 Am. St. Rep. 325, 44 N. W. 226. The foregoing also shows that the duties of a hotel keeper to his guests are regarded as similar to the common-law obligation of a common carrier to his passengers. As regards the duty of a common carrier to his passengers, in *Dwinelle v. New York C. & H. R. R. Co.* 120 N. Y. 122, 8 L. R. A. 224, 17 Am. St. Rep. 611, 24 N. E. 319, the court said: "As we have seen, the defendant owed the plaintiff the duty to transport him to New York, and during its performance to care for his comfort and safety. This duty of protecting the personal safety of the passenger, and promoting by every reasonable means the accomplishment of his journey, is continuous, and embraces other attentions and services than the occasional service required in giving the passenger a seat or some temporary accommodation. Hence, whatever is done by the carrier or its servants which interferes with or injures the health or strength or person of the traveler, or prevents the accomplishment of his journey in the most reasonable and speedy manner, is a violation of the carrier's contract, and he must be held responsible for it." To the same effect are the following: *Pittsburgh, Ft. W. & C. R. Co. v. Hinds*, 53 Pa. 515, 91 Am. Dec. 224; *Goddard v. Grand Trunk R. Co.* 57 Me. 214, 2 Am. Rep. 39; *Chamberlain v. Chandler*, 3 Mason, 245, Fed. Cas. No. 2,575; *Pendleton v. Kinsley*, 3 Cliff. 417, Fed. Cas. No. 10,922; *Bryant v. Rich*, 106 Mass. 188, 8 Am. Rep. 311; *Chicago & E. R. Co. v. Flexman*, 103 Ill. 548, 42 69 L. R. A.

Am. Rep. 33; *Southern Kansas R. Co. v. Rice*, 38 Kan. 398, 5 Am. St. Rep. 766, 16 Pac. 817. An examination of the foregoing cases will show, we think, that the reasoning applies with equal force to a hotel keeper, as regards his duties to his guests. Those duties spring from the implied terms of his contract, and a failure to discharge them, while it may in some instances amount to a tort, amounts in every instance to a breach of contract.

If, then, the defendants were under a contractual obligation that the plaintiff and his family should be treated with due consideration for their comfort and safety, the act of the servant, resulting in the injuries complained of, obviously amounts to a breach of contract. That the wrongful act was committed by a servant is wholly immaterial. The rule which requires that a guest at a hotel be treated with due consideration for his comfort and safety would be of little value if limited to the proprietor himself. As a rule, he does not come in contact with the guests. His undertaking is not that he personally shall treat them with due consideration, but that they shall be so treated while inmates of the hotel as guests; and, if they be not thus treated, there is a breach of the implied contract, whether the lack of such treatment is the result of some act or omission of the proprietor himself, or of his servant or servants.

Neither do we deem it material whether the servant at the time of the injury was actively engaged in the discharge of his duty as servant or not. He was a servant of the proprietor, and an inmate of the hotel. His duty as to the treatment to be accorded the guests of the hotel was a continuing one, and rested upon him wherever, within the hotel, he was brought in contact with them. To hold otherwise would be to say that a guest would have no redress for any manner of indignity received at a hotel, so long as it was inflicted by a servant not actively engaged in the discharge of some duty. The following from *Dwinelle v. New York C. & H. R. R. Co.* 120 N. Y. 122, 8 L. R. A. 224, 17 Am. St. Rep. 611, 24 N. E. 319, is peculiarly applicable at this point: "The idea that the servant of a carrier of persons may, in the intervals between rendering personal services to the passenger for his accommodation, assault the person of the passenger, destroy his consciousness and disable him from further pursuit of his journey, is not consistent with the duty that the carrier owes to the passenger, and is little less than monstrous. While this general duty rested upon the defendant to protect the person of the passenger during the entire performance of the

contract, it signifies but little or nothing whether the servant had or had not completed the temporary or particular service he was performing, or had completed the performance of it, when the blow was struck. The blow was given by a servant of the defendant while the defendant was performing its contract to carry safely and to protect the person of the plaintiff, and was a violation of such contract."

It is equally immaterial to this case, we think, whether the shooting was accidental or wilful. The servant, in pointing a loaded gun at the boy, committed a trespass, and, as a result of such trespass, inflicted serious and permanent injuries on the child. His acts, therefore, constitute a breach of the implied undertaking of his employers to treat the plaintiff and his family with due consideration for their safety and comfort, for which breach his employers are liable in damages.

We are aware that there are cases holding contrary to the foregoing conclusion, but they do not seem to us to be based on sound reasons, nor upon just considerations of public policy, and are contrary to the weight and trend of modern authority.

The plaintiff offered to prove by one of his witnesses that the day following the accident one Mr. Bowman, the manager of the hotel, told the witness "that he had told the boys [referring to the porters and bell boys of the hotel] time and again to keep the kid [meaning the plaintiff's son] out of the elevator, halls, and rooms of the hotel, and to keep him in his mother's room." The offer was rejected, and the plaintiff contends that the ruling of the court in that behalf is erroneous. We do not think so. It was not within the scope of the authority of the manager to bind his employer by the admission or declaration sought to be proved, and it was too remote in point of time, and too detached from the injury, to be admissible as a part of the *res gestæ*. *Gale Sulky Harrow Co. v. Laughlin*, 31 Neb. 103, 47 N. W. 638; *Commercial Nat. Bank v. Brill*, 37 Neb. 626, 58 N. W. 382; *Collins v. State*, 46 Neb. 37, 64 N. W. 432; *Friend v. Burleigh*, 53 Neb. 677, 74 N. W. 50.

As to the defendant George E. Barker, as we have seen, there is no evidence which would warrant a verdict against him. Hence, so far as he is concerned, the judgment of the district court is right; but, as to the other defendants, it is recommended that the judgment be reversed, and the cause remanded for further proceedings according to law.

Barnes and Glanville, CC., concur.
69 L. R. A.

Per Curiam:

For the reasons stated in the foregoing opinion, *the judgment of the District Court as to the defendant George E. Barker is affirmed, and as to the other defendants the judgment is reversed, and the cause remanded for further proceedings according to law.*

A petition for rehearing having been filed, **Sedgwick, J.**, on May 3, 1905, handed down the following response:

Since the filing of the former opinion in this case (*ante*, 642, 98 N. W. 440), the question principally discussed therein, and arising out of the same transaction, has been decided by the United States court of appeals for this circuit (*Clancy v. Barker*, *post*, 653, 66 C. C. A. 469, 131 Fed. 161). The opinion of that court, prepared by Judge Sanborn, strongly states the reasons that led the majority of the court to the conclusion that the hotel company ought not to be held liable. In a dissenting opinion, Judge Thayer upholds the views expressed in the former opinion of this court.

1. The first ground urged by counsel for holding the defendants liable, we think, is satisfactorily discussed in the majority opinion of that court. This relates to the doctrine of *respondere superior*, derived from the relation of master and servant. If there had been evidence showing that it was the duty of the employees of the hotel to prevent children from entering and playing in rooms which were not assigned to them, it might perhaps be contended that the boy Lacy was acting within the scope of his employment when the accident occurred. The evidence offered as tending to show that he was so acting was properly excluded as shown in the former opinion, and it does not appear that there was any other evidence in the record upon this point.

2. Whether the relation that exists between a keeper of a hotel and his guests makes the former liable for any misconduct of his employees by which his guests are injured while they are in the hotel and are in his care is a more difficult question. It is admitted that common carriers under such circumstances are liable. It is said that the reason for this is that the passenger places himself in the care of the employees of the carrier, and is continually in their care, so that whatever they do while the passenger is being transported is within the scope of their employment. The hotel keeper is also bound to bestow reasonable care for the safety and comfort of his guests. He is not an insurer of his guests; but neither is the carrier an insurer of his passengers. The carrier, of course, is bound to use extraordinary care—as is sometimes

said, the utmost care—for the safety of his passengers. The business engaged in is a dangerous one, and the care should be in proportion to the danger that exists. In this respect there is a difference between the two situations, but both perform public duties, and are bound to serve any individual who requires their service and suitably applies for it. The hotel keeper offers accommodations for strangers who are not acquainted with his employees and who have no voice in their selection. He undertakes to provide them with suitable accommodations, and with at least a certain degree of care for their comfort and safety. He has some control over their persons and conduct. He must not allow such conduct on their part as will interfere with the reasonable hospitality which he owes to other guests. It may be that the carrier has greater control over the persons and conduct of passengers, but this idea seems to be exaggerated in some of the opinions. In what sense does the porter of a sleeping car have charge of the occupants of the car and have control of their conduct and behavior? Surely, if it is different in degree from the control that the hotel keeper has over his guests, it is not much different in kind. The hotel keeper is under obligation to protect his guests from danger when it is reasonably within his power to do so, and is under obligation to select such employees as will look after the safety and comfort of his guests, and will not commit acts of violence against them, so far as is reasonably within his power. It would seem that to relieve him from liability for injuries done to his guests by his employee upon the sole ground that the employee was not then in the active discharge of some specific duty in connection with his employment, and hold the carrier responsible under similar conditions, is making a fine distinction. The liability of a common carrier under such circumstances is a doctrine of modern growth. There does not appear to be reason for establishing such doctrine that would not equally apply under modern conditions to the relations between an innkeeper and his guests.

Notwithstanding the great respect due to the court which has reached a contrary conclusion in *Clancy v. Barker*, *post*, 653, we conclude that our former decision ought to be adhered to.

Barnes, J., dissenting:

In this case I find myself unable to concur in the majority opinion, which adheres to our former decision. While I concurred in that decision when it was rendered, on a re-examination of the question, as presented on the rehearing, I am convinced that the defend-

ant should not be held liable. The facts which are the basis of the plaintiff's cause of action briefly stated, are as follows: The plaintiff, Michael F. Clancy, and his wife, with their infant son, Freeman, who was about six years old, were stopping at the Barker hotel, in the city of Omaha, and had been guests at the hotel for several days prior to the accident complained of. About 8:30 o'clock of the evening of January 15, 1902, Freeman left his mother's room and went down the elevator to the first floor of the hotel, as he says, "to get some ice water." Reaching that floor, he passed by a room where a boy of the name of Lacy, who was employed as a porter or bell boy at the hotel, was playing a harmonica; the door being ajar, he entered this room, apparently to satisfy his childish curiosity; another boy who sometimes ran the elevator, was also in the room; both of these employees seem to have been off duty at the time, and engaged in amusing themselves in a room not occupied by any of the guests of the house. As the Clancy boy entered the room young Lacy said to him (apparently in jest): "See here, young fellow, if you touch anything, this is what you get" (at the same time pointing a pistol at him). The pistol was at that instant accidentally discharged, the ball striking the boy Freeman in the head, destroying one of his eyes, and inflicting other injuries upon him, which, however, did not prove fatal, and this action was brought by the father to recover damages alleged to have been sustained by him by reason of these facts.

The prevailing opinion does not place the right of recovery in this case on the ground of negligence or tort, for no negligence on the part of the defendant is alleged or proved, but bases such right solely on an alleged breach of the implied contract of an innkeeper that his guest shall be treated with due consideration for his comfort and safety, and so holds the proprietors of the hotel liable to both the father and his infant son for the damages sustained by them.

It must be conceded that until recent years the whole trend of authority supported and adhered to the common-law rule that an innkeeper is not an insurer of the safety of his guest against injury, and that his obligation is limited to the exercise of reasonable care for the safety, comfort, and entertainment of his visitor. *Caly's Case*, 8 Coke, 32a; *Sandys v. Florence*, 47 L. J. C. P. N. S. 598; *Weeks v. McNulty*, 101 Tenn. 499, 43 L. R. A. 185, 70 Am. St. Rep. 693, 48 S. W. 809; *Curtis v. Dinneen*, 4 Dak. 245, 30 N. W. 148; *Sheffer v. Willoughby*, 163 Ill. 518, 34 L. R. A. 464, 54 Am. St. Rep. 483, 45 N. E. 253; *Gilbert v. Hoffman*, 66 Iowa, 206, 55 Am. Rep. 263, 23 N. W. 632;

Overstreet v. Moser, 88 Mo. App. 72; *Stanley v. Bircher*, 78 Mo. 245; *Stott v. Churchill*, 15 Misc. 80, 36 N. Y. Supp. 477; *Sneed v. Moorehead*, 70 Miss. 690, 13 So. 235. It is claimed, however, that the more recent cases have changed the rule, and, to support this view, we are referred in the original opinion to *Rommel v. Schambacher*, 120 Pa. 579, 6 Am. St. Rep. 732, 11 Atl. 779. In that case it appears that on the evening of the 9th of August, 1884, the plaintiff, William Rommel, a minor, entered the tavern of Jacob Schambacher, and there found one Edward Flannagan; they both became intoxicated on the liquor furnished them by Schambacher. While the plaintiff was standing outside of the bar engaged in conversation with the defendant, Flannagan pinned a piece of paper to his back and set it on fire. The consequence was that Rommel's clothes were soon in flames and before they could be extinguished he was badly injured. On those facts it was held that the "proprietor of a saloon is liable for injuries sustained by one who enters therein and becomes intoxicated, by reason of another who also became intoxicated there, and who, in full view of the proprietor, attached a piece of paper to the former and set it on fire." The sole ground of holding the proprietor liable was that he furnished the liquor which caused the intoxication of the two men, and allowed one of them, in his presence, to attach the paper to the other and set it on fire, when he could, and should, have prevented it. So it will be seen that there is nothing in the facts of that case, or in the matter actually decided, which supports the prevailing opinion.

Our attention is also called to the case of *Jencks v. Coleman*, 2 Sumn. 221, Fed. Cas. No. 7,253, in which Story, J. [Shaw, Ch. J., in *Com. v. Power*, 7 Met. 601, 41 Am. Dec. 465], said: "An owner of a steamboat, or railroad, in this respect is in a condition somewhat similar to that of an innkeeper whose premises are open to all guests. Yet he is not only empowered, but he is bound, to so regulate his house, as well with regard to the peace and comfort of his guests, who there seek repose, as to the peace and quiet of the vicinity, as to repress and prohibit all disorderly conduct therein; and, of course, he has a right, and is bound, to exclude from his premises all disorderly persons, and all persons not conforming to regulations necessary and proper to such quiet and good order." This language, it seems to me, comes far short of justifying the conclusion announced by the majority.

The case of *Dickson v. Waldron*, 135 Ind. 507, 24 L. R. A. 483, 41 Am. St. Rep. 440, 34 N. E. 506, 35 N. E. 1, is also cited to sustain the prevailing opinion. The facts in 69 L. R. A.

that case were that George A. Dickson and others were lessees and managers of the Park theater, in the city of Indianapolis; that Waldron came to the box office of the theater and applied for a 10-cent ticket, giving the ticket seller, one Joseph Gordon, a silver dollar, and receiving from him his ticket and only 70 cents in change; that one John Dickson was in the box office at the time with the ticket seller, and was in charge of, and conducting, the theater for and on behalf of the lessees. Waldron demanded of the ticket seller the right change; an altercation ensued, and the janitor of the theater, who was also a special policeman, was ordered by Dickson, who had reached through the window and grabbed Waldron and slapped him in the face, to arrest Waldron for a "vag." The janitor thereupon struck Waldron, knocked him down, and beat him severely; someone interfered, and the janitor withdrew; then Gordon came out of the ticket office, and, in the presence of the manager, assaulted Waldron, and beat him shamefully; that thereafter the janitor arrested Waldron and took him to the police station. On these facts it was held, as in *Rommel v. Schambacher*, 120 Pa. 579, 6 Am. St. Rep. 732, 11 Atl. 779, that the proprietor of the theater was liable for the injuries sustained by Waldron.

In the foregoing cases, and in some others, the courts have made use of the expression: "The liability of an innkeeper is like that of a common carrier." But it is nowhere held that the kind and extent of the liability of the innkeeper is the same as that of a common carrier. All of the other cases referred to are actions where common carriers were sued for injuries to passengers while being transported.

Our attention was also called, on the rehearing, to the case of *Curran v. Olson*, 88 Minn. 307, 60 L. R. A. 733, 97 Am. St. Rep. 517, 92 N. W. 1124, as sustaining plaintiff's contention. That was a case where a patron of a saloon fell asleep in his chair, and a third person poured alcohol, which was furnished by the bartender in charge of the defendant's business, on the foot of the sleeper, and set it on fire. The saloon keeper was held liable because the tort was committed in the presence and with the assent of his managing agent, when it was the duty and within the power of the agent to have prevented it. So it seems to me that in none of the cases to which our attention has been directed are the facts the same or similar to those in the case at bar, and I am of opinion that none of them fairly support the rule announced by the majority. On the other hand, I believe the great weight of authority to be with the defendants, and that the rule that an innkeeper is not an insurer

of the safety of the person of his guest against injuries, and that his contract obligation is limited to the exercise of reasonable care for the safety, comfort, and entertainment of his visitors, should be adhered to. While my associates state that they do not intend to make the innkeeper an insurer of the safety of the guest, it seems clear to me that such is the effect of the prevailing opinion.

The case of *Clancy v. Barker*, post, 653, 66 C. C. A. 469, 131 Fed. 161, which was an action for the infant, Freeman Clancy, by the plaintiff herein, as his next friend, to recover for his injuries occasioned by the accident which is the basis of this action, is commented on by the majority, and I take this occasion to review it. It was there held by the United States circuit court of appeals that the defendants were not liable. The plaintiff's contention there was the same as here, and Judge Sanborn, who wrote the prevailing opinion, said: "The crucial question here, therefore, is whether or not an innkeeper is an insurer of the safety of the person of his guest, while the latter remains in his hotel, against the negligent and wilful acts of his servants, when they are acting within the course and without the actual or apparent scope of their employment.

. . . Counsel for the plaintiff insists that the liability of the innkeepers should be extended in the case at bar even beyond that of common carriers; so that the defendants should be held liable for the injuries inflicted by the wilful or careless act of their servant when he was not acting within the course or scope of his employment. The argument in support of this contention is that common carriers are liable for the negligent or wilful acts of their servants to whom they intrust the care, custody, and control of the passengers they transport, and that the liability of innkeepers to their guests is similar to that of carriers to their passengers. There are many reasons, however, why this argument is not persuasive, and why it fails to demonstrate that an innkeeper insures the safety of the persons of his guests against injuries inflicted by his servants when they are not engaged in the discharge of their duties as employees. . . .

There is a marked difference in the character of the contracts of carriage on a railroad or steamboat and of entertainment at an inn, and a wide difference in the relation of the parties to these contracts. In the former, the carrier takes and the passenger surrenders to him the control and dominion of his person, and the chief, nay, practically the only, occupation of both parties is the performance of the contract of carriage. For the time being all other occupations are subordinate to the transportation. The car-

rier regulates the movements of the passenger, assigns him his seat or berth, and determines when, how, and where he shall ride, eat, and sleep while the passenger submits to the rules regulations, and directions of the carrier, and is transported in the manner the latter directs. The contract is that the passenger will surrender the direction and dominion of his person to the servants of the carrier, to be transported in the car, seat, or berth, and in the manner in which they direct, and that the latter will take charge of and transport the person of the passenger safely. The logical and necessary result of this relation of the parties is that every servant of the carrier who is employed in assisting to transport the passenger safely, every conductor, brakeman, and porter who is employed to assist in the transportation, is constantly acting within the scope and course of his employment while he is upon the train or boat, because he is one of those selected by his master and placed in charge of the person of the passenger to safely transport him to his destination. Any negligent or wilful act of such a servant which inflicts injury upon the passenger is necessarily a breach of the master's contract of safe carriage, and for it the latter must respond. But the contract of an innkeeper with his guest, and their relations to each other, are not of this character. The innkeeper does not take, nor does the guest surrender, the control or dominion of the latter's person. The performance of the contract of entertainment is not the chief occupation of the parties, but is subordinate to the ordinary business or pleasure of the guest. The innkeeper assigns a room to his guest, but neither he nor his servants direct him when or how he shall occupy it. . . . The agreement is not that the guest shall surrender the control of his person and action to the servants of the innkeeper in order that he may be protected from injury and entertained. It is that the guest may retain the direction of his own action, that he may enjoy the entertainment offered, and that the innkeeper will exercise ordinary care to provide for his comfort and safety.

. . . The natural and logical result of this relation of the parties is that when the [innkeeper's] servants are not engaged in the course or scope of their employment, although they may be present in the hotel, they are not performing the master's contract, and he is not liable for their negligent or wilful acts."

An examination of the cases involving the liability of common carriers, of owners of palace cars, of steamboats, and of theaters, cited in the prevailing opinion, discloses that the defendants' servants in every case were acting within the course or scope

of their employment, and none of them hold the defendants liable for the wilful or negligent acts of their employees beyond that scope. I am much impressed with the prevailing opinion of Judge Sanborn. The reasoning employed by him appears to be sound, and is supported by the great weight of authority in both England and in this country; and, while I do not consider myself bound by that opinion, yet it seems to me to announce the better rule. I regret that different courts should arrive at different and inconsistent conclusions from the same facts, and practically in the same case.

Again, the supreme court of Dakota, in *Curtis v. Dinneen*, 4 Dak. 245, 30 N. W. 148, directly decided a similar question to the one presented in this case in accordance with the general rule, and in favor of the innkeeper. In that case the plaintiff, while a guest at the defendant's hotel, was assaulted by the defendant's husband, who was employed in and about the house, but not in the course of his employment. The court said: "It is doubtless good legal doctrine that a master is liable to answer in a civil action for the tortious or wrongful act of his servant, if done in the course of his employment in his master's service, even though the master did not know of or authorize such act, or may have disapproved of or forbidden it. The act must be done in the execution of the authority given by the master and in pursuit of the master's business, and must be within the scope of the servant's employment, or, unless it be ratified by the master, he (the master) will not be liable therefor." And so it was held that an innkeeper is not liable for assault and battery committed on a guest by one of his servants, where the assault was not within the line of the servant's duty, and was not advised or countenanced by the master.

In a still later case, *Rahmel v. Lehndorff*, 142 Cal. 681, 65 L. R. A. 88, 100 Am. St. Rep. 154, 76 Pac. 659, the supreme court of California, in a well-considered opinion, held: "An assault by a waiter in a hotel on a guest is not within the scope of the waiter's employment, or within the real or supposed scope of his duties, so as to render the innkeeper liable for the tort. An innkeeper is not bound to protect his guests from acts of violence of his servants, in the absence of negligence in employing a violent or disorderly person."

To my mind, there are many other reasons why the contractual liability of innkeepers to their guests should not be held to be co-extensive with and the same as that of common carriers to their passengers. The agencies employed by common carriers to transport their passengers are extremely hazardous, and are not in any manner under the

control of the passenger himself. They are used and controlled wholly by the servants of the carrier in transporting the passenger to his place of destination. During every moment of his journey he is in charge and under the control of the employees of the carrier, and so the carrier is held liable for the lightest negligence; while one who is the guest of the modern hotel or inn has the utmost freedom of movement; there is no danger or hazard connected with the business, and when a room is assigned to the guest it is his own to occupy or not, as he pleases; it is his domicile from which he may exclude all intruders; and when, as in many cases, the guest lives constantly at the hotel, it is his home, from which he may depart, and to which he may return, at any time, and at all hours of both day and night. Again, there are at all times other guests of the house with whom he necessarily is thrown in contact, and from whom he may possibly receive an injury; and it is believed that our former opinion goes to the extent of holding the proprietor of the hotel liable for such injuries without any negligence on his part. The modern hotel is, to a certain extent, a public place. Anyone may enter it for any lawful purpose without the consent of the proprietor, and leave it without let or hindrance; and yet the effect of the prevailing opinion is that, for any injury inflicted by such a person to a guest of the house, the innkeeper would be liable, even if he had no reason to expect it, and could not in any way have prevented it. It seems clear to my mind that an ordinary nonhazardous and useful occupation should not be required to bear such an extraordinary burden.

Again, the thought intrudes itself that the person injured in this case was an infant of such tender years that the defendants had the right to expect that its parents, who in reality were their guests, would prevent him from entering the rooms of the servants or other guests, or getting into place of danger; in other words, from roaming about the hotel at will and untended. It can hardly be said that the proprietors, knowing that the child was with his mother and under her immediate care and control, impliedly contracted to relieve her of that duty, assume it themselves, and insure him against injury while in their hotel.

After mature reflection and a careful examination of the authorities, I am of opinion that the defendants should not be held liable for the injury complained of. For the foregoing reasons, it seems clear to me that our former opinion should be vacated, and the judgment of the district court should be affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT

Freeman CLANCY, by Catherine Clancy,
His Next Friend, *Plff. in Err.*,
v.

George E. BARKER *et al.*

(66 C. C. A. 469, 131 Fed. 161.)

- *1. Innkeepers are not insurers of the safety of the persons of their guests. The limit of their liability is for the exercise of reasonable care for the safety, comfort, and entertainment of their visitors.
2. Innkeepers do not contract to insure the safety of their guests against injuries which are inflicted upon them by the negligent or wilful acts of their servants beyond the scope and course of their employment, and for such acts they are not liable in damages when they have exercised reasonable care to prevent them.
3. A boy about six years of age, a guest of the defendants at their hotel, wandered out of the room assigned to him, and into a room in which a bell boy or porter of the defendants was engaged in playing a harmonica for his own amusement, and the latter accidentally or wilfully shot the former with a pistol. *Held*, the bell boy was not acting within the course, or within the apparent or actual scope, of his employment at the time of the shooting, and the innkeepers were not liable for the injury he inflicted.

(*Thayer, Circuit Judge, dissents.*)

(May 28, 1904.)

ERROR to the Circuit Court of the United States for the District of Nebraska to review a judgment in favor of defendants in an action brought to recover damages for personal injuries for which defendants were alleged to be responsible. *Affirmed.*

The facts are stated in the opinions.

Argued before *Sanborn, Thayer*, and *Hook*, Circuit Judges.

Mr. John O. Yelzer for plaintiff in error.

Mr. William A. Redick for defendants in error.

Sanborn, Circuit Judge, delivered the opinion of the court:

This case was determined in the lower court on a demurrer to the evidence; the trial court holding, on the conclusion of the plaintiff's testimony, that there was no substantial evidence warranting a recovery. It accordingly directed a verdict in favor of the defendants. This action was taken

*Headnotes by *SANBORN*, Circuit Judge.

NOTE.—See last preceding case, *Clancy v. Barker*, and *note*.
69 L. R. A.

on testimony which tended to establish, and did establish, the following facts:

Freeman Clancy, in whose behalf the action is brought, at the time of the accident hereafter described, was about six years old, and was stopping with his parents at the Barker hotel, in the city of Omaha, Nebraska; the father, mother, and son having been guests at the hotel for a few days prior to the accident. During the evening of January 15, 1902, about 8:30 P. M., he went down the elevator from one of the upper floors, where the room occupied by his parents was located, to the ground floor of the hotel for the purpose, as he says, of getting some ice water. Reaching the ground floor, he passed by a room where someone was playing a harmonica. The door being ajar, he entered this room, actuated, apparently, by no other motive than childish curiosity, and found a boy, who was employed about the hotel either as a bell boy or porter, engaged in playing the instrument. Another boy who ran the hotel elevator was also in the room. Both of these employees of the hotel seem to have been off duty at the time, and engaged in amusing themselves in a room that was not occupied by guests. As the boy Clancy entered the room, the boy who was playing the harmonica said to him, evidently in jest, "See here, young fellow; if you touch anything, here is what you will get," at the same time pointing a pistol at him. The pistol was accidentally discharged, the ball striking the boy in the head, fracturing "the frontal ethmoid and sphenoid bones of the head," and destroying one of his eyes. The ball also passed through the boy's thumb, but the injury did not prove fatal.

One paragraph of the complaint, on which the case was tried, alleged: "That on or about the 12th day of January, 1902, the said father and mother of the plaintiff entered the said hotel of defendant with their said infant child, the plaintiff, as guests of the defendant, for a temporary rest in said city at said hotel, and were received by the said defendants as the guests of the said innkeepers or hotel keepers; the defendants thereby contracting with the said father for and on behalf of said plaintiff, and with the plaintiff by implication of law, for his personal safety, kind treatment, and for all of the usual hospitalities, covenants, and agreements, and obligations due from an innkeeper and hotel keeper to his guests."

Another paragraph of the complaint alleged, in substance, that it was the duty of the bell boy or porter, through whose acts

as aforesaid the injury was sustained, "to direct the guests of said hotel about said hotel, and to wait on, watch over, and protect said guests and their property and the property of the said hotel, and such other duties as are usually required by porters by innkeepers or hotel keepers, and imposed by law."

Another paragraph of the complaint alleged that said bell boy or porter, being a servant of the defendants and of said hotel, in that capacity, by the acts heretofore described, "violated all obligations of hospitality and patience due from said defendants, through said servants, to said infant guest, and the defendants thereby violated their agreement, duty, and obligation of law with and to the plaintiff."

On this state of facts and pleading, counsel for the plaintiff in error asserts a right of recovery against the defendants on two grounds: First, he contends that by receiving the boy and his parents as guests at the hotel the proprietors of the hotel undertook, like a common carrier of passengers, to protect him against injuries occasioned by the negligence or wilful misconduct of their employees in and about the hotel, and that this contractual obligation of the defendants was violated. In the second place, counsel contends that when Lacey, the porter, pointed the pistol at the boy, he was guilty of a wrongful and negligent act; that he was engaged at the time in the performance of one of his duties as servant; and that on this ground the defendants are liable. It is argued that it was a part of Lacey's duty as a servant, when the child entered the room where he was playing the harmonica, to see that he did not disturb or handle any articles in the room; that a jury might well infer that the act which occasioned the injury was done by Lacey in the performance of this duty; and that the ordinary rule, *respondet superior*, applies to the case.

We entertain no doubt that the act in question was in fact wrongful and negligent, but the difficulty which we encounter in upholding this latter theory is that the evidence fails to show that Lacey had been charged with the duty of guarding such articles as may have been in the room where the accident occurred, or that the room contained any articles which the child could have injured or carried away, or that he had made any movement in that direction. All this is mere surmise, which will not suffice to sustain a verdict. So far as the evidence warrants an inference, the inference is that Lacey was not engaged at the time in the discharge of any duty for and in behalf of the defend-

ants; that he was temporarily, at least, off duty, engaged in amusing himself; and that he pointed the pistol at the child in sport, to see how he would act, rather than to prevent him from touching or intermeddling with anything in the room. The act in question seems to have been prompted by a momentary impulse, and to have been done by Lacey for his own amusement, and to have been in no wise connected with the discharge of any duty, or with the performance of any task, that had been devolved upon him by the defendants. Under these circumstances, we are of opinion that the proprietors of the hotel cannot be held accountable for the act in question on the second ground above stated, since it is too well settled to require the citation of any authority that the master is not responsible ordinarily for the negligent acts of his servant, unless they are committed while the servant is rendering some service for and in behalf of the master.

But counsel for the plaintiff insists that, although the defendants were not negligent in the employment of their servant, the bell boy, and although he was not acting in the course or within the actual or apparent scope of his employment when he discharged the pistol, yet the defendants are liable for the injury he inflicted, because it is a part of the contract between an innkeeper and his guest that the former will insure the safety of the person of the latter against injury from every act or omission of his servants. The crucial question here, therefore, is whether or not an innkeeper is an insurer of the safety of the person of his guest while the latter remains in his hotel against the negligent and wilful acts of his servants, when they are acting without the course and without the actual or apparent scope of their employment.

An affirmative answer to this question would be in conflict with the decisions of the courts rendered prior to the time when the contract herein was made, and to our understanding of the law upon this subject as it then existed. The general rule of law governing the liability of innkeepers when these defendants made their agreement with the plaintiff—the rule which had received the approval of every court which had ever decided the question, so far as we have been able to discover—was that an innkeeper was not an insurer of the safety of the person of his guest against injury, but that his obligation was limited to the exercise of reasonable care for the safety, comfort, and entertainment of his visitor. *Calye's Case*, 8 Coke, 32a, 33b; *Sandys v. Florence*, 47 L. J. C. P. N. S. 598; *Weeks v. McNulty*, 101 Tenn. 499, 43

L. R. A. 185, 70 Am. St. Rep. 693, 48 S. W. 809; *Curtis v. Dinneen*, 4 Dak. 245, 30 N. W. 148, 153; *Sheffer v. Willoughby*, 163 Ill. 518, 521, 522, 34 L. R. A. 464, 54 Am. St. Rep. 483, 45 N. E. 253; *Gilbert v. Hoffman*, 66 Iowa, 206, 55 Am. Rep. 263, 23 N. W. 632; *Overstreet v. Moser*, 78 Mo. App. 72, 75; *Stanley v. Bircher*, 88 Mo. 245, 248; *Stott v. Churchill*, 15 Misc. 80, 36 N. Y. Supp. 476, 477; *Sneed v. Moorehead*, 70 Miss. 690, 13 So. 235.

In another class of cases, those involving the liability of common carriers and of the operators of palace cars to their passengers, this measure of liability has in later years been extended to include responsibility for the wilful and negligent acts of those to whom the carriers intrust the transportation of their passengers, such as brakemen, porters, and conductors, upon the ground that these servants, when upon the trains or steamboats, are engaged in the course or scope of their employment to conduct the safe transportation of the passengers, whatever they may be doing. The reasons for this extension of liability are well stated in *Bass v. Chicago & N. W. R. Co.* 36 Wis. 450, at page 463, 17 Am. Rep. 495, and in *Mallach v. Ridley*, 24 Abb. N. C. 181, 9 N. Y. Supp. 922.

In the former case the court said: "These officers [the conductors and other servants in charge of the train] may be guilty of acts of arbitrary oppression, beyond endurance, towards passengers, which might warrant resistance. But we feel warranted by principle and authority to hold that, in the enforcement of order on the train, and in the execution of reasonable regulations for the safety and comfort of the passengers, and for the security of the train, the authority of these officers, exercised upon the responsibility of the corporations, must be obeyed by passengers, and that forcible resistance cannot be tolerated. They act on the peril of the corporation, and their own. Indeed, as that fictitious entity, the corporation, can act only through natural persons, its officers and servants, and as it of necessity commits its trains absolutely to the charge of officers of its own appointment, and passengers of necessity commit to them their safety and comfort *in transitu*, under conditions of such peril and subordination, we are disposed to hold that the whole power and authority of the corporation, *pro hac vice*, is vested in these officers, and that, as to passengers on board, they are to be considered as the corporation itself, and that the consequent authority and responsibility are not generally to be straitened or impaired by any arrangement between the corporation and 69 L. R. A.

the officers; the corporation being responsible for the acts of the officers, in the conduct and government of the train, to the passengers traveling by it, as the officers would be for themselves, if they were themselves the owners of the road and train. We consider this rule essential to public convenience and safety, and sanctioned by great weight of authority."

In the latter case the court declared: "It was long held by the courts that a common carrier was not responsible for a wilful assault by one of its employees upon a passenger. This rule, however, has been abrogated upon the theory that the common carrier invites the passenger to subject himself to the protection and care of the employee of the corporation, and under these circumstances the common carriers should be responsible for all the acts of the subordinates toward the passenger while under his custody and control."

Counsel for the plaintiff insists that the liability of the innkeepers should be extended in the case at bar even beyond that of common carriers, so that the defendants should be held liable for the injuries inflicted by the wilful or careless act of their servant when he was not acting within the course or scope of his employment. The argument in support of this contention is that common carriers are liable for the negligent or wilful acts of their servants to whom they intrust the care, custody, and control of the passengers they transport, and that the liability of innkeepers to their guests is similar to that of carriers to their passengers. There are many reasons, however, why this argument is not persuasive, and why it fails to demonstrate that an innkeeper insures the safety of the persons of his guests against injuries inflicted by his servants when they are not engaged in the discharge of their duties as employees.

While there are many loose statements in the books to the effect that the liability of common carriers to their passengers and the liability of innkeepers to their guests are similar; and while that proposition may be conceded,—it is certain that the limits of these liabilities are by no means the same. A railroad company is liable to its passengers for a failure to exercise the utmost care in the preparation of its road and the operation of its engines and trains upon it, because the swift movement of its passenger trains is always fraught with extraordinary danger, which it requires extraordinary care to avert. But an innkeeper's liability for the condition and operation of his hotel is limited to the failure to exercise ordinary care, because his is an ordinary occupation fraught with no ex-

traordinary danger. *Sandys v. Florence*, 47 L. J. C. P. N. S. 598, 600. It no more follows, from the similarity of the liability of the carrier to that of the innkeeper, that the latter is liable for the wilful or negligent acts of its servants beyond the scope of their employment, than it does that the latter is liable for a failure to exercise the highest possible care to make his hotel and its operation safe for its guests, because the carrier must exercise that degree of care in the management of its railroad, engines, and trains.

Again, there is a marked difference in the character of the contracts of carriage on a railroad or steamboat and of entertainment at an inn, and a wide difference in the relations of the parties to these contracts. In the former, the carrier takes and the passenger surrenders to him the control and dominion of his person, and the chief, nay, practically the only, occupation of both parties is the performance of the contract of carriage. For the time being all other occupations are subordinate to the transportation. The carrier regulates the movements of the passenger, assigns him his seat or berth, and determines when, how, and where he shall ride, eat, and sleep, while the passenger submits to the rules, regulations, and directions of the carrier, and is transported in the manner the latter directs. The contract is that the passenger will surrender the direction and dominion of his person to the servants of the carrier, to be transported in the car, seat, or berth and in the manner in which they direct, and that the latter will take charge of and transport the person of the passenger safely. The logical and necessary result of this relation of the parties is that every servant of the carrier who is employed in assisting to transport the passenger safely, every conductor, brakeman, and porter who is employed to assist in the transportation, is constantly acting within the scope and course of his employment while he is upon the train or boat, because he is one of those selected by his master and placed in charge of the person of the passenger to safely transport him to his destination. Any negligent or wilful act of such servant which inflicts injury upon the passenger is necessarily a breach of the master's contract of safe carriage, and for it the latter must respond. But the contract of an innkeeper with his guest, and their relations to each other, are not of this character. The innkeeper does not take, nor does the guest surrender, the control or dominion of the latter's person. The performance of the contract of entertainment is not the chief oc-

cupation of the parties, but it is subordinate to the ordinary business or pleasure of the guest. The innkeeper assigns a room to his guest, but neither he nor his servants direct him when or how he shall occupy it; but they leave him free to use or to fail to use it, and all the other means of entertainment proffered, when and as he chooses, and to retain the uncontrolled dominion of his person and of his movements. The agreement is not that the guest shall surrender the control of his person and action to the servants of the innkeeper, in order that he may be protected from injury and entertained. It is that the guest may retain the direction of his own action, that he may enjoy the entertainment offered, and that the innkeeper will exercise ordinary care to provide for his comfort and safety. The servants of the innkeeper are not placed in charge of the person of the guest, to direct, guide, and control his location and action, nor are they employed to perform any contract to insure his safety; but they are engaged in the execution of the agreement of the master to exercise ordinary care for the comfort and safety of the visitor. The natural and logical result of this relation of the parties is that when the servants are not engaged in the course or scope of their employment, although they may be present in the hotel, they are not performing their master's contract, and he is not liable for their negligent or wilful acts.

Moreover, the authorities in the cases involving the liability of common carriers, of owners of palace cars, of steamboats, and of theaters, upon which counsel for the plaintiff seems to rely, when carefully examined, are found to be cases in which the servants were acting within the course or scope of their employment, and they do not rest upon the proposition that the defendants in those cases were liable for the wilful or negligent acts of their employees beyond that scope.

In *Duinelle v. New York C. & H. R. R. Co.* 120 N. Y. 117, 126, 127, 8 L. R. A. 224, 17 Am. St. Rep. 611, 24 N. E. 319, the porter of a sleeping car, who had taken up the ticket of a passenger, was held to be acting within the scope of his employment when he struck the passenger during an altercation between them relative to the return of the ticket.

In *Stewart v. Brooklyn & O. T. R. Co.* 90 N. Y. 588, 591, 43 Am. Rep. 185, the court declared the limit of the company's liability to be "to protect the passenger against any injury arising from the negligence or wilful misconduct of its servants while engaged in performing a duty which

the carrier owes to the passenger," and held that a driver of a street car, who was also the conductor, and who beat a passenger in the car, was within the scope of his employment to carry the passenger safely when he committed the assault.

In *Goddard v. Grand Trunk R. Co.* 57 Me. 202, 203, 2 Am. Rep. 39, a brakeman, who had authority to collect tickets, and who, after collecting one from a passenger, demanded another of him, and grossly insulted him because he declined to pay for his passage again, was held to have been acting within the scope of his employment, and the company was charged with the damages he inflicted.

So in *Craker v. Chicago & N. W. R. Co.* 36 Wis. 657, 673, 17 Am. Rep. 504, a conductor who kissed a passenger; in *Pendleton v. Kinsley*, 3 Cliff. 416, 427, 428, Fed. Cas. No. 10,922, the clerk of a steamer who assaulted a passenger while trying to collect his fare; in *Chicago & E. R. Co. v. Fleznan*, 103 Ill. 546, 42 Am. Rep. 33, a brakeman who struck a passenger because during a search for a lost watch he said he thought the brakeman had it; in *Terre Haute & I. R. Co. v. Jackson*, 81 Ind. 19, 22, a conductor or brakeman who drenched a passenger with water; in *Campbell v. Pullman Palace Car Co.* 42 Fed. 485, a porter of a sleeping car who made indecent proposals to a passenger; in *Williams v. Pullman Palace Car Co.* 40 La. Ann. 421, 8 Am. St. Rep. 538, 4 So. 85, a porter of a Pullman car who assaulted a passenger; and in *Dickson v. Waldron*, 135 Ind. 507, 24 L. R. A. 483, 41 Am. St. Rep. 440, 34 N. E. 506, 35 N. E. 1, the ticket taker and special policeman of a theater, who, in endeavoring to sell the tickets to a customer, assaulted him,—were all held to be, and undoubtedly were, acting within the scope of their various employments when they inflicted the injuries for which the defendants were made to pay.

When all these authorities, and others cited by counsel for the plaintiff, are carefully considered, it clearly appears that the controlling reasons why common carriers have been held liable for the wilful or negligent acts of their servants in these cases are (1) that they owe to their passengers the highest degree of care, and (2) that during the transportation they intrust the entire care, custody, and control of their trains, steamboats, and passengers to these servants, and the passengers yield obedience and control of their movements to these servants, under conditions of peril and subordination in which the passengers are confined and helpless, and the servants in charge of the train are practically the vice

principals of the defendants. *Bass v. Chicago & N. W. R. Co.* 36 Wis. 450, 463, 17 Am. Rep. 495. There are no such reasons for the existence of the liability of innkeepers for the wilful or negligent acts of their servants beyond the scope of their employment, and the argument of counsel in support of such an extension by analogy with the liability of common carriers fails (1) because innkeepers are not liable to their guests for extraordinary care, while carriers are liable to their passengers for the highest degree of care; (2) because innkeepers do not intrust to their servants the absolute control and dominion of their hotels and of the persons of their guests, nor do the latter surrender themselves to the dominion and direction of such servants; and (3) because the wilful and negligent acts of their servants, for which carriers have been held liable, were committed in the discharge of the duties which they were employed to perform, while those of the servants of innkeepers, now under consideration, were done outside the actual and the apparent scope of their employment.

In addition to the argument by analogy which we have been considering, our attention is called to the remarks of Chief Justice Shaw in *Com. v. Power*, 7 Met. 596, 601, 41 Am. Dec. 465, a case in which the question was whether a railroad company had the right to exclude a disorderly person from its railroad station, and Chief Justice Shaw, in discussing that question, said: "An owner of a steamboat or railroad, in this respect, is in a condition somewhat similar to that of an innkeeper, whose premises are open to all guests. Yet he is not only empowered, but he is bound, so to regulate his house, as well with regard to the peace and comfort of his guests, who there seek repose, as to the peace and quiet of the vicinity, as to repress and prohibit all disorderly conduct therein; and, of course, he has a right, and is bound, to exclude from his premises all disorderly persons, and all persons not conforming to regulations necessary and proper to secure such quiet and good order."

It is also called to the opinion of Judge Story, of the same tenor, in *Jencks v. Coleman*, 2 Sumn. 221, Fed. Cas. No. 7,258, a case which involved a similar question, to wit, the right of the owner of a steamboat to exclude a disorderly person therefrom; to the decision of the supreme court in *Rommel v. Schambacher*, 120 Pa. 579, 6 Am. St. Rep. 732, 11 Atl. 779, that an innkeeper who furnished liquor to make a man drunk, and then with gross carelessness permitted him to attach a paper to the back

of one of his customers and to set it on fire in his plain sight, was liable for the injury; and to the opinions of various courts in cases in which the liability of innkeepers for the loss or destruction of the property of their guests was in question. These cases have been examined, but neither the decisions of the questions there presented, nor the opinions of the courts concerning them, are either decisive or persuasive in the consideration and determination of the question here under consideration, whether or not an innkeeper is an insurer of the safety of the person of his guest against the wilful or negligent acts of his servants beyond the scope of their employment, because that question was not considered or determined, and clearly was not in the minds of the judges who rendered the decisions and opinions to which reference has been made. This is also true of all the cases, opinions, and expressions which have been cited by counsel for the plaintiff. To them all the declaration of Chief Justice Marshall in *Oaken v. Virginia*, 6 Wheat. 264, 399, 5 L. ed. 257, 290, applies in all its force: "It is a maxim not to be disregarded that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision."

Finally, counsel for plaintiff presents for our consideration the opinion of the supreme court of Nebraska, rendered since the case in hand was argued and submitted to this court, in an action brought by the father of the plaintiff in this action for the damages which he suffered from the very accident here involved, and in which that court has held that the innkeepers were liable for the act of the bell boy which inflicted the injury, although he was then acting beyond the course and scope of his employment. *Clancy v. Barker*, ante, 642, 98 N. W. 440. This opinion is entitled to, and it has received, great respect and grave consideration. But, after all, the question here is, not what the supreme court of Nebraska has made the law and the contract of innkeepers since the parties to this action made their agreement, but what that law was, and what the contract between these parties was, when their minds met upon the terms of their agreement. At that time no court had ever held, so far as our research and the authorities cited by counsel have disclosed the decisions, that the contract of an innkeeper was to insure the safety of the person of his guest

against the negligent or wilful acts of his servants without the scope of their employment. The pregnant fact that no case can be found in the entire field of English and American jurisprudence in which an innkeeper was ever held to be an insurer of the safety of his guest, or to be liable for the wilful or negligent acts of his servants beyond the scope of their employment, is the most complete demonstration that this was not the law. If it had been, judgments founded upon it would not have been lacking. Every court that had ever decided the question had declared that the liability of the innkeeper was limited to the exercise of reasonable care, that it did not extend to a guaranty of safety, and hence that it extended only to the acts of his servants within the scope of their employment. This was declared to be the general rule of law in the digests and in the textbooks. 16 Am. & Eng. Enc. Law, pp. 546, 547, note 6.

In *Calve's Case*, 8 Coke, 32a, 33b, the court declared that, "if the guest be beaten in the inn, the innkeeper shall not answer for it."

In *Sandys v. Florence*, 47 L. J. C. P. N. S. 598, 600, a case in which a ceiling fell upon a guest in a hotel, Mr. Justice Lindley said: "I pass over the previous allegation that it was the defendant's duty 'to keep the said hotel in a secure and proper condition, so as to be safe for persons using the same as guests,' because I think that duty is too widely alleged, and that the defendant's duty is not to insure his guests, but to see only that they do not suffer from want of reasonable and proper care on his part."

In *Weeks v. McNulty*, 101 Tenn. 496, 499, 43 L. R. A. 185, 70 Am. St. Rep. 693, 48 S. W. 809, an action for damages for the death of a guest in a hotel by fire, the court said: "The general rule of law governing the liability of an innkeeper is that he is not an insurer of the person of his guest against injury, but his obligation is merely to exercise reasonable care that his guests may not be injured by anything happening through the innkeeper's negligence."

In *Sheffer v. Willoughby*, 163 Ill. 518, 521, 522, 34 L. R. A. 464, 54 Am. St. Rep. 483, 45 N. E. 253, a case in which an attempt was made to apply the rule of absolute liability for the loss of the property of a guest in support of a claim for damages caused by the administration of unwholesome food to his guest by the keeper of a restaurant, the court held that the limit of the latter's liability was for the failure to exercise reasonable care.

In *Stanley v. Bircher*, 78 Mo. 245, 246, 248, an action was brought by the plaintiff,

Stanley, against the executors of the estate of Bircher for injuries to her person resulting from her fall down an elevator shaft of a hotel operated by Bircher. She alleged that she was a guest at this hotel, that it became his duty, and that he agreed, to furnish safe accommodations for the reasonable wants of the plaintiff, and that he did not perform the duty or keep the agreement, in that the door to the elevator pit was dangerously constructed and negligently left open by Bircher and his servants, so that she walked into it and was injured. A demurrer was interposed to this complaint on the ground that the cause of action did not survive the death of Bircher. Mark that the complainant clearly alleged a breach of a contract to keep the guest safely, as well as a failure to discharge the duty to exercise ordinary care as in the case at bar, and that the question was whether or not the innkeeper's obligation included a contract of safe-keeping. If it did, the cause of action survived, and the action could be maintained; otherwise, it could not be. The supreme court of Missouri held that the obligation of an innkeeper comprised no such contract, that the action could not be changed from an action on the case for a breach of the duty to exercise ordinary care to one for a breach of contract of safe-keeping by an averment or proof of such contract and breach, because no such contract arose out of the relation of innkeeper and guest. That court said: "But it is claimed by counsel for plaintiff that the action is for the breach of a contract, and that it is not an action on the case for injuries to the person. The allusions in the petition to the formal contract between the plaintiff and the proprietor of the hotel, whereby the plaintiff became a guest in the hotel, cannot change the true character of the action. In setting forth an action of trespass on the case, the pleader often finds it proper, although not absolutely necessary, to mention matters of contract connected with the tort, by way of inducement and explanation. In this case the relation of host and guest, which originated in contract, explains how the defendant's testator came to owe the plaintiff a duty. That duty, however, the law imposes. It is a public duty, which is not defined by the contract. Neither can the proprietor relieve himself from that duty by contract. The action in truth is for a violation of the duty which the law imposes, independent of the contract. Neither the damages nor the scope of the action can be measured or limited by the contract."

And in *Curtis v. Dinneen*, 4 Dak. 245, 30 N. W. 148, 149, 152, the supreme court of

Dakota territory directly decided the very questions presented in this case in accordance with this general rule and in favor of the innkeeper. The complaint in that case alleged, among other things, that "The defendant undertook, for a compensation paid her by the plaintiff, to keep safely and from harm and in a proper manner this plaintiff while she should remain in the defendant's inn or hotel; that while this plaintiff was stopping at the inn or hotel of the defendant this plaintiff was, by the wrongful and spiteful acts of the defendant's servants, greatly injured."

The evidence tended to show that one of the defendant's servants assaulted and inflicted serious injury upon the plaintiff while she was in the hotel as a guest, but the court held that the guest could not recover, because the assault and battery, although committed by the defendant's servant in her hotel, was not inflicted while the servant was acting within the actual or apparent scope of his employment.

The result is that when the defendants made their contract to entertain the plaintiff at their hotel the law was, and in our opinion it still is (*Rahmel v. Lehnendorff*, 142 Cal. 681, 65 L. R. A. 88, 100 Am. St. Rep. 154, 76 Pac. 659), notwithstanding the late decision of the supreme court of Nebraska to the contrary, that their agreement was to exercise reasonable care for his safety, comfort, and entertainment, and that their agreement did not include an insurance of his person against the wilful or negligent acts of their servants beyond the course of their employment. A change of this law and an extension of the liability of the innkeepers now, after the execution of the contract, so as to make the agreement include such an insurance, is to make a new agreement for the parties after the event, and to impose upon the defendants a liability which they could not foresee and to which they did not assent. A retroactive decision, which makes and applies a new rule of law, and attaches another and unforeseen liability to a contract after its execution, is as vicious as an *ex post facto* statute.

The judgment below enforced the contract which the parties made in strict accordance with the law which governed it, and it is affirmed.

Thayer, Circuit Judge, dissenting:

The important question in this case is whether an innkeeper is exempt from liability to one of his guests who is injured within the hotel by an act of gross negligence on the part of a servant of the innkeeper, because the servant, at the time he committed the negligent act, was not en-

gaged in rendering any service for his master, but was momentarily off duty and awaiting orders. The majority of the court decide that question in the affirmative, holding, as I understand, that, if the proprietor of a hotel exercises ordinary care in the selection of his servants, he is not responsible to his guests for any of their acts committed, even within the hotel, no matter how rash, negligent, or brutal they may be, nor how seriously a guest may be injured, provided the servant was not at the moment engaged in some work for and in behalf of the master. I am unable to assent to this doctrine.

The relation existing between a carrier and a passenger has on numerous occasions been likened to that existing between an innkeeper and his guest. Thus, in *Com. v. Power*, 7 Met. 596, 601, 41 Am. Dec. 465, Chief Justice Shaw said: "An owner of a steamboat or railroad in this respect is in a condition somewhat similar to that of an innkeeper whose premises are open to all guests. Yet he is not only empowered, but he is bound, so to regulate his house, as well with regard to the peace and comfort of his guests who there seek repose as to the peace and quiet of the vicinity, as to repress and prohibit all disorderly conduct therein; and, of course, he has a right and is bound to exclude from his premises all disorderly persons and all persons not conforming to regulations necessary and proper to secure such quiet and good order."

This remark was quoted with approval by Ryan, Ch. J., in *Bass v. Chicago & N. W. R. Co.* 36 Wis. 450, 459, 17 Am. Rep. 495.

Also in *Jencks v. Coleman*, 2 Sumn. 221, 226, Fed. Cas. No. 7,258, Mr. Justice Story compared the rights and duties of a carrier with those of an innkeeper, upon the evident assumption that the relation of an innkeeper to his guest was practically like that of a carrier to a passenger.

In *Norcross v. Norcross*, 53 Me. 163, 169, the supreme court of that state remarked, when considering an innkeeper's liability for the property of his guest, that "innkeepers are under the same liability as common carriers."

And in the case of *Dickson v. Waldron*, 135 Ind. 507, 24 L. R. A. 483, 41 Am. St. Rep. 440, 34 N. E. 506, 510, 35 N. E. 1, the supreme court of Indiana remarked: "But common carriers, innkeepers, merchants, managers of theaters, and others who invite the public to become their patrons and guests, and thus submit personal safety and comfort to their keeping, owe a more special duty to those who may accept such invitation. Such patrons and guests have a right to ask that they shall be protected from injury while present on 69 L. R. A.

such invitation, and particularly that they shall not suffer wrong from the agents and servants of those who have invited them."

Also in the case of *Pinkerton v. Woodward*, 33 Cal. 557, 585, 91 Am. Dec. 657, it was held that the liability of innkeepers and of common carriers is founded upon the same considerations of public policy in the one case as in the other.

In the absence of express authority on this point I should be of opinion that an innkeeper is under the same obligation to protect his guests against the wrongful and discourteous acts of his servants, committed within or upon his premises, as a carrier to protect its passengers against like acts of its employees. A guest comes to a hotel on the invitation of the proprietor, and for the latter's profit and advantage, and upon the implied understanding that while on the premises as a guest he shall receive courteous and considerate treatment from the proprietor and all persons who are his servants, or, at least, upon the implied understanding that while beneath his roof the life of the guest shall not be imperiled by the rash, inconsiderate, or wrongful acts of those who are his servants. The general law of hospitality would seem to impose such an obligation upon an innkeeper. He promises suitable entertainment to all his guests, as well as respectful, considerate, and proper treatment on the part of all his servants. If a servant of a hotel, when off duty, should meet a guest outside of the hotel, and not on the premises, and there assault him, it is doubtless true—although the case at bar requires no decision on that point—that the innkeeper could not be charged with responsibility for the servant's conduct; and it is probably true that the innkeeper would not be responsible for an assault committed on one of his guests within the hotel by a stranger, provided he has taken all reasonable precautions to prevent such occurrences by excluding disorderly persons from his premises. But in my opinion the law casts on the innkeeper an obligation to see to it that his guest is not injured, while within the hotel, by the wrongful, inconsiderate, or negligent acts of those who are his servants.

It is said in the opinion of the majority that an innkeeper is not an insurer of the safety of the person of his guest while within the hotel. The same may be said of carriers. They do not insure the personal safety of passengers, but only to exercise a very high degree of care, or, as it is sometimes said, "the utmost care," for their protection. Yet it is now well settled that this duty is so comprehensive that it renders the carrier responsible for

injuries inflicted on passengers so long as the relation of carrier and passenger exists, not only by the negligent acts of its servants done while in the performance of some duty, but also by their wilful and wrongful acts, such as assaults committed on passengers or indignities offered to them. The obligation also rests on the carrier to protect its passengers while in transit, not only against the wilful and wrongful acts of its own servants, but so far as practicable from acts of violence committed by strangers and copassengers. It makes no difference, as it seems, what motive may have actuated a servant of the carrier in committing the wrongful act complained of, or whether it was done in conformity with the carrier's orders, or in express violation thereof and on the sole responsibility of the servant; for, if it was done while the relation of carrier and passenger existed, the carrier is responsible, and it cannot defend on the ground that the act of its servant was done without its sanction and at a moment when he was not rendering any special service to the carrier. A different rule obtains, of course, as respects wilful and wrongful acts done by employees to those to whom the carrier at the time owed no other or greater duty of protection than it owed to every other person in the community; but, when the peculiar relation of carrier and passenger exists, the modern rule appears to be that the carrier is under an obligation to see to it that a passenger suffers no harm on account of the wrongful and wilful acts of its servants, and that every practicable precaution is taken to protect him against the wrongful acts of strangers and copassengers. *Stewart v. Brooklyn & C. T. R. Co.* 90 N. Y. 588, 43 Am. Rep. 185; *Dioinelle v. New York C. & H. R. R. Co.* 120 N. Y. 117, 125, 8 L. R. A. 224, 17 Am. St. Rep. 611, 24 N. E. 319; *Goddard v. Grand Trunk R. Co.* 57 Me. 202, 213, 2 Am. Rep. 39, and cases there cited; *Bryant v. Rich*, 106 Mass. 188, 8 Am. Rep. 311; *Spohn v. Missouri P. R. Co.* 87 Mo. 74, 80; *Craker v. Chicago & N. W. R. Co.* 38 Wis. 657, 17 Am. Rep. 504; *Pendleton v. Kinsley*, 3 Cliff. 416, 427, Fed. Cas. No. 10,922; *Chicago & E. R. Co. v. Fleaman*, 103 Ill. 546, 42 Am. Rep. 33; *Terre Haute & I. R. Co. v. Jackson*, 81 Ind. 19.

Now, it is true that a hotel is an immovable structure, and does not run on wheels like a train of cars; but in all other respects the relation existing between an innkeeper and his guest is like that existing between a carrier and passenger, and this fact has always been recognized, as shown by the cases above cited. An innkeeper, like a carrier, is engaged in a quasi public

service. When he embarks in the business of keeping a hotel, he is bound to provide entertainment for all travelers who seek a place of rest and refreshment, provided they come to him in a fit condition to be entertained as guests, and are able to pay the customary charges. Unless relieved of the obligation by an express statute, the innkeeper, like the carrier, is an insurer of his guests' baggage against loss occasioned otherwise than by an act of God or the public enemy. 16 Am. & Eng. Enc. Law, 2d ed. p. 528, and cases there cited. Besides, an innkeeper is vested with the same power of control over his premises which the carrier exercises over such means of public conveyance as he provides. An innkeeper has the right to exclude from his premises all disorderly persons, and to suppress all disturbances therein that tend to disturb his guests or imperil their safety, and, according to the decision of Chief Justice Shaw in the case above cited (7 Met. 596, 601), it is his common-law duty to exercise this power. Aside from these considerations, the innkeeper, like the carrier, has the exclusive right to select all of the persons who are to aid him in the discharge of his quasi public functions. I have been unable, therefore, to discover any sufficient reason why he should not be held responsible to his guests for the consequences of any wilful and wrongful acts of his servants, committed within the hotel, to the same extent that the carrier is responsible to his passengers for like wrongful acts of its servants; and within the authorities above cited a carrier would be clearly responsible to one of its passengers for an injury inflicted by one of its employees under such circumstances as those disclosed in the present case.

Relative to the authorities cited in the majority opinion and not already referred to, this may be said: *Calye's Case*, 8 Coke, 32a, 33b, contains the single detached statement that, "if the guest be beaten in the inn, the innkeeper shall not answer for it." But it does not say by whom beaten, whether by a servant of the innkeeper or by a stranger. This, however, is a very old case, decided in 1584, and the statement quoted is purely *dictum* since the case involved no question respecting the liability of an innkeeper for an assault committed upon a guest within the hotel. Moreover, as the learned editor of the American & English Encyclopædia of Law remarks, in substance (*vide* vol. 16, 2d ed. p. 545), it may well be doubted whether the statement above quoted would be accepted at the present day as authority for the doctrine which it enunciates, since the modern authorities are opposed to the view that an

innkeeper cannot be held responsible for an assault committed upon one of his guests within the hotel by a servant, or even by a stranger when the innkeeper has not taken proper care to exclude disorderly persons from his premises.

Curtis v. Dinneen, 4 Dak. 245, 30 N. W. 148, was a case in which a guest of a hotel kept by a married woman sought to hold her responsible for an assault and battery committed by her husband without her consent or ratification. The husband was living with the wife in the hotel, as he had a right to do, and was assisting her to operate it, so that the case was embarrassed by the existence of the marital relation; the court holding that under the circumstances the wife could not be held responsible for the tort of the husband.

The other cases that are referred to are without exception cases where it was sought to hold the innkeeper responsible for some defect in the hotel premises, and

in one of them (*Sandys v. Florence*, 47 L. J. C. P. N. S. 598, 600) it was remarked, *arguendo*, in discussing a demurrer to the complaint, that an innkeeper's duty "is not to insure his guests, but to see only that they did not suffer from want of reasonable and proper care on his part." None of the cases, however, discuss the particular question which is presented in the case at bar, whether an innkeeper is liable to his guest for the reckless conduct of one of his servants committed upon the hotel premises, whereby the life of the guest is jeopardized. In my judgment an innkeeper ought to be held liable for an act of that nature, and as respects that question I concur in the view which was expressed by the supreme court of Nebraska in *Clancy v. Barker*, ante, 642, 98 N. W. 440, that was decided upon the same state of facts which this record discloses.

I think the judgment below should be reversed, and a new trial ordered.

TENNESSEE SUPREME COURT.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, *Appt.*,

v.

John H. SAWYER.

(.....Tenn.....)

The duty to sound warnings when trains approach a trestle over a highway depends upon the dangerous character of the place, which is a question for the determination of the jury.

(March 25, 1905.)

A PPEAL by defendant from a judgment of the Circuit Court for Williamson County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Reversed*.

The facts are stated in the opinion.

Messrs. John Bell Kuhle, C. E. Berry, and Henderson & Henderson for appellant.

Messrs. Hearn, McCorkle, & Lane for appellee.

McAllister, J., delivered the opinion of the court:

The defendant in error, Sawyer, recovered

NOTE.—As to duty to give signal when trains approach a trestle over highway, see also, in this series, *Rupard v. Chesapeake & O. R. Co.* 7 L. R. A. 316.
69 L. R. A.

a verdict and judgment against the company for the sum of \$1,300 damages for personal injuries. The company appealed, and has assigned errors.

The gravamen of the action, as alleged in the declaration, is that Sawyer was driving in a buggy along a turnpike road, and, when about to pass under the overhead trestle of the company, a train of cars rapidly came upon the tracks, frightening plaintiff's horse, overturning the buggy, and throwing plaintiff to the ground, as the result of which he sustained serious personal injuries. The theory of the plaintiff below was that this was a dangerous crossing, and the company was guilty of negligence in not warning the public of an approaching train.

The declaration comprises five counts, but the substance of the complaint, as alleged in the first count, is: "Said defendant, Louisville & Nashville Railroad Company, through and by its agents and servants, did carelessly, wantonly, negligently, and wrongfully, and without notice or warning to plaintiff, run, drive, and propel one of its said engines and trains of cars up to, upon, over, and across said overhead bridge, directly over and above said line of pike road upon which plaintiff was traveling in the way and manner aforesaid, on account of which careless, wanton, negligent, and wrongful act of defendant railroad company, the horse which plaintiff was driving became frightened," etc.

There is no complaint, either in the declaration or proof, that the horse was frightened in consequence of any excessive or unusual whistling or ringing of the bell or escaping of steam, which is usually the foundation of such actions, as illustrated by the case of *Mitchell v. Nashville, C. & St. L. R. Co.* 100 Tenn. 329, 40 L. R. A. 426, 45 S. W. 337.

But it is conceded that the train approached this overhead bridge under which the plaintiff was about to pass almost noiselessly.

The complaint in this declaration is that it was the legal duty of the railroad company to warn travelers upon the highway, about to pass under the railroad track, of the approach of the train, and the failure of the company to perform this duty was the proximate cause of the accident.

There is proof tending to show that at the *locus in quo* of the accident the Louisville & Nashville Railroad crosses the Franklin & Nolensville Turnpike by means of an overhead trestle, resting upon massive rock walls, which project out on either side of the railroad, forming a narrow and restricted passageway under the railroad. The view of the approaching train was to some extent obstructed by houses, walls, hedges, etc.; and, though plaintiff was looking and listening for any train that might be coming from either direction, he neither saw nor heard the approaching train until about to start under the overhead bridge, when this train, running at the rate of about 40 miles an hour, suddenly appeared and passed over said trestle while plaintiff was passing under it, or just as he emerged from it on the eastern side. As a result thereof, plaintiff's horse became frightened, throwing plaintiff from the buggy to the ground, breaking his collar bone, and inflicting other serious personal injuries. There is proof tending to show that, as a consequence of the fracture of plaintiff's collar bone, a knot or malformation had appeared on that part of his breast and shoulder where said collar bone was broken. According to the proof, the whistle was not sounded, nor the bell rung, as the train approached this overhead crossing. It is insisted that the company was under no obligation to ring the bell or sound the whistle at this point in obedience to the requirements of the statute, since the obstruction was not upon the track of the company, but beneath it.

The theory of the plaintiff is that the company was under a common-law duty to sound the whistle on approaching a public highway extending under the railroad trestle, and which crossing, by reason of the topography of the country and the surrounding environment, was dangerous to the public travel-

ing along the highway. On the other hand, it is insisted on behalf of the company there is no common-law obligation on a railroad company to sound signals at an underpass, and no liability for any injury resulting from the frightening of a horse by the lawful and reasonable operation of a train over an underpass. The company therefore assigns as error the following instruction of the trial judge on this subject, *viz.* :

"It was the duty of the defendant company to give plaintiff reasonable warning of the approach of its trains, by the usual signals, so as to put plaintiff upon his guard on his approaching or passing under the track. If you believe from the evidence in this case that the plaintiff, on approaching the overhead bridge, was in the exercise of due care and caution, as defined to you above, and while passing under the overhead bridge the defendant's train ran over the bridge, having given plaintiff no reasonable warning of the approach in the usual way, by ringing the bell or blowing the whistle; and if the noise of the sudden approaching train passing over the road scared the plaintiff's horse and caused him to run away, throwing the plaintiff out of his buggy; and if the negligence of the defendant, through its servants or agents, by failing to give such warning, was the proximate cause (that is, the direct and efficient cause) of his injuries, without which his injuries would not have occurred, —then the defendant company is liable, and your verdict should be for the plaintiff."

It is conceded by counsel on both sides that the question thus presented by the charge of the trial judge is one of first impression in this state. It is conceded by counsel for the company that, under the authorities, if this were a grade crossing, the company would be operated with some common-law duty to warn travelers of its approach, but claimed that no such duty applies when the traveler is not compelled to pass over the railroad track, but beneath it.

As illustrating the position of counsel for the company, the case of *Favor v. Boston & L. R. Corp.* 114 Mass. 350, 19 Am. Rep. 364, is cited, in which the court used this language, *viz.* :

"Where a railroad crosses a highway at grade, the law imposes upon it the duty of giving notice to travelers of the approach of its trains. . . . This rule applies because at grade crossings the traveler on the highway and the railroad enjoy a common privilege on the highway itself, and each must use such privilege with due regard to the safety and rights of the other. . . . And as a train of cars is a dangerous power when in motion, and capable of doing great injury, a high degree of care

is demanded of the railroad in controlling it, and some notice of its approach to the highway is required both by the rules of the common law and by statute. But where a railroad crosses a highway by a bridge, it does not, in common with the traveler, have any privilege in or use of the highway itself. Though the track and the highway are near and adjacent to each other, they are entirely distinct and separate. The railroad has no rights in the highway, and consequently the same duties are not imposed upon it that are imposed when it passes over the highway itself in common with the traveler. It has the right to use its roadbed and bridge as a railroad may use them,—by running its trains at the common rate of speed, accompanied by the usual noises attendant upon such exercise of its rights. It is not bound by law to notify the traveler of its intention to use its bridge in the ordinary and usual manner."

In *Ryan v. Pennsylvania R. Co.* 132 Pa. 304, 19 Atl. 81, it appeared that plaintiffs were driving under defendant's railroad upon a public street, when a train crossing overhead frightened their horse so that it became unmanageable and ran away, inflicting serious personal injuries, and resulting in the death of one of the children. The court said: "The defendant company was operating its road in a lawful manner. No defect was shown in the construction of the road. On the contrary, it was the work of competent engineers, approved by the chief engineer and surveyor of the city, and in pursuance of an ordinance of councils expressly authorizing it. The sight and sound of a moving train always have a tendency to frighten horses. In this case the fright was occasioned by the sound. We cannot measure, nor can a jury be properly allowed to measure, the amount of sound which may be made by a railroad train, either in crossing bridges at overhead crossings or at other places. The defendant company, under all the authorities, has the right to operate its road in a lawful manner; and, when it does so without negligence and without malice, it is not responsible for injuries occasioned thereby."

In *Ransom v. Chicago, St. P. M. & O. R. Co.* 62 Wis. 178, 51 Am. Rep. 718, 22 N. W. 147, liability was adjudged against the company for breach of a statute of that state requiring certain precautions to be observed by railroad companies before crossing any highway; causing a horse to run away near a crossing, and inflicting personal injuries on plaintiff's wife. The court said: "There is no statute, and we are aware of no common-law rule, which, under such circumstances, requires railroad companies to observe those precautions to

avoid accident. If, therefore, the defendant is liable in this action, it is so because it failed to comply with the requirements of the statute prescribing its duty when its train approached the crossing of the highway."

In *Jenson v. Chicago, St. P. M. & O. R. Co.* 86 Wis. 589, 22 L. R. A. 680, 57 N. W. 359, the court said as follows: "It is certainly no wrong for the train to be run over such bridges in the usual and ordinary way, and even in this way some horses going under the bridge, or being near it at the same time, might be frightened by it. The trains must necessarily make considerable noise going over the bridge. They cannot be run without it. It is not by any means certain that a train would make less noise going over slowly than faster. What degree of noise must it make, to frighten horses? . . . As to ringing the bell and blowing the whistle, they are only required, if at all, in order to avoid frightening horses, and, with that view, to warn the traveler on the highway to stop. Where should he stop, and how near the bridge? If near the bridge, and his horse is liable to be frightened and run away, he will be in a much more dangerous condition than if he should drive on and take his chances, for the horse, facing the train rushing over the bridge, would turn suddenly around to escape danger, and upset the carriage."

The cases just mentioned comprise all those cited by counsel for the company in support of their contention that the charge of the circuit judge was erroneous. The authorities holding the contrary doctrine will now be considered. *Rapalje & Mack*, in their *Digest of Railway Law*, vol. 3, § 92, p. 493, state the law thus: "Independently of statute, it is the duty of those in charge of a train to give notice of their approach at all points of known or reasonably apprehended danger;" citing *Chicago & A. R. Co. v. Dillon*, 123 Ill. 570, 5 Am. St. Rep. 559, 15 N. E. 181; *Pennsylvania Co. v. Krick*, 47 Ind. 368; *Winstanley v. Chicago, M. & St. P. R. Co.* 72 Wis. 375, 39 N. W. 856. "The absence of a statute requiring the ringing of a bell or the sounding of a whistle in approaching highway crossings will not excuse the company for a failure to do so under all circumstances. Where the view of approaching trains is obstructed, or it is impossible or very difficult to hear them, and in similar cases, it is clearly the duty of the company to give such signals, although not required by statute;" citing authorities. "Whether, in a given case, ordinary care requires the giving of such signals, is a ques-

tion for the jury;" citing *Indianapolis, C. & L. R. Co. v. Hamilton*, 44 Ind. 76.

Again, the same author, at § 97, p. 494, vol. 3, says: "Where the view of an approaching train is obstructed, though the company is not required by statute to sound a whistle or ring a bell when its train approaches a highway, yet, where such appliances are available, a failure to use them is negligence;" citing cases. "Where an approaching engine is concealed from the view of persons approaching a highway crossing at a place of much travel, regardless of the statute, the duty of the company to operate its train at a moderate rate of speed, and to give the usual signals of its approach, is more imperative than at a place of less danger;" citing authorities.

Again, the same author, at § 154, p. 524, vol. 3, says:

"The provisions of New York act of 1850, § 39 [p. 232, chap. 140], prescribing a penalty for running a locomotive past highway crossings without giving signals, applies to a crossing where the track is carried over the highway on a bridge;" citing *People v. New York C. R. Co.* 13 N. Y. 78, Affirming 25 Barb. 199. "It is as much the duty of a company to give notice of the approach of trains where highways pass under or over the track as where they cross at grade, if danger is likely to result to persons or property from a failure to do so;" citing *Pennsylvania R. Co. v. Barnett*, 59 Pa. 259, 98 Am. Dec. 346.

This latter case seems to be the leading authority relied on by counsel for the plaintiff below, and we shall therefore proceed to notice it *in extenso*. The facts of that case are that the public road crossed the railroad by a bridge 19 feet above the track. The plaintiff was traveling along this road, and while driving over the bridge an express passenger train passed under it, whistling as it passed, at which his horse took fright and ran away, overturning the carriage and throwing plaintiff out, in consequence of which he was seriously and permanently injured. It appeared that a mill on the east side of the public road obstructed the view of the railroad to some extent. About 100 rods east of the bridge there was a whistling post, and it was usual for trains going west to sound an alarm whistle as they passed, but at the time of the accident the whistle was not sounded until the train was passing under the bridge. The court, in the midst of its opinion, said: "The degree of care demanded of the company in running its train depended on circumstances, and whether it observed due care in approaching the bridge, or was guilty of negligence in not sounding an alarm whistle, was a question which properly belonged to the jury to determine." 69 L. R. A.

. . . If there was no danger to the persons and property of those who might be traveling along the public road in running its trains without giving any notice of their approach to the bridge, then the company is not chargeable with negligence in not giving it. But if danger might be reasonably apprehended, it was the duty of the company to give some notice or warning in order that it might be avoided. . . . Whether, therefore, the company exercised proper care and diligence in running the train in order to prevent injury to the persons and property of those who were lawfully on the public road and in the vicinity of the crossing, was a question for the jury."

It was further insisted in that case that the company would not be liable for failing to sound the alarm whistle except at points on the road where injury might result to persons on the track at road crossings at grade and stations. The court held that whether it is the duty of the company to give notice of the approach of its trains at any point on the road depends altogether upon circumstances. Where there is no reasonable apprehension of danger, no such notice is required. But if danger to the person or property of others may be reasonably apprehended or is likely to result from the running of its trains without giving such notice, then it is the duty of the company to give it, and its omission is negligence. The court approved the charge of the circuit judge in saying that it was the duty of the company to give notice wherever danger may result to persons rightfully traveling on a public road that crosses the track, whether at grade, or over or under the railroad, where danger would be the consequence of want of notice. It will be observed that the substance of this opinion is that, whether or not it was negligence on the part of the company to fail to warn travelers of the approach of the train to a public crossing, was a question for the determination of the jury, in view of all the surrounding circumstances, and it was immaterial whether the railroad crossed the public road at a grade, or over or under the public road.

Another case very much relied on by counsel for plaintiff below is *Rupard v. Chesapeake & O. R. Co.* 88 Ky. 280, 7 L. R. A. 316, 11 S. W. 70. In that case it appeared that the wife of plaintiff, while riding horseback on the public road at a point where the railroad crosses said road on a high trestle, was thrown from her horse in consequence of his fright from the noise of the train as it passed over the trestle. The ground of liability asserted in that case was the failure of the company to give notice of the approach of the train to the crossing. The court, in considering the lia-

bility of the company, repudiated the doctrine laid down in *Favor v. Boston & L. R. Corp.* 114 Mass. 350, 19 Am. Rep. 364, in which a distinction was drawn between the duty of the company to warn travelers of the approach of a train to an overhead bridge or to a grade crossing. In the Kentucky case the court held that it is the duty of a railroad company, where a train crosses a public highway on a trestle, and there is danger of catching a traveler thereunder unawares, and frightening the horse that he is riding or driving, to give some timely warning of the approach of the train to the crossing. The court, in its opinion, while disagreeing with the conclusions reached by the court in *Favor v. Boston & L. R. Corp.*, approved the principles enunciated in *Pennsylvania R. Co. v. Barnett*, 59 Pa. 263, 98 Am. Dec. 346.

It was further held in that case that the question of negligence in failing to give notice should be left to the determination of the jury. Counsel for plaintiff in error cites the case of *Farley v. Harris*, 186 Pa. 440, 40 Atl. 798, which case, it is claimed, is a modification of the rule laid down in *Pennsylvania R. Co. v. Barnett*, 59 Pa. 259, 98 Am. Dec. 346. In that case it appeared that the plaintiff was crossing an overhead bridge when his horse became frightened, ran away, and injured the plaintiff. The grounds of recovery alleged in that case were two: (1) That the whistle had been negligently sounded when the locomotive was immediately under the bridge; and (2) that no whistle had been sounded by the locomotive on approaching this overhead bridge. The court said that the rule applicable to grade crossings—that it is negligence in railroad companies not to give warning on approaching them—has no application to under and over crossings at every street crossing in a city. The court, in concluding its opinion, says that the cases cited by the appellant (*Pennsylvania R. Co. v. Barnett*, 59 Pa. 259, 98 Am. Dec. 346, and other cases) are all applicable to a different state of facts than are presented here.

A careful examination of *Farley v. Harris*, 186 Pa. 440, 40 Atl. 798, will show that the gravamen of the action was the blowing of the whistle when Farley was on the bridge, and the locomotive was directly beneath it. The proof was that the fright of the horses was caused solely by the blasts of the whistle

when Farley was in the middle of the bridge. It is true that in the midst of the opinion the court said that the rule applicable to grade crossings has no application to under and over crossings at every street crossing in a city. "In fact," continued the court, "such crossings are constructed on the theory that, by adopting them, travel is unobstructed, and danger to travelers on parallel and crossing streets is lessened by the absence of the . . . screams of steam whistles necessary to give warning at grade crossings." The court then said that *Pennsylvania R. Co. v. Barnett*, 59 Pa. 259, 98 Am. Dec. 346, and other cases cited, are all applicable to a different state of facts, and concludes by saying: "Our decision is based solely on the circumstance of an accident at a properly constructed overhead bridge at one of the many street crossings of a steam railroad in a city." After an examination of all the authorities cited, we think the true rule deducible therefrom is that, if the place is dangerous, then the company is onerated with the duty of warning travelers on the highway of the approach of its trains, but whether the place, as a matter of fact, is dangerous, is a question for the determination of the jury. The law imposed no absolute duty upon the company to give notice at this particular crossing. That duty was only required, as matter of law, in the event the jury should find that danger was to be reasonably apprehended at this conjunction of underpass and overhead bridge. The charge of the trial judge in this case made the duty of the company absolute to give warning of the approach of the train to the crossing. Said the court: "It was the duty of the defendant company to give plaintiff reasonable warning of the approach of the train by the usual signals, so as to put plaintiff upon his guard on his approaching or passing under the track." There was no such absolute duty resting upon the company either at common law or by statute, but its duty in this respect was entirely dependent upon the question of fact whether the place was dangerous. The charge of the court should have been so formulated as to leave to the determination of the jury the dangerous character of the place as the predicate for the application of the principle of law announced. For the error indicated, the judgment is reversed and the cause remanded.

MINNESOTA SUPREME COURT.

STATE of Minnesota, *Resp't.*,
v.

Robert H. EDWARDS *et al.*, *Appts.*

(.....Minn.....)

- *1. Section 2, chap. 225, p. 246, Laws 1899, requires a commission merchant, duly licensed to sell grain on commission, to render a true statement to the consignor within twenty-four hours of making a sale, showing the grain sold, price received, name and address of purchaser, and the date, hour, and minute when sold, with vouchers for charges and expenses. *Held*: This law contemplates an actual purchaser, other than the consignee, and the purchase by him of such grain, after close of business hours, at the highest price of the day upon the board of trade, is not a sale within the meaning of this act, and a report of such sale to the consignor is not a compliance with its provisions. If the consignee makes such purchase, and subsequently sells the same at an advance, such sale inures to the benefit of the consignor, and the failure to return to him a true statement, as provided, constitutes a violation of the law.
2. The consignor is not estopped from repudiating a purchase of grain by his consignee, unless he acquiesces therein, and ratifies the same after being fully informed of the entire transaction, including a subsequent sale at a profit.
3. The statement in the criminal complaint that defendants wilfully and unlawfully made a false report is immaterial. The penalty is imposed for a failure to render the report as provided, irrespective of intent, and it is immaterial that the consignee acted in good faith and in accordance with the custom of commission merchants in that locality.
4. Chapter 225, p. 246, Laws 1899, is constitutional, and not in conflict with the Federal Constitution, as an interference with interstate commerce.

(February 17, 1905.)

APPPEAL by defendants from an order of the Municipal Court of Duluth denying a new trial after their conviction for alleged violation of the statute governing returns by commission merchants. *Affirmed.*

The facts are stated in the opinion.

Messrs. Alexander Marshall and Warner E. Whipple, for appellants:

Having charged the offense as having been

*Headnotes by LEWIS, J.

NOTE.—As to rule that agent must not profit at his principal's expense in the matter of his agency, see also, in this series, *Tyler v. Sanborn*, 4 L. R. A. 218, and *note*; *McNutt v. Dix*, 10 L. R. A. 660; *Jansen v. Williams*, 20 L. R. A. 207; *Boswell v. Cunningham*, 21 L. R. A. 54; *Kimball v. Ranney*, 46 L. R. A. 408; *Holmes v. Cathcart*, 60 L. R. A. 784; *Trice v. Comstock*, 61 L. R. A. 176, and *Van Dusen v. Bigelow*, 67 L. R. A. 288.
69 L. R. A.

done wilfully and unlawfully, the state cannot disregard this feature of the formal charge as surplusage, and omit to prove it.

Felton v. United States, 96 U. S. 699, 24 L. ed. 875; *Potter v. United States*, 155 U. S. 438-446, 39 L. ed. 214-217, 15 Sup. Ct. Rep. 144.

There is no law making it unlawful for those who follow the business of grain commission merchants under the act here under consideration also to buy grain on the open market, on their own account, and to sell the same at an advance, if possible.

The disability which the law, from considerations of public policy, imposes upon the defendants in this transaction, is also imposed upon all parties occupying towards others certain confidential or fiduciary relations.

Gilbert v. Hewetson, 79 Minn. 326, 79 Am. St. Rep. 486, 82 N. W. 655.

Such a transaction between principal and agent is not void, but voidable.

Allis v. Billings, 6 Met. 417, 39 Am. Dec. 744; *Mechem, Agency*, § 464; *Story, Agency*, § 214; 1 *Story, Eq. Jur.* 11th ed. § 316a; *Eastern Bank v. Taylor*, 41 Ala. 93; *Bassett v. Brown*, 105 Mass. 551; *Marsh v. Whitmore*, 21 Wall. 178, 22 L. ed. 482; *Hammond v. Hopkins*, 143 U. S. 224-251, 36 L. ed. 134-145, 12 Sup. Ct. Rep. 418; *Hoyt v. Latham*, 143 U. S. 553-566, 36 L. ed. 259-264, 12 Sup. Ct. Rep. 568; *Ferguson v. Gooch*, 94 Va. 1, 40 L. R. A. 234, 26 S. E. 397; *Staats v. Bergen*, 17 N. J. Eq. 554; *Porter v. Woodruff*, 36 N. J. Eq. 174; *Adams v. Sayre*, 76 Ala. 509; *Ives v. Ashley*, 97 Mass. 198; *Sims v. Miller*, 37 S. C. 402, 34 Am. St. Rep. 762, 16 S. E. 155; *Francois v. Kerker*, 85 Ill. 190; *Greenwood v. Spring*, 54 Barb. 375; *People v. Open Board*, 92 N. Y. 98; *Jones, Pledges*, 2d ed. § 637; 22 Am. & Eng. Enc. Law, 2d ed. p. 892; *Lord v. Hartford*, 175 Mass. 320. 56 N. E. 609; *Bryan v. Baldwin*, 52 N. Y. 232; 2 *Cook, Corp.* 4th ed. § 652; *Bjorngaard v. Goodhue County Bank*, 49 Minn. 483, 52 N. W. 49; 1 Am. & Eng. Enc. Law, 2d ed. pp. 1073, 1080; 1 *Perry, Tr.* §§ 205-206; *Baldwin v. Allison*, 4 Minn. 25, Gil. 11; *Tilleny v. Wolverton*, 46 Minn. 256, 48 N. W. 908.

Such voidable sales have the effect of divesting the property of the principal, *cestui que trust*, or party similarly situated, and passing the same, subject to divestiture by repudiation, to the agent or trustee, or to their vendees.

Pearce v. Gamble, 72 Ala. 341; *Baldwin v. Allison*, 4 Minn. 25, Gil. 11; *Grumley v. Webb*, 44 Mo. 444, 100 Am. Dec. 304; *Fountain Coal Co. v. Phelps*, 95 Ind. 271; *Krusc*

v. Steffens, 47 Ill. 112; *Marshall v. Carson*, 38 N. J. Eq. 250, 48 Am. Rep. 319; *Bassett v. Brown*, 105 Mass. 551; *Lytle v. Beveridge*, 58 N. Y. 592; *Fulton v. Whitney*, 66 N. Y. 548; *Gilbert v. Hewetson*, 79 Minn. 328, 79 Am. St. Rep. 486, 82 N. W. 655; *Lees v. Nuttall*, 1 Russ. & M. 53; 1 Perry, Tr. § 206.

Being voidable only, it was capable of ratification.

Ratification may be shown by acts of acceptance.

Hatch v. Taylor, 10 N. H. 538; *Hazard v. Spears*, 2 Abb. App. Dec. 353; 1 Am. & Eng. Enc. Law, 2d ed. p. 1195; *Goss v. Stevens*, 32 Minn. 472, 21 N. W. 549; *Wright v. Vineyard M. E. Church*, 72 Minn. 78, 74 N. W. 1015; *Anderson v. Johnson*, 74 Minn. 171, 77 N. W. 26; *Smith v. Fletcher*, 75 Minn. 189, 77 N. W. 800; *Robbins v. Blanding*, 87 Minn. 247, 91 N. W. 844.

Carlson's conduct amounted in law to a ratification.

Wright v. Vineyard M. E. Church, 72 Minn. 78, 74 N. W. 1015; *Anderson v. Johnson*, 74 Minn. 171, 77 N. W. 26; *Robbins v. Blanding*, 87 Minn. 246, 91 N. W. 844; *Bassett v. Brown*, 105 Mass. 551; *Story, Agency*, § 244; *Mecham, Agency*, § 167; *Hankins v. Baker*, 46 N. Y. 666; *Cook v. Tullis*, 18 Wall. 332-338, 21 L. ed. 933-936; *Marsh v. Fulton County*, 10 Wall. 676-684, 19 L. ed. 1040-1042; *Grenada County v. Brogden*, 112 U. S. 271, 28 L. ed. 707, 5 Sup. Ct. Rep. 125; *Sykes v. Columbus*, 55 Miss. 115; *Lourey v. Harris*, 12 Minn. 255, Gil. 166; *Sheffield v. Ladue*, 16 Minn. 388, 10 Am. Rep. 145, Gil. 346; *Wisconsin v. Torinus*, 26 Minn. 5, 37 Am. Rep. 395, 49 N. W. 259; *Hunter v. Cobe*, 84 Minn. 187, 87 N. W. 612; *Clews v. Jamieson*, 182 U. S. 461-483, 45 L. ed. 1183-1194, 21 Sup. Ct. Rep. 845; *Hoyt v. Thompson*, 19 N. Y. 219; *Ballston Spa Bank v. Marine Bank*, 16 Wis. 125; 2 Kent, Com. 616; *Saveland v. Green*, 40 Wis. 431; *Brown v. La Crosse City Gaslight & Coke Co.* 21 Wis. 51.

If the principal wishes to repudiate the unauthorized act of his agent, he should do so when it is brought to his knowledge.

Law v. Cross, 1 Black, 535, 17 L. ed. 185; *Hoyt v. Thompson*, 19 N. Y. 218; *Indianapolis Rolling Mill v. St. Louis, Ft. S. & W. R. Co.* 120 U. S. 256, 30 L. ed. 639, 7 Sup. Ct. Rep. 542; *Clews v. Jamieson*, 182 U. S. 461-483, 45 L. ed. 1183-1194, 21 Sup. Ct. Rep. 845.

The return of the proceeds of an unauthorized act is a condition precedent to repudiation, and the failure so to return or tender such proceeds is a ratification.

Johnston v. Milwaukee & W. Invest. Co. 49 Neb. 68, 68 N. W. 383; *First Nat. Bank v. Oberne*, 121 Ill. 25, 7 N. E. 85; *Farmers & M. Bank v. Farmers & M. Nat. Bank*, 49 Neb. 379, 68 N. W. 488. 69 L. R. A.

The contract was binding until Carlson gave notice of his dissatisfaction with, and refusal to be bound by, such transactions.

Nichols & S. Co. v. Snyder, 78 Minn. 502, 81 N. W. 516.

Where a principal confers on an agent an authority of a kind, or empowers him to transact business of a nature, in reference to which there is a well defined and generally known custom or usage, it is the presumption of law, in the absence of anything to indicate a contrary intent, that the authority was conferred in contemplation of such custom or usage, and to be exercised with reference thereto.

Kraft v. Fancher, 44 Md. 215; *Long Bros. v. J. K. Armsly Co.* 43 Mo. App. 267; *Sutton v. Tatham*, 10 Ad. & El. 27; *Graves v. Legg*, 2 Hurlst. & N. 210; *Guesnard v. Lowisville & N. R. Co.* 76 Ala. 453; *Samuels v. Oliver*, 130 Ill. 73, 22 N. E. 499; *Oldershaw v. Knoles*, 4 Ill. App. 63; *Bayliffe v. Butterworth*, 1 Exch. 425; *Pollock v. Stables*, 12 Q. B. 765; *Goodenow v. Tyler*, 7 Mass. 36. 5 Am. Dec. 22.

By reason of partial transit of the car through Wisconsin, the transaction lost its character of domestic commerce, and became interstate.

Pacific Coast S. S. Co. v. Railroad Comrs. 18 Fed. 10; *Sternberger v. Cape Fear & Y. Valley R. Co.* 29 S. C. 510, 2 L. R. A. 105. 7 S. E. 836; *Hanley v. Kansas City Southern R. Co.* 187 U. S. 617, 47 L. ed. 333, 23 Sup. Ct. Rep. 214; *St. Clair County v. Interstate Sand & Car Transfer Co.* 192 U. S. 454-458, 48 L. ed. 518-520, 24 Sup. Ct. Rep. 300; *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 565, 30 L. ed. 247, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4; *Leisy v. Hardin*, 135 U. S. 108, 34 L. ed. 132, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; *Mobile County v. Kimball*, 102 U. S. 702, 26 L. ed. 241; *Bowman v. Chicago & N. W. R. Co.* 125 U. S. 485, 31 L. ed. 707, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689.

Being such, the state had no power over it.

Robbins v. Taxing District, 120 U. S. 489-492, 30 L. ed. 694-696, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; *Welton v. Missouri*, 91 U. S. 280, 23 L. ed. 349; *State Freight Tax Case*, 15 Wall. 280, 21 L. ed. 163; *Mobile County v. Kimball*, 102 U. S. 697, 26 L. ed. 240; *Bowman v. Chicago & N. W. R. Co.* 125 U. S. 480, 31 L. ed. 705, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 197, 29 L. ed. 159, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; *Henderson v. New York (Henderson v. Wickham)* 92 U. S. 259-271, 23 L. ed. 543-548; *Brennan v. Titusville*, 153 U. S. 289-299, 38 L. ed. 719-722, 4 Inters. Com. Rep. 658, 14 Sup. Ct.

Rep. 829; *Walling v. Michigan*, 116 U. S. 446-460, 29 L. ed. 691-695, 6 Sup. Ct. Rep. 454; *Crutcher v. Kentucky*, 141 U. S. 47-58, 35 L. ed. 649-652, 11 Sup. Ct. Rep. 851; *Norfolk & W. R. Co. v. Pennsylvania*, 136 U. S. 118, 34 L. ed. 396, 3 Inters. Com. Rep. 178, 10 Sup. Ct. Rep. 958; *Pickard v. Pullman Southern Car Co.* 117 U. S. 34, 29 L. ed. 785, 6 Sup. Ct. Rep. 635; *Orandall v. Nevada*, 6 Wall. 36, 18 L. ed. 745; *State Freight Tax Case*, 15 Wall. 272, 21 L. ed. 160; *Stockard v. Morgan*, 185 U. S. 37, 46 L. ed. 794, 22 Sup. Ct. Rep. 576; *Philadelphia & S. Mail S. S. Co. v. Pennsylvania*, 122 U. S. 326, 30 L. ed. 1200, 1 Inters. Com. Rep. 308, 7 Sup. Ct. Rep. 1118; *Leloup v. Mobile*, 127 U. S. 640-645, 32 L. ed. 311-313, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1380; *American Fertilizing Co. v. Board of Agriculture*, 11 L. R. A. 179, 3 Inters. Com. Rep. 532, 43 Fed. 609; *Re Spain*, 14 L. R. A. 97, 3 Inters. Com. Rep. 738, 47 Fed. 208; *San Bernardino v. Southern P. Co.* 107 Cal. 524, 29 L. R. A. 327, 40 Pac. 796; *State v. Scott*, 98 Tenn. 254, 36 L. R. A. 461, 39 S. W. 1; *Lawrens v. Elmore*, 55 S. C. 477, 45 L. R. A. 249, 33 S. E. 560; *Re Wilson*, 10 N. M. 32, 48 L. R. A. 417, 60 Pac. 73; *State v. Northern Pacific Exp. Co.* 27 Mont. 419, 94 Am. St. Rep. 824, 71 Pac. 404.

The defendants cannot be held criminally responsible.

1 Bishop, Crim. Law, 1892 ed. §§ 317, 892; *State v. Mahoney*, 23 Minn. 181; *State v. Robinson*, 55 Minn. 169, 56 N. W. 594; *Barnes v. State*, 19 Conn. 398; *People v. Hughes*, 86 Mich. 180, 48 N. W. 945; *Com. v. Stevens*, 153 Mass. 421, 11 L. R. A. 357, 25 Am. St. Rep. 647, 26 N. E. 992; *State v. Heck*, 23 Minn. 549; 1 McClain, Crim. Law, 1897 ed. § 188; *United States v. Beatty*, Hempst. 487, Fed. Cas. No. 14,555.

Messrs. Freeman P. Lane and John R. Bane also for appellants.

Messrs. W. J. Donahower, Attorney General, and **Washburn, Bailey, & Mitchell**, for respondent:

The agent with power to sell, if he violates his instructions, and, instead of selling to an actual purchaser, makes the purchase himself, in effect puts himself in a position of allowing his principal to treat the matter as a sale, or to treat it as a nullity, when all the facts are known.

Looked at from the standpoint of the consignee, it is an absolute nullity.

Gilbert v. Hewetson, 79 Minn. 333, 79 Am. St. Rep. 486, 82 N. W. 655; *Holmes v. Cathcart*, 88 Minn. 213, 60 L. R. A. 734, 97 Am. St. Rep. 513, 92 N. W. 956; *Tilleny v. Wolverton*, 46 Minn. 256, 48 N. W. 908; *Bain v. Brown*, 56 N. Y. 285; *Leathers v. Canfield*, 117 Mich. 277, 45 L. R. A. 41, 75 N. W. 612; 69 L. R. A.

Colbert v. Shepherd, 89 Va. 401, 16 S. E. 246.

By no possible construction of the law can it be satisfied by a report made by the merchant of a pretended purchase made by himself.

State ex rel. Beek v. Wagener, 77 Minn. 483, 46 L. R. A. 442, 77 Am. St. Rep. 681, 80 N. W. 633, 778, 1134.

This transaction was a Minnesota transaction, between residents of Minnesota, and concerns grain that was actually or constructively within the state of Minnesota at the time of the transaction.

Hopkins v. United States, 171 U. S. 578, 43 L. ed. 290, 19 Sup. Ct. Rep. 40.

Where no discrimination is made between the business that originates outside of the state and that which originates in the state, the courts have always upheld the right to require licenses of persons engaged in any business the regulation or control of which comes within the proper exercise of the police power of the state.

Prentice & Egan, Commerce Clause of Fed. Const. p. 279; *Emert v. Missouri*, 156 U. S. 296, 39 L. ed. 430, 5 Inters. Com. Rep. 68, 15 Sup. Ct. Rep. 367; *Parsons v. Missouri*, 166 U. S. 719, 41 L. ed. 1187, 17 Sup. Ct. Rep. 997; *Preston v. Finley*, 72 Fed. 858; *Re May*, 82 Fed. 425; *Oliver Finney Grocery Co. v. Speed*, 87 Fed. 413; *Anniston v. Southern R. Co.* 112 Ala. 566, 20 So. 915; *Carrollton v. Bazzette*, 159 Ill. 293, 31 L. R. A. 522, 42 N. E. 837; *State v. Wheelock*, 95 Iowa, 585, 30 L. R. A. 429, 58 Am. St. Rep. 442, 64 N. W. 620; *State v. Montgomery*, 92 Me. 439, 43 Atl. 13; *Wrought Iron Range Co. v. Carver*, 118 N. C. 334, 24 S. E. 352; *Schollenberger v. Pennsylvania*, 171 U. S. 23, 43 L. ed. 57, 18 Sup. Ct. Rep. 757.

When the court has once held that the business of selling grain upon commission is one that is subject to the regulation of the police power of the state, it is placed within the list of business which may be regulated by the state law, even though it be interstate wholly.

Plumley v. Massachusetts, 155 U. S. 461, 39 L. ed. 223, 5 Inters. Com. Rep. 590, 15 Sup. Ct. Rep. 154; 12 Rose's Notes (U. S.) p. 659.

The commission merchant who does his business through an agent makes himself responsible for the omissions of the agent as fully as if everything done by the agent had been done by himself. The question of intent in such laws is wholly immaterial.

People v. Roby, 52 Mich. 577, 50 Am. Rep. 270, 18 N. W. 365; *People v. Blake*, 52 Mich. 566, 18 N. W. 360; *People v. Snowberger*, 113 Mich. 86, 67 Am. St. Rep. 449, 71 N. W. 497; *Smith v. Ayrault*, 71 Mich. 487, 1 L. R. A. 311, 39 N. W. 724; *State v. Hartfiel*,

24 Wis. 60; *State v. Kelly*, 54 Ohio St. 166, 43 N. E. 103; *State v. Smith*, 10 R. I. 260; *Com. v. Smith*, 103 Mass. 444; *People v. Cipperly*, 101 N. Y. 634, 4 N. E. 107; *State, Bayles, Prosecutor, v. Newton*, 50 N. J. L. 549, 18 Atl. 77; *Com. v. Gray*, 150 Mass. 327, 23 N. E. 47; *People v. Longwell*, 120 Mich. 311, 79 N. W. 484.

Mr. Bert Fesler also for respondent.

Lewis, J., delivered the opinion of the court:

Upon the complaint of Charles P. Staples, a member of the State Railroad & Warehouse Commission, defendants, commission merchants, doing business at Duluth, were charged with having violated the provisions of § 2, chap. 225, p. 246, Laws 1899, in failing to render a true statement to the consignor concerning a consignment of flax. A plea of not guilty was entered, and the trial resulted in a verdict of guilty. The case is brought here upon appeal by defendants from an order denying their motion for a new trial.

It is undisputed that the consignor, Victor Carlson, resided at Hallock, Minnesota, and shipped a carload of flax to defendants at Duluth, to be sold by them on commission; that the car was shipped from Hallock, January 14th, over the Great Northern Railroad, reaching Duluth January 19, 1903. Carlson made a draft upon defendants for \$700, attached the bill of lading, and sent it through a bank for collection. The flax was inspected January 19th at Duluth, and was ready to be sold upon the market that day. The evening of January 19th defendants wrote consignor the following letter:

Duluth, Minn., Jany. 19th, 1903.

Mr. Victor Carlson, Hallock, Minn.

Dear Sir:—

We have received the following car of flax from you to-day, which inspected and sold (subject to comparison with sample) for your account and risk as stated below:

Car No.	Initial	Grade	Sold at	How sold
21048	G. N.	No. 1 Flax 14%	119½	

The market was a very narrow one all day and above was best price. Acct. sales & check to balance will follow as soon as unloaded. Trusting same is satisfactory, and awaiting your further orders, we remain,

Yours truly,
Edwards, Wood, & Co.,
Geo. K. Taylor, Mngr.

January 22d the following account was rendered:

Duluth, Minn., Jan. 22nd, 1902.

Account sales of Edwards, Wood, & Co.,
69 L. R. A.

Grain Commission Merchants, 310 Board of Trade. Account of Victor Carlson, Hallock, Minn.

Date unloaded.	Car.	Grade.	Freight.	Date Sold.	Gross Weight
Jan. 21.	21048.	Flax.	83.34	1-19.	980.10.
No. 1 14 %					
Shrinkage by cleaning.	Net Weight Delivered.	Price.	Amount		
137.12	842.54	119½	\$1007.33		
75					
Freight and Inspection			\$83.09		
Weighing			.25		
Interest					
Insurance			.40		
Commission ½ %			5.04	88.78	
				918.55	
				700.00	
Balance to your credit				218.55	

January 20th, defendants sold the carload of flax to the Hall Elevator Company at Duluth at \$1.20 per bushel, an advance of ½ cent, but of this sale made no report to consignor. Defendants claim the sale was made to themselves at the close of the business day, January 19th, and that the letter of that date, and the account stated, of date January 22d, constituted a report of the transaction within the requirement of the statute. Defendants further claim that there was a subsequent ratification of the transaction by the consignor.

At the trial, the court instructed the jury that, when grain is consigned to commission merchants to be sold upon commission, it is their duty to sell it in the open market for the best obtainable price, and remit to the shipper the amount of the sale, less commission and necessary disbursements; that commission merchants have no right, when grain has been consigned to be sold on commission, to themselves purchase it, and that an attempt so to do is not binding upon the shipper; that if such an attempt is made, and thereafter the grain is sold to an actual purchaser, the law requires the commission merchants to make a true report of the amount received at the sale to the actual purchaser within twenty-four hours thereafter; and, further, that, if the jury found from the evidence that the car in question was consigned to defendants to be sold on commission, then defendants had no right or authority to themselves purchase the grain, and any such attempt at purchase would not relieve them of the positive duty to report to Carlson the sale to a subsequent legal purchaser. The court refused to instruct the jury, upon request of defendants, to the effect that they were not guilty if the jury should find that the duly authorized agent of defendants sold the carload of flax to them, paying therefor the highest market

price of that date, and duly reported the same to the consignor within twenty-four hours thereafter. The court also refused to instruct the jury that, if such sale was made to defendants in accordance with the usages and customs of the board of trade at Duluth, at the highest price obtainable on that day, and duly reported the same to the consignor within twenty-four hours thereafter, and the consignor did not, within a reasonable time thereafter, repudiate the transaction, then such act would constitute ratification by the consignor. Error is also assigned in refusing defendants' offer to prove it was the custom among members of the Duluth board of trade to purchase for themselves consignments of grain shipped to them to be sold upon commission at the highest market price for the day, in the event that other purchasers could not be obtained. The instruction of the court to the following effect is also questioned: "The offense charged is that of omitting to perform a positive duty enjoined upon the commission merchants by the law of the state, and it is immaterial whether he actually knew anything about the transaction, if the grain was shipped to them to be sold upon commission, or was sold by them, or any authorized person acting for them, on commission."

Section 1, chap. 225, p. 245, defines the purpose of the act, and declares it to be unlawful to do business without procuring a license and giving a bond for the benefit of persons intrusting commission merchants with consignments; that, if such commission merchant receive grain for sale on commission, the bond shall be conditioned that he faithfully account and report to all persons intrusting him with grain for sale, less commission and disbursements; and that, if he does not receive grain for sale on commission, the bond shall be conditioned upon the faithful performance of his duties as such commission merchant. The record shows that defendants were duly licensed to sell grain, exclusive of other agricultural products and farm produce, on commission, at Minneapolis and Duluth, and that they duly executed and delivered their bond, as provided by law, conditioned to faithfully account and report to all persons intrusting them with grain to be sold on commission, less commission earned and actual disbursements. The law does not prohibit defendants from engaging in the business of directly buying and dealing in grain, but, so far as shown, they did not take advantage of that privilege, and take out a license for that purpose. Having held themselves out as commission merchants to sell grain on commission, defendants entered into an obligation to use their knowledge and position in disposing of the grain for the greatest

benefit of their patrons; and were required to take all reasonable and usual means and precautions to dispose of the grain to the best advantage of the consignor immediately upon its arrival; and if for good reason they failed to dispose of it on the day of its arrival, and it was necessary to sell it at private sale after business hours of the board of trade, or to carry the grain over the day, the same duty followed them, and they were still required to exercise reasonable diligence on behalf of the shipper. They could not shift such responsibility by bidding in the property for themselves after business hours, and subsequently turn it over to some one else at a profit, and not be held accountable therefor. The record conclusively shows that on the following day the car of flax, without being unloaded, was disposed of by defendants to the Hall Elevator Company at an advance of $\frac{1}{2}$ cent a bushel. Under the law of agency such sale inured to the benefit of defendants' principal, and the attempted sale to themselves, as testified by their agent, was, *prima facie*, a nullity. We cannot accept as applicable to this case the proposition that, if the shipper made no protest after receiving the report of the alleged sale and the proceeds thereof, he thereby accepted and ratified the sale. On the other hand, it was the duty of defendants to clearly show that the shipper not only knew the sale was made to themselves, upon which point the report of sale is silent, but that he also knew that subsequently defendants sold the flax at an advanced price, and, being possessed of all these facts, he accepted the proceeds of the sale to defendants as final, and waived his right to profits on account of the subsequent sale. In this respect the evidence entirely fails. Conceding there is evidence tending to show that the manager, Mr. Taylor, sold the flax to defendants, and made a report thereof, the evidence fails to show that the consignor ever accepted the transaction after being put in full possession of all the facts.

The complaint charged that defendants wilfully and unlawfully neglected and failed to render the statement within the time required, but, on the contrary, wilfully and unlawfully made and rendered to the consignor a false report and statement in writing, in and by which they pretended and represented they had sold the flax for the sum of \$1,007.38, whereas in fact they sold it for \$1,011.54. The gist of the offense is one of omission, in failing to render a true statement to the consignor, showing what portion of such consignment had been sold, the price received, and the name and address of the purchaser, the date, hour, and minute when such sale was made, with vouchers for all charges and expenses paid or incurred;

and defendants were put on trial upon that charge, and none other. The statement in the complaint that they wilfully made a false report was unnecessary, and mere surplusage. Upon the trial, however, in support of the offense charged, it was proper to prove what reports were made, and that such reports were not those required by law. Defendants' business was conducted through their local manager, and, it may be admitted, they were acting in good faith, in accordance with the custom of commission merchants in Duluth, and the agent may, in good faith, have been endeavoring to comply with the law in making the stated reports, but the question of good faith or intent is not involved in this action. If, under such circumstances, a sale to themselves was unauthorized and prohibited, defendants could not avoid the effect of the statute in failing to report the sale which they did make, no matter what their intentions may have been. In *State v. Robinson*, 55 Minn. 169, 56 N. W. 594, it was held that the owner of a drug store was not liable for a sale by one of his clerks, not a registered pharmacist, and made without his knowledge or assent. Here, however, that principle has no application. Mr. Taylor was defendants' general manager, and the only person in charge of the Duluth office, and was held out to the world as their representative to transact their business, and no claim was made at the trial that he was not authorized to do the very things which he did. On the contrary, it was insisted that his attempted purchase of the flax was justified under the law, and was in accordance with the general custom. In this connection the case of *State v. O'Connor*, 58 Minn. 193, 59 N. W. 999, may be considered, wherein it was held that, in order to excuse himself from liability for permitting a saloon to be kept open on Sunday, the master would have to show that it was opened against his will, and notwithstanding all reasonable efforts by him to keep it closed. The question of intent is not material in this class of statutory offenses. As remarked by Judge Cooley in *People v. Roby*, 52 Mich. 577, 50 Am. Rep. 270, 18 N. W. 365, such statutes are in the nature of police regulations, and impose a penalty irrespective of intent to violate them, the object being to require a degree of diligence for the protection of the public which shall render violations impossible. The statute makes the act criminal without regard to intent. *State v. Heck*, 23 Minn. 549. For the reasons already stated, it was immaterial that it was the custom among commission merchants at Duluth to buy grain at the highest figure for the day, in case not sold on the market. They could

not make that lawful which was unlawful, and it was just such irregularities that the statute was intended to correct.

The law under consideration is assailed upon the ground that it is in violation of the Federal Constitution, as an interference with interstate commerce. In *State ex rel. Beek v. Wagener*, 77 Minn. 483, 46 L. R. A. 442, 77 Am. St. Rep. 681, 80 N. W. 633, 778, 1134, this law was declared to be not in conflict with the 14th Amendment of the Federal Constitution, nor with §§ 2 or 7, art. 1, of the state Constitution. The court at that time, after exhaustive argument, put at rest all of the questions touching upon the constitutionality of the law, except, possibly, an intimation that the statute did not apply to interstate business, but what was stated in the opinion on that point was by way of precaution or reservation only.

In the case before us, the consignor resided within the state; but, to our minds, that fact is not significant. The law applies to all shipments, from beyond as well as within the state. The object of the statute is to protect the public in its dealings with commission merchants against an infringement upon the rights of shippers of grain. Indeed, the law might be open to the objection of an unjust discrimination were its benefits conferred only upon the citizens of the state. The question of transportation is not involved. It is immaterial from whence the grain is shipped, over what route or through what states it travels to the point of destination. The provisions involved in this case take no account of the grain as an article of commerce until it has been sold; and, even then, only to require the consignee to make a true report of the transaction within a reasonable time. The subject-matter of the law as applicable to this case no more relates to interstate commerce than the criminal statutes which protect grain from larceny after arrival within the borders of the state. If it be an interference with the prerogative of Congress to require commission merchants to make a true report of their dealings with citizens of Dakota or Wisconsin, for their protection, why is it not equally an interference with interstate commerce when our criminal laws are put in force to arrest and punish for the larceny of such grain upon arrival within the borders of our lines? We fancy there is no crying demand on the part of the citizens of our sister states to be excluded from the benefit of these protective measures.

This cause was submitted to the jury upon the right theory, and we find no error in the instructions or rulings. *The order appealed from is accordingly affirmed.*

ILLINOIS SUPREME COURT.

Marion O. PROCTOR, *Plff. in Err.*,
v.

Nettie M. PROCTOR.

(215 Ill. 275.)

1. Service upon defendant in a divorce suit by delivering him a copy of the bill and giving him notice of the suit at his residence in another state will give the court no jurisdiction to enter a personal judgment against him for alimony and attorneys' fees.
2. No interest in real estate located in another state can be vested in a complainant in a divorce proceeding by a decree which purports to deal directly with the title to the estate.

(April 17, 1905.)

NOTE.—*Jurisdiction of equity over suits affecting real property in another state or country.*

- I. In general; jurisdiction limited to suits in personam, 673.
- II. Conditions of jurisdiction.
 - a. Necessity of proper case for equitable intervention, 675.
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Scope.

It will be observed that the foreign decree involved in *PROCTOR V. PROCTOR*, purported to affect directly real property in Illinois. In this respect the case is distinguishable from those that involve merely the collateral or incidental effect upon real property in one state or country, of a decree of divorce, or other decree, rendered in another, which does not purport upon its face to affect real property beyond the

ERROR to the Superior Court for Cook County to review a decree in favor of plaintiff in a suit to dissolve a marriage and secure alimony. *Reversed in part.*

The facts are stated in the opinion.

Messrs. Clarence A. Burley and William H. McSurely, with *Mr. Edward R. Hills*, for plaintiff in error:

A decree for divorce is a proceeding *in rem* so far as it fixes the status of the parties by dissolving their marital relations. But, so far as it disposes of any other matter than the marriage, it is a proceeding *in personam*.

2 Freeman, Judgm. 584; 2 Black, Judgm. 933; 9 Am. & Eng. Enc. Law, 2d ed. 745; *Rigney v. Rigney*, 127 N. Y. 413, 24 Am. St. Rep. 462, 28 N. E. 405; 2 Bishop, Marr.

territorial jurisdiction, *a. g.*, the effect upon dower rights in real property in one state of a decree of divorce rendered in another which contains no provision with respect to the property. The latter class of cases is not included in this note, it being confined to cases involving the jurisdiction of equity over suits the avowed purpose of which is to affect real property beyond the territorial jurisdiction, either directly by a decree *in rem*, or indirectly by a decree *in personam*. For similar reasons, the cases dealing with the effect upon real property in one state or country of a decree rendered in another admitting a will to probate or determining its construction or validity are also omitted.

I. In general; jurisdiction limited to suits in personam.

It should be stated at the outset that real property is subject to the exclusive jurisdiction of the courts of the state or country in which it is located. *Davis v. Headley*, 22 N. J. Eq. 115. No other courts may properly exercise any jurisdiction over it, and this is as true of courts of equity as of courts of law. Therefore, it is beyond the power of a court of one state or country to entertain a suit *in rem* in respect of land in another, or to render a decree either in a suit *in rem* or in a suit *in personam* which shall, *ex proprio vigore*, affect the title to real property in another state or country. The following cases illustrate the principle just stated:

While, by means of its power over the person of a party, a court of equity may, in a proper case, compel him to act in relation to property not within its jurisdiction, its decree does not operate directly upon the property, nor affect the title, but is made effectual through the coercion of the defendant. *Carpenter v. Strange*, 141 U. S. 87, 35 L. ed. 640, 11 Sup. Ct. Rep. 960.

In *Clopton v. Booker*, 27 Ark. 482, the court said that it was well settled that the title to land, and the right of possession thereto, must be determined by the courts of the state wherein the land lies; that contracts may be made and obligations passed at points remote from the land intended to be affected thereby,

& Div. 1891 ed. § 79; *Lynn v. Sentel*, 183 Ill. 387, 75 Am. St. Rep. 110, 55 N. E. 838; *Dunham v. Dunham*, 57 Ill. App. 475.

Process from the tribunals of one state cannot run into another state and summon a party there domiciled to respond to proceedings against him; and process sent to him out of the state is unavailing in a proceeding to establish a personal liability.

Harkness v. Hyde, 98 U. S. 476, 25 L. ed. 237; *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565; *Cloyd v. Trotter*, 118 Ill. 391, 9 N. E. 507.

The authority of every tribunal is necessarily restricted by the territorial limits of the state in which it is established.

Pennoyer v. Neff, 95 U. S. 722, 24 L. ed. 569; *Lynn v. Sentel*, 183 Ill. 387, 75 Am. St. Rep. 110, 55 N. E. 838.

but whenever litigation must be had to test the validity of the claim to such land, whether the contract be express or implied, direct or in secret trust, resort must be had to the local laws and local courts. This seems to state the exclusive jurisdiction of the courts of the state where the land lies too broadly; for a court of a state having jurisdiction of the parties may undoubtedly declare and enforce a trust with reference to real property in another state. See *infra*, III. a.

No court, state or Federal, can reach, or confer title to, or sell under decree, lands situated in a state in which it does not sit. Every attempt of a court to found jurisdiction of such lands must, from the very nature of the case, be utterly nugatory. *Williams v. Nichol*, 47 Ark. 254, 1 S. W. 243.

While a court of chancery which has acquired jurisdiction over the person of a party may, in a proper case, by virtue of its power to enforce obedience to its decrees, enforce the performance of contracts of lands situated in another state, such court has no power to divest title to real estate in another state. *Winn v. Strickland*, 34 Fla. 610, 16 So. 606.

While a court of the state in which the husband is domiciled has jurisdiction to grant a divorce upon service by publication against the wife, who is a nonresident, it has no power to settle the title to lands in another state; and a general order made by it, purporting to bar the rights of the wife in the real and personal property of the husband, is ineffectual, so far as real property in another state is concerned. *Rodgers v. Rodgers*, 56 Kan. 483, 43 Pac. 779.

The courts of one state or country are without jurisdiction over title to lands in another state or country. *Lindley v. O'Reilly*, 50 N. J. L. 636, 1 L. R. A. 79, 7 Am. St. Rep. 802, 15 Atl. 379.

A court of one state cannot, by its judgment or decree, pass title to land situated in another state. *Johnson v. Kimbro*, 3 Head, 557, 75 Am. Dec. 781.

A court of one state cannot decree a sale of lands lying in another state. *Polindexter v. Burwell*, 82 Va. 507.

The courts of Virginia are without jurisdiction to sell and convey land situated beyond the limits of the state. *Gibson v. Burgess*, 82 Va. 650.

So a court cannot directly, and by virtue of 69 L. R. A.

Ricks, Ch. J., delivered the opinion of the court:

The defendant in error filed her bill in the circuit court of Cook county on the 18th day of April, 1901. The bill alleged the marriage of the parties, desertion for over two years on the part of plaintiff in error, and prayed that the marriage be dissolved, and that the plaintiff in error be required to pay permanent alimony and solicitors' fees. No personal service was had in this state upon the plaintiff in error. The service on the plaintiff in error was by copy of the bill, with notice of commencement of suit, and was made at Piqua, Ohio, his place of residence. No appearance was entered by or for the plaintiff in error. The plaintiff in error was defaulted, and at the trial of the cause the bill was taken *pro confesso*. The

its decree alone, create a lien upon land in another state. *Hansel v. Chapman*, 2 App. D. C. 361; *Short v. Galway*, 83 Ky. 501, 4 Am. St. Rep. 168; *Almsley v. Mead*, 3 Lans. 116.

A decree of a court of the testator's domicile in a suit brought by the widow against the legatees and others, reciting that the defendants were heirs of the deceased and entitled to participation in the distribution of his estate, can have no effect upon the real property of the deceased in another state. *Cooper v. Ives*, 62 Kan. 395, 63 Pac. 434.

Real property situated in one state cannot be subjected to the payment of a widow's allowance either by a statute or by a decree of a court of another state, in which the owner of the property was domiciled at the time of his death. *Smith v. Smith*, 174 Ill. 52, 43 L. R. A. 403, 50 N. E. 1083.

So a decree rendered in one state, revoking the probate of a will, does not conclusively affect the title to land in another state. *Doe ex dem. Pritchard v. Roe*, 2 Penn. (Del.) 553, 47 Atl. 376.

So in *Harrison v. Harrison*, L. R. 3 Ch. 342, the court said: "As against the real estate in Scotland, the courts of England have no jurisdiction at all. Any jurisdiction which they can exercise as to the real estate in Scotland can only be through the medium of some personal equity attaching to the owner in Scotland of that real estate."

Originally courts of chancery acted only *in personam*, and never *in rem*; and, although they are now commonly authorized by statute to render a decree *in rem* when the interests of justice require, they still act *in personam* when occasion demands. Therefore, when a case otherwise properly cognizable in equity is presented, a court of equity having personal jurisdiction of the parties may, in the exercise of its discretion, assume jurisdiction of the subject-matter, although land in another state may be affected, if it can grant effective relief by a decree acting solely upon the person whose title or interest in the land is to be affected, as distinguished from a decree acting directly upon the land. In other words, the court may, in a proper case for equitable intervention, by virtue of its jurisdiction over such person, and its consequent power to enforce obedience to its decree *in personam*, compel him to do with respect to land beyond the territorial jurisdiction

court decreed that the marriage between the defendant in error and the plaintiff in error be dissolved, and that the defendant in error recover of the plaintiff in error the sum of \$5 a week as alimony, and the sum of \$50 solicitors' fees, together with an undivided one-third interest in a house and lot belonging to the plaintiff in error, situated in the city of Piqua, county of Miami, and state of Ohio. From the above decree the plaintiff in error sued out a writ of error from this court to reverse the decree in so far as it relates to the recovery of \$5 per week as alimony, \$50 as solicitors' fees, and an undivided one-third interest in a house and lot belonging to plaintiff in error, situated in the city of Piqua, county of Miami, and state of Ohio. The record shows plaintiff in error had no property within the state.

what it could not itself and without its intervention accomplish. This principle lies at the foundation of all of the cases subsequently cited in this note which uphold the jurisdiction of a court of equity of one state or country over a suit the avowed purpose of which is to affect real property in another. For a general statement of the principle, see especially the cases cited in *infra*, II., a.

The Lord Chancellor (Nottingham), in *Arglasse v. Muschamp*, 1 Vern. 75, thus quaintly replied to an objection that a court of equity of England had no jurisdiction of a suit for relief from a fraudulent conveyance of land in Ireland: "This is surely only a jest put upon the jurisdiction of this court by the common lawyers; for when you go about to bind the lands, and grant a sequestration to execute a decree, then they readily tell you that the authority of this court is only to regulate a man's conscience, and ought not to affect the estate, but that this court must *agere in personam* only; and when, as in this case, you prosecute the person for a fraud, they tell you, you must not intermeddle here, because the fraud, though committed here, concerns lands that lie in Ireland, which makes the jurisdiction local, and so would wholly elude the jurisdiction of this court."

The following case states sharply and concisely the nature and general scope of the peculiar jurisdiction discussed in this note.

The jurisdiction acquired by the courts in one state over parties to an action incidentally affecting lands in another state is a jurisdiction purely *in personam*. The decree or judgment cannot have any extraterritorial force *in rem*. *Bullock v. Bullock*, 52 N. J. Eq. 561, 27 L. R. A. 213, 46 Am. St. Rep. 528, 30 Atl. 676.

It will be observed, in addition to the other objections to giving effect to the Ohio decree involved in *PROCTOR V. PROCTOR*, so far as real property in Illinois was concerned, that it was not a decree *in personam*, but a decree *in rem*, purporting to affect directly the property in question.

II. Conditions of jurisdiction.

a. Necessity of proper case for equitable intervention.

As will be shown in II. b, the ability to 60 L. R. A.

The grounds relied on are that the court did not acquire such jurisdiction of the person of plaintiff in error as authorized it to enter the money decree against him, and did not have jurisdiction to enter any decree affecting real estate in the state of Ohio.

That the court had no such jurisdiction of the person of plaintiff in error as authorized a money decree or decree *in personam* seems to be settled by the case of *Cloyd v. Trotter*, 118 Ill. 391, 9 N. E. 507. In that case a bill was filed to remove a cloud from real estate situated in this state. James C. Cloyd, the defendant to the bill, resided in the city of New York, and service was had upon him in that city by a copy of the bill, and notice, as in the case at bar. The defendant defaulted, and the relief prayed was granted, and a judgment for

grant effective relief by a decree operating solely against the person in a necessary condition of the jurisdiction of a court of equity over a suit, the purpose of which is to affect real property in another state or country. That, however, is not the only condition of such jurisdiction. To warrant the court in entertaining such a suit, it must also appear that the case, independently of the location of the land beyond the territorial jurisdiction, is a proper one for equitable intervention. Chief Justice Marshall defined this indirect jurisdiction as follows: "In a case of fraud, of trust, or of contract, the jurisdiction of a court of chancery is sustainable wherever the person be found, although lands not within the jurisdiction of that court may be affected by the decree." This statement of the jurisdiction has been very frequently quoted and approved in subsequent cases. See, for example, *Carpenter v. Strange*, 141 U. S. 87, 35 L. ed. 640, 11 Sup. Ct. Rep. 960; *Binney's Case*, 2 Bland, Ch. 99; *DeKlyn v. Watkins*, 3 Sandf. Ch. 185; *Davis v. Morris*, 76 Va. 21. It follows that a court of equity of one state or country will not assume jurisdiction of a suit that in its essence involves merely the title or possession of land in another, and presents no ground of equitable intervention. In other words, if the action is one which, if it related to real property within the territorial jurisdiction, would be at law, and not in equity, a court of equity will not assume jurisdiction merely because, the property being beyond the territorial jurisdiction, a court of law cannot entertain an action in respect of it.

Thus, Chief Justice Marshall said, in *Massie v. Watts*, 6 Cranch, 148, 3 L. ed. 181, that, if the cause of action in that case were to be considered as involving a naked question of title to land in Virginia, the court of Kentucky would not have had jurisdiction.

An action of ejectment cannot be maintained in the circuit court of the district of Michigan for land in any other district. *Northern Indiana R. Co. v. Michigan C. R. Co.* 15 How. 233, 14 L. ed. 674.

A decree recovered in the courts of Kentucky in a real action to try the title of lands in New Jersey, or in ejectment for the possession, would be a perfect nullity. No action could be brought upon it in New Jersey to obtain execution of it. It would be simply void. A decree to deliver possession of lands in New Jersey

costs against the defendant, Cloyd, was awarded. On error this court held that, in so far as the proceeding was *in rem*, the decree was valid, but that the court was without jurisdiction to enter a decree for costs against Cloyd, as that was *in personam*. In so far as the proceeding at bar related to the marital relation and its dissolution, the proceeding is regarded as one *in rem*, and the court was warranted in entering its decree dissolving the same. But the court could go no farther. It could not enter any binding decree *in personam* against plaintiff in error. 2 Black, Judgm. § 933; 9 Am. & Eng. Enc. Law, 2d ed. p. 745; *Rigney v. Rigney*, 127 N. Y. 413, 24 Am. St. Rep. 462, 28 N. E. 405; *Pennoyer v. Neff*, 95 U. S. 727, 24 L. ed. 570.

So much of the decree as sought to vest

in defendant in error an interest in real estate in Ohio was extraterritorial and beyond the jurisdiction of the court. That part of the decree was purely a proceeding *in rem*, and the *res*, having its situs in another state, must be controlled by the laws of the state of its situs. *Lynn v. Sentel*, 183 Ill. 382, 75 Am. St. Rep. 110, 55 N. E. 838; *Pennoyer v. Neff*, 95 U. S. 727, 24 L. ed. 570; Story, Conf. L. § 539.

In decreeing alimony, solicitors' fees, and an interest in the land in Ohio, the court was in error, and in those respects the decree is reversed. As to the divorce no reversal is asked, and the decree remains in force and is affirmed. Plaintiff will have judgment for costs.

Decree reversed in part.

might be enforced by the courts of Kentucky; if in possession of the person of the defendant, he could be imprisoned, or even subjected to *paine forte et dure* until he actually delivered it. *Davis v. Headley*, 22 N. J. Eq. 115.

A court of one state has no jurisdiction of a suit which, in its essence, involves the possession of real property in another state, such possession not being incidental to the enforcement of a contract, or trust, or relief from fraud, but being in itself the foundation of the controversy. *Lindsley v. Union Silver Star Min. Co.* 26 Wash. 301, 66 Pac. 382.

Thomas v. Hukill, 181 Pa. 298, 18 Atl. 875, affirmed a decree dismissing a bill filed by a second lessee, out of possession, of oil lands situated in another state, alleging a forfeiture incurred by a prior lessee, in possession for failure to perform his covenants, and praying for an injunction to restrain further operations and for a decree declaring the prior lease void, and for an account. The supreme court said that, while the proceeding was in form a bill in equity, it was in substance a possessory action involving the title to real estate; that the decree of the court could only affect the person of the litigants, and could not control the title and possession of the land; and therefore the exercise of such jurisdiction would be of at least doubtful propriety, even though the parties were residents of Pennsylvania.

A court will not entertain jurisdiction where the naked question of title is involved, or a mere trespass or nuisance on extraterritorial real property is sought to be restrained. *Chase v. Knickerbocker Phosphate Co.* 82 App. Div. 400, 53 N. Y. Supp. 220.

Equity acts *in personam* when the parties are within the jurisdiction of the court, though the lands affected be within another state, but not to the extent of awarding relief more appropriately obtainable in a common-law action of ejectment triable by a jury of the vicinage. *Genet v. Delaware & H. Canal Co.* 13 Misc. 409, 35 N. Y. Supp. 147. In this case the court said that a determination that a contract relating to land in another state should be rescinded on account of breaches, with a decree requiring the defendants to remove from the lands all their apparatus, etc., and to surrender the premises to the plaintiff, would, in effect, be to enforce an action of ejectment from the 69 L. R. A.

lands, a jurisdiction which the court could not assume; the rule being that actions for the possession of real property must be brought in the *forum rei sitae*.

b. *Ability to grant effective relief by a decree in personam the criterion of jurisdiction.*

The nonresidence of the defendant, and the inability to subject him personally to the jurisdiction of the court, do not necessarily defeat the jurisdiction of a court of equity over a suit affecting lands within the territorial jurisdiction, since, as stated in *supra*, I., such courts are now commonly empowered by statute to grant decrees *in rem* in respect of land within the territorial jurisdiction. It is otherwise in respect of real property beyond the territorial jurisdiction. Assuming that a proper case for equitable intervention is presented, the criterion of the jurisdiction of a court of equity over a suit, the purpose of which is to affect real property beyond the territorial jurisdiction, is its ability to grant effective relief by a decree *in personam*; and, therefore, in order to uphold the jurisdiction, the defendant must be personally subject to the jurisdiction of the court; and to subject him personally to the jurisdiction, he must, if a nonresident, either have appeared, or have been served personally within the jurisdiction; constructive service, or service outside of the jurisdiction, is not sufficient (see note to *Pinney v. Providence Loan & Invest. Co.* 50 L. R. A. 577); though, according to the weight of authority, such service is sufficient if the defendant is a resident, though temporarily absent from the jurisdiction (see same note).

An exception to the rule that the defendant must be personally subject to the jurisdiction of the court was, however, made in the case of *Ward v. Arredondo*, 10opk. Ch. 213, 14 Am. Dec. 543, which held that a court of equity might enforce specific performance of a contract for the sale of land outside the state, notwithstanding that the vendor was out of the jurisdiction, by laying hold of a deed which he had sent to an agent within the state to be delivered upon the payment of a certain sum, which was in excess of that found to be due him upon an accounting. This seems to be the only case in which the jurisdiction of a suit *in personam*, the purpose of which is to

affect real property in another state or country has been upheld, when the owner of the title or interest to be affected was not personally subject to the jurisdiction of the court; and in this case the jurisdiction was upheld only because of the court's control over the deed.

In *Cookney v. Anderson*, 32 L. J. Ch. N. S. 427, 9 Jur. N. S. 736, 8 L. T. N. S. 295, 11 Week. Rep. 629, it was held that the court of chancery of England had no power, in a suit to carry out trusts under a deed made in Scotland, to order a copy of the bill to be served on the defendants out of the jurisdiction, it appearing that they were nonresidents. It was further held in this case that, the defendants having appeared and demurred to the bill, the demurrer must be allowed, although the defendants did not move to discharge the order of service.

A decree requiring the conveyance of property in another state by nonresidents who are not personally, but only constructively, before the court, would be nugatory. *McGaw v. Gortner*, 96 Md. 489, 54 Atl. 133.

Existence or nonexistence of the power to make a decree which the court can enforce is a good test by which to try the jurisdiction of the court. *Ibid.*

Ordinarily a court of equity having personal jurisdiction of the defendant will, in case of fraud, of trust, or of contract, grant relief, although lands not within the jurisdiction of the court will be affected by the decree, upon the principle that, in equity, the primary decree is *in personam*, and not *in rem*; still, in such cases relief will not be granted unless that sought is of such a nature as the court is capable of administering in the particular case. *Harris v. Pullman*, 84 Ill. 20, 25 Am. Rep. 416.

The power of a court of equity to require one personally subject to its jurisdiction to execute a conveyance is the most prolific source of its jurisdiction of suits the purpose of which is to affect real property beyond the territorial jurisdiction. And a court of equity having personal jurisdiction of the parties may entertain a suit, otherwise cognizable in equity,—or at least any such suit arising out of fraud, of trust, or of contract,—in which effective relief may be granted by a decree requiring a conveyance of land in another state or country. *Massie v. Watts*, 6 Cranch, 148, 3 L. ed. 181; *Lewis v. Darling*, 16 How. 1, 14 L. ed. 819; *Corbett v. Nutt*, 10 Wall. 464, 19 L. ed. 976; *Pennoyer v. Neff*, 95 U. S. 714, 2 L. ed. 565; *Tardy v. Morgan*, 8 McLean, 358, Fed. Cas. No. 18,752; *Lyman v. Lyman*, 2 Paine, 11, Fed. Cas. No. 8,628; *McGee v. Sweeney*, 84 Cal. 100, 23 Pac. 1117; *Enos v. Hunter*, 9 Ill. 211 (*obiter*); *Gilliland v. Inabnit*, 92 Iowa, 46, 60 N. W. 211; *Seixas v. King*, 39 La. Ann. 510, 2 So. 416; *Vreeland v. Vreeland*, 49 N. J. Eq. 322, 24 Atl. 551; *Bullock v. Bullock*, 52 N. J. Eq. 561, 27 L. R. A. 213, 46 Am. St. Rep. 528, 30 Atl. 676; *Mead v. Merritt*, 2 Paige, 402; *Mitchell v. Bunch*, 2 Paige, 606, 22 Am. Dec. 669; *Chase v. Knickerbocker Phosphate Co.* 32 App. Div. 400, 53 N. Y. Supp. 220; *Orr v. Irwin*, 4 N. C. (2 Car. Law Repos.) 465; *Kirklin v. Atlas Sav. & L. Asso.* (Tenn. Ch. App.) 60 S. W. 149; *Moseby v. Burrow*, 52 Tex. 396; *Morris v. Hand*, 70 Tex. 481, 8 S. W. 210; *Farley v. Shippen*, Wythe (Va.) 135.

Where the necessary parties are before a court of equity, it is immaterial that the *res* of the controversy, whether it be real or per-

sonal property, is beyond the territorial jurisdiction. It has power to compel the defendant to do all things necessary, according to the *lex loci rei sitæ*, which he could do voluntarily, to give full effect to the decree against him. Without regard to the situation of the subject-matter, such courts consider the equities between the parties, and decree *in personam* according to those equities, and enforce obedience to their decrees by process *in personam*. *Phelps v. McDonald*, 99 U. S. 298, 25 L. ed. 478.

Excluding cases where a suit is brought in one state or country to restrain legal proceedings in another in respect of lands situated in the latter, it may be said for practical purposes that a court of equity will not, by virtue of its jurisdiction over the person whose title or interest is to be affected, compel him to take any action in respect of real property beyond the territorial jurisdiction, unless a case is presented of which equity might take cognizance if the land were within its territorial jurisdiction. The converse of this proposition is not necessarily true, since the location of land within the territorial jurisdiction of a court of equity may enable it to grant relief by a decree *in rem*, which could not be effectually granted by a decree *in personam*. See *infra*, III., j, with reference to a suit for partition.

c. Nonresidence of defendant as affecting jurisdiction.

In some of the cases the rule with respect to the jurisdiction of equity over suits *in personam*, the purpose of which is to affect real property in another state or country, is stated with the condition or qualification that the suit must be against a resident of the state or country where the suit is brought.

Thus, in *Todd v. Lancaster*, 104 Ky. 427, 47 S. W. 836, the court said: "It is well settled that suits for rescission, or for specific performance of agreements respecting land, are transitory, and not local. *Kendrick v. Wheatley*, 8 Dana, 84; *Bullitt v. Eastern Kentucky Land Co.* 99 Ky. 324, 36 S. W. 16. But this rule is not applicable to suits against nonresidents. In such cases the courts where the land is situated have jurisdiction to rescind the contract for fraud or other reason, or enforce its specific execution. This is a rule of necessity."

So, in *Wicks v. Caruthers*, 13 Lea, 353, it was said that courts of equity act *in personam* in most cases where they have jurisdiction of the person, and compel parties to perform contracts for conveyance of lands in foreign countries; but the essential qualification of the rule is, "if the parties are resident within the territorial jurisdiction of the court."

In *Solenberger v. Herr* (Va.) 27 S. E. 839, the court said that, if a bill to compel one to acknowledge the trust character of his holding of real property had otherwise set forth a proper case for the intervention of equity, it could not be sustained in view of the fact that the defendant was a resident of Pennsylvania, and that the subject of the alleged trust was real estate in West Virginia; since the court had jurisdiction neither of the trustee nor of the subject of the trust, and it could acquire no jurisdiction of either unless he came forward and voluntarily submitted himself to its jurisdiction, which it could not be expected that he would do.

A court of equity will not entertain a suit by a person residing within its jurisdiction against parties residing in Scotland in respect of real property situated there, and upon a contract entered into there which contains no special provision affecting, in any way, the jurisdiction of the *locus contractus*. *Cookney v. Anderson*, 32 L. J. Ch. N. S. 305, Affirmed in 32 L. J. Ch. N. S. 427.

Matthaei v. Galitzin, L. R. 18 Eq. 340, sustained a demurrer to a bill filed by a foreigner against another foreigner, and against an English company formed for working a Russian mine, to restrain the English company from paying to the codefendant a part of the profits of the mine, which were claimed by the plaintiff, and for an account of profits against the company, upon the ground that the matter related to foreign property, and that the substantial controversy was between parties who were both foreigners. See also *Norris v. Chambres*, 29 Beav. 246, Affirmed in 3 De G. F. & J. 583, *infra*, II., d, and *Blake v. Blake*, 18 Week. Rep. 944, *infra*, III., g, 1.

It is doubtful, however, whether these courts intended to make the residence of the defendant within the jurisdiction where the suit is brought an absolute condition of the jurisdiction considered from the broad point of view of private international and interstate law. Practically, of course, the nonresidence of the defendant will frequently defeat the jurisdiction because of the inability to subject him personally to the jurisdiction of the court, which, as shown in *supra*, II., a, is a condition of the jurisdiction of a suit the purpose of which is to affect land beyond the territorial jurisdiction. If, however, the defendant, though a nonresident, is personally served within the state or country where the suit is brought, or voluntarily appears, it would seem, upon principle, that his nonresidence would not necessarily defeat the jurisdiction; and in many of the cases cited in *infra*, III., the jurisdiction was upheld, notwithstanding that the defendant was a nonresident, he having been personally served within the jurisdiction, or having appeared. Most of these cases seem to assume, without questioning the point, that if the defendant is personally subject to the jurisdiction, his residence or nonresidence is immaterial. But in *Mussina v. Belden*, 6 Abb. Pr. 165, which held that the supreme court of New York had jurisdiction of a suit for fraudulent conspiracy by defendants in another state to divest the plaintiff of his title to land in that state, the relief sought being damages for the wrong and an accounting and payment of rents and profits, the court said that it was not necessary that the defendants should be residents of New York; it was sufficient if they were served with process within the state, however brief their sojourn there.

In *Wicks v. Caruthers*, 13 Lea. 371, *supra*, the court held that a decree requiring a nonresident to convey should not be granted, although he had been personally served within the state, it appearing that he was no longer within the state. The court said that a decree ordering him to convey would only give authority in Tennessee, and be waste paper as soon as he crossed the line of Mississippi; and that the court would not make a mere declaration of right which it could not enforce. This suggests a practical difficulty in enforcing the decree when the defendant is a nonresident, 69 L. R. A.

though within the jurisdiction at the time of the commencement of the suit, since he may depart from the jurisdiction before the decree, and thus render the court powerless, for the time, at least, to enforce the decree. The difference in this respect, however, between a nonresident and a resident is merely one of degree, since even a defendant who is a resident at the time of the commencement of the suit may depart from the state pending the suit. At most the nonresidence of the defendant, assuming that he is at any time after the commencement of the suit personally subject to the jurisdiction, would seem to be a matter that merely affects the discretion of the court in exercising the jurisdiction or the practical possibility of enforcing the decree, rather than the existence of the jurisdiction.

d. Discretion as to exercising jurisdiction.

The existence of the jurisdiction is one thing, and the discretion of the court with respect to its exercise is another. As will appear from the cases cited in the subdivisions of *infra*, III., the courts have frequently refused, as a matter of discretion, to entertain suits, the purpose of which was to affect lands beyond the territorial jurisdiction, even though the existence of the jurisdiction was conceded. For example in *Norris v. Chambres*, 29 Beav. 246 (Affirmed in 3 De G. F. & J. 583), it was said that some special state of circumstances must exist in order to enable a court of England, in a suit between residents of England, to enforce a lien on immovable property situated out of the jurisdiction.

In a number of cases the courts have, in the exercise of their discretion, refused to entertain the suit, because under all the circumstances the interests of justice required that the litigation be determined by the courts of the place where the property was situated.

III. Particular subjects of jurisdiction.

a. Creation and enforcement of trusts; substitution of trustees.

It will be observed by referring to *supra*, II., a, that the case of "trusts" was specifically mentioned by Chief Justice Marshall as a proper one for the jurisdiction of a court of chancery, when the person can be found within the jurisdiction, although lands not within the jurisdiction may be affected; and it is settled by the great weight of authority that a court of equity of one state or country, having personal jurisdiction of the necessary parties, and the consequent power to compel a conveyance, may declare and enforce a trust relating to real property in another state or country.

Thus, *Massie v. Watts*, 6 (ranch, 148, 3 L. ed. 181, upon the ground that the action arose out of a contract or an implied trust, held that a court of Kentucky had jurisdiction to compel defendant to convey to the plaintiff land in Ohio, for which he had procured a patent in his own name in violation of his duty under a contract by which he was employed to locate the land for the plaintiff's assignor.

A court of equity having jurisdiction of the parties may entertain a suit for the establishment of a resulting trust in lands in another state. *Moore v. Jaeger*, 2 McArthur, 465. This was a case of fraud and resulting trust arising from the purchase of an outstanding title to

real property by one who had previously conveyed it by a deed of trust to secure a debt due the complainant.

Questions of trust are personal, and not local; and are, therefore, subject to the jurisdiction of a court of the District of Columbia, although the land in respect of which the trust has arisen is situated elsewhere. *Whitney v. Frisbie*, 6 D. C. 262. This also was a case of a constructive trust.

A court having jurisdiction of the person of defendants may entertain a suit in equity to have the defendants declared trustees *ex maleficio* of an undivided interest in real property in Mexico. *Butterfield v. Nogales Copper Co.* (Ariz.) 80 Pac. 345.

A court of equity of another state having personal jurisdiction of the parties has jurisdiction of a suit to declare that a legal title to lands in Iowa is subject to a trust; and a decree of such court dismissing the bill is therefore conclusive upon the parties in Iowa. *MacGregor v. MacGregor*, 9 Iowa, 65.

A court of equity of one state has jurisdiction of a bill to set aside a conveyance of land in another state, which an agent, appointed to sell the land, caused to be conveyed to himself. *Sturdevant v. Pike*, 1 Ind. 277.

The general principle that a court having jurisdiction of the parties has jurisdiction to enforce trusts, although in doing so the title to lands lying beyond its territorial limits is incidentally affected, is asserted in *Manley v. Carter*, 7 Kan. App. 86, 52 Pac. 915, although in that case it is merely applied as between courts of different districts of the same state.

A court of one state, having personal jurisdiction over the trustee of a resulting or constructive trust of land in another state, may compel him to make a conveyance to the beneficiaries of the trust. *McQuerry v. Gilliland*, 89 Ky. 434, 7 L. R. A. 454, 12 S. W. 1037. The court said that, in such a case, the subject-matter is not the recovery of the land, and the action is not a proceeding *in rem*; that it is true that the title to the land is to be affected by the decree in so far as it compels the party to convey, but, by reason of his trust or contract duty, he is personally obliged to convey, and that duty may be discharged in one state as well as another, although the land may not be situated in such state.

In *Hawley v. James*, 7 Paige, 213, 32 Am. Dec. 623, the chancellor directed a decree declaring that, in consequence of the invalidity of the express trust declared in a will with reference to land in Illinois, there was a resulting trust in favor of the heirs at law, and requiring the trustees to convey the property to such heirs by a conveyance duly executed to pass the legal title according to the laws of Illinois, and to be recorded according to the laws of that state. The chancellor said that the court had no jurisdiction to make a decree which would directly affect either the legal or equitable title to lands situated in another state; and that, if the legal title to the lands in question had been in any of the infant parties according to the laws of Illinois, or if those who had the legal title had been out of the jurisdiction of the court, so that it would have been impossible to operate upon them personally to compel them to execute the trust, or to convey the legal title according to the decree, he would have dismissed the application and referred the parties to the courts of the 69 L. R. A.

state where the trust property was situated; but that the court would not decline the jurisdiction of the case so long as it had power to execute its decision through the medium of the holders of the legal title.

The New York supreme court has jurisdiction to compel the conveyance by defendant, who has appeared in the suit, of land in a for-

Gardner v. Ogden, 22 N. Y. 327, 78 Am. Dec. 192. It was alleged in this case that the plaintiff had been fraudulently induced to convey the land to defendant; but the ground of the suit was that the defendant stood in such relation to the plaintiff that he became a trustee of the former with respect to the land in question.

A court of equity of North Carolina, having jurisdiction of the person of the trustee, may compel the execution of the trust with reference to real property in another state by compelling him to pay over the sum for which the land was sold. *Henderson v. McBee*, 79 N. C. 219.

A court of one state has jurisdiction of a bill to compel the conveyance, by a trustee residing within the state, of the outstanding legal estate in lands situated in other states. *Vaughan v. Barrav*, 6 Whart. 392.

Where the legal title to a tract of land, partly in Tennessee and partly in Mississippi, is held subject to a constructive trust in favor of a decedent's estate, a decree may be rendered, in a suit for that purpose, requiring the holder of the legal title to convey the entire tract of land, including that in Mississippi, as well as that in Tennessee, to the administrator for the purposes of the estate; and a sale of the land may then be decreed to be made by the administrator in such manner and on such terms as will be most beneficial to the trust. *Miller v. Birdsong*, 7 Baxt. 536. The court said it was obvious that no decree could be made in the first instance for a sale of the Mississippi portion of the land, but, after determining that complainant was entitled to the land as assets of the estate, it had power to make such decree *in personam* as would coerce him to convey the land to complainant for the benefit of the estate.

A court of equity in Virginia may compel persons residing within that state to account for lands in Kentucky descended to them as heirs, as a trust subject to the payment of the ancestor's debts, in accordance with the law of Kentucky. *Dickinson v. Hoomes*, 8 Gratt. 353, 410.

An executrix as such cannot be held to an account and settlement by a court of a state other than that in which her letters were granted; but the court of another state may, for the purpose of determining whether real property in the latter state is held by her subject to a constructive trust in favor of the heirs of the testator, compel her to disclose whether the property was purchased with the funds of the estate. *Clopton v. Booker*, 27 Ark. 482.

In *Cranstown v. Johnston*, 3 Ves. Jr. 182, the court decreed a reconveyance of an estate in the West Indies, which the defendant had purchased under his own execution under circumstances making his purchase a security for the debt. The decision was upon the ground that such a decree acts *in personam*, and not *in rem*.

In *Kildare v. Eustace*, 1 Vern. 405, Lord Chancellor Jefferies doubted his jurisdiction to entertain a bill to be relieved touching trusts

created in Ireland of lands in that Kingdom, notwithstanding that both plaintiff and defendant were in England. Upon the subsequent argument, however, before himself, Lord Chief Justice Beddingfield and Lord Chief Baron Atkins (1 Vern. 419) it was held that the court had jurisdiction.

An English court has jurisdiction to administer a trust under the will of a person domiciled in Scotland, not only as to the estate in England, but as to that in Scotland. *Ewing v. Ewing*, L. R. 9 App. Cas. 34.

In *Falke v. Terry*, 32 Colo. 86, 75 Pac. 425, however, it was held that a court of Colorado had no jurisdiction, in an action by legatees against a foreign executrix charged with conversion of the assets of the estate to her own use in fraud of the rights of the legatees, to adjudge the title of real estate situated in another state, the title of which was in her name, to be the property of the legatees, and to be held by her in trust for them. The decree of the trial court, which was reversed, adjudged that the real estate situated in New York standing in the defendant's name upon the records, was the property of the plaintiffs, and decreed that the same should be held by her in trust for them.

In *Servis v. Nelson*, 14 N. J. Eq. 101, the court said, in effect, that a trust sought to be established in land in New York could not be enforced in a court in New Jersey. The case, however, was decided on other grounds.

The decision in *Pickett v. Ferguson*, 86 Tenn. 642, 8 S. W. 386, denying any relief under a bill to establish a resulting trust in land in Arkansas by reason of its purchase by defendant at a judicial sale while holding it under a lease from the complainant, was upon the ground that a resulting trust does not arise under such circumstances, and the question of the jurisdiction of the court of Tennessee to entertain such a suit, assuming the existence of a trust, was not decided. Upon the original hearing in the case, however, the court was of the opinion that it would not have jurisdiction of a suit to enforce a constructive trust based upon the mere relation of landlord and tenant in the absence of any actual fraud on the latter's part. It is said that the authorities limited the jurisdiction of the courts of equity to make decrees respecting land situated in other states or countries to cases of contract, trust, and fraud, and that the rationale of that limitation required that the contract, trust, and fraud, intended by the court in establishing the limitation, should be understood to be an express contract, a direct trust, an actual fraud; that the constructive trust arising from actual fraud should be classed under the head of "fraud" in the statement of the limitation. Upon a reconsideration of the case, however, the court came to the conclusion that the decision ought to be placed upon the fundamental ground already stated, and said that its former opinion was not to be regarded as a precedent.

While a court may, by virtue of its personal jurisdiction of the parties, declare and enforce a trust with respect to real property beyond the jurisdiction, a court of one state or country cannot, by its decree appointing a new trustee in the place of one named in a will, deed, or trust, affect the real property in another; and a conveyance by such substituted trustee is equally ineffectual.

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Thus, a court of one jurisdiction cannot, by its decree appointing a new trustee in place of the one named in a will, affect the title to real property in another state. *Corbett v. Nutt*, 10 Wall. 464, 19 L. ed. 976.

A court of another state has no jurisdiction to appoint a trustee to convey property in the District of Columbia. And the decree appointing him, and his sale of the property thereunder, are an absolute nullity. *Contee v. Lyons*, 8 Mackey, 207.

A court of the state in which the testator was domiciled, and in which a will creating a trust estate in lands in Illinois was executed, cannot, by the appointment of a trustee in the place of the person designated in the will, who refused to serve, effect a transfer of title to such appointee. That court can only act *in personam*, and the outside limit of its powers would be to compel those having the legal title to convey it to the trustee after his appointment. *West v. Fitz*, 109 Ill. 425. The court, however, did not concede, except for the purposes of the argument, that the court of the testator's domicile would have the power to compel such a conveyance.

Glen v. Gibson, 9 Barb. 634, refused to recognize, or give any effect to, a decree of a court of Maryland appointing trustees in place of a deceased trustee, under a deed of trust relating to real property in New York, and directing them to carry out a contract of sale for such land. In this case, however, the trust estate vested in the court of chancery of New York upon the decease of the original trustee.

A sale of land in Ohio by a trustee substituted by a court of Virginia in place of the deceased trustee designated by the conveyance is invalid. *Henry v. Doctor*, 9 Ohio, 49.

The appointment of a trustee by the court of another state, in the place of a deceased trustee to whom land in Pennsylvania had been conveyed, vests no title in the trustee thus appointed so as to enable him to maintain ejectment for it, notwithstanding that the creator of the trust was domiciled in the other state. *Williams v. Maus*, 6 Watts, 278, 31 Am. Dec. 465.

Smith v. Davis, 90 Cal. 25, 25 Am. St. Rep. 92, 27 Pac. 26, however, held that a court of a state in which a trust deed respecting land in another state is executed may, if it has jurisdiction of the parties, appoint a new trustee to carry out the trust if the trustee named in the deed refuses to act, and the deed provides for the appointment of a new trustee in such event. The court said that, if the title to the realty does not vest in the new trustee, there is no basis whatever for the contention that the decree affects the title to real property; and that, if the title to the realty does vest in the trustee, it must be by operation of law, or by virtue of the contract of the parties, since the decree does not so provide, and does not purport *ex proprio vigore* to vest a title in the trustee.

It will be observed that the last case begs the question as to the effect of its decree, merely contenting itself with rendering the decree without concerning itself with the effect of the decree when rendered. Usually, however, as pointed out in *supra*, II., b, a court of equity does not assume jurisdiction of a suit, the purpose of which is to affect land in another state or country, unless its decree, when rendered, will be effective to accomplish the purpose for

which the suit is brought. In other words, the courts will not go through the form of entertaining a suit for the purpose of rendering a decree which can have no practical effect.

In *Barger v. Buckland*, 28 Gratt. 850, where a deed of trust was executed to secure a debt on a tract of land which, at the time, was wholly within Virginia, but part of which was subsequently incorporated into West Virginia, the court, upon default of payment (there being no trustee to execute the contract of the parties to sell the land and pay the debt), decreed that, unless the grantor should pay the debt within a prescribed period, certain named persons should execute the trust by selling the land and applying the proceeds in payment of the debt.

In the subsequent case of *Polindexter v. Burwell*, 82 Va. 507, it was said that the decision in the last case might be taken at first glance as an exception to the rule that the courts of one state cannot decree a sale of lands lying in another; but that the case was distinguishable from the rule by reason of its peculiar circumstances.

b. Suit for specific performance.

See also *Mariposa Co. v. Garrison*, 26 How. Fr. 448, *infra*, III., h.

In *Penn. v. Baltimore*, 1 Ves. Sr. 444, 2 White & T. Lead. Cas. in Eq. 928,—one of the first cases which asserted the indirect jurisdiction of equity in respect of land beyond the territorial jurisdiction,—the chancellor decreed specific performance of articles executed in England concerning the boundaries of two provinces in America. And the specific performance of contracts relating to real property has since been one of the favorite subjects of this peculiar jurisdiction.

In *Archer v. Preston*, 1 Eq. Cas. Abr. 133, cited in 1 Vern. 77, the defendant coming into England, a bill was exhibited against him there to answer a contract made of land in Ireland; and, notwithstanding that the land lay in Ireland, and was under the act of settlement there, yet a *ne exeat regno* was granted, and process against him to answer; and when he afterwards went into Ireland without answering he was sent for by special order from the King, and made to answer the contempt and to abide the justice of the court.

So, courts, having personal jurisdiction of the parties, have frequently asserted and exercised jurisdiction to enforce specific performance upon the part of the vendor of contracts to convey land in another state or country, upon the ground that the decree in such case is *in personam*, and not *in rem*, and that the vendor may be compelled by process against the person to execute a conveyance which shall be sufficient, according to the law of the place where the land is situated, to pass the title. *Montgomery v. United States*, 36 Fed. 4; *Smith v. Davis*, 90 Cal. 25, 25 Am. St. Rep. 92, 27 Pac. 26 (*obiter*); *Winn v. Strickland*, 34 Fla. 610, 16 So. 606 (*obiter*); *Cloud v. Greasley*, 125 Ill. 313, 17 N. E. 826; *Bethell v. Bethell*, 92 Ind. 318 (*obiter*); *Rea v. Ferguson* (Iowa) 102 N. W. 778; *Brown v. Desmond*, 100 Mass. 267; *Olney v. Eaton*, 66 Mo. 563; *Davis v. Headley*, 22 N. J. Eq. 115; *Potter v. Hollister*, 45 N. J. Eq. 508, 18 Atl. 60 L. R. A.

204; *Lindley v. O'Reilly*, 50 N. J. L. 636, 1 L. R. A. 79, 7 Am. St. Rep. 802, 15 Atl. 379; *Sutphen v. Fowler*, 9 Paige, 280; *Shattuck v. Cassidy*, 3 Edw. Ch. 152; *Newton v. Bronson*, 13 N. Y. 587, 67 Am. Dec. 89; *Burnley v. Stevenson*, 24 Ohio St. 474, 15 Am. Rep. 621; *Conover v. Wright*, 9 Pa. Dist. R. 688; *Johnson v. Kimbro*, 3 Head, 557, 75 Am. Dec. 781 (*obiter*); *Morris v. Hand*, 70 Tex. 481, 8 S. W. 210; *Montgomery v. Ruppensburg*, 31 Ont. Rep. 433. See also *Ward v. Arredondo*, Hopk. Ch. 213, 14 Am. Dec. 543, *supra*, II., b.

In *Episcopal Church v. Wiley*, 2 Hill, Eq. 584, 30 Am. Dec. 386, it was held that a court of South Carolina may entertain a suit by the vendor, who tenders title deeds, to compel the specific performance by the purchaser of a contract for the purchase of lands in Georgia. Johnston, Chancellor, however, said that he was not prepared to go to the length of the decisions which hold that a defendant within the jurisdiction may be compelled to make conveyances or deliver possession of lands in foreign parts; and that he was inclined to think that he would not have sustained a bill by the purchaser against the vendor for specific performance. This intimation against the jurisdiction to compel specific performance upon the part of the vendor is clearly against the great weight of authority as shown above.

It is also settled that a suit will lie in one state by the vendor against the purchaser to enforce specific performance, although the land lies in another state. *Garden City Sand Co. v. Miller*, 157 Ill. 225, 41 N. E. 753; *Robinson Mineral Spring Co. v. De Baulte*, 50 La. Ann. 1281, 23 So. 865; *Myers v. De Mier*, 4 Daly, 343; *Baldwin v. Talmadge*, 7 Jones & S. 400. And see *Episcopal Church v. Wiley*, 2 Hill, Eq. 584, 30 Am. Dec. 386.

A court of equity may compel a purchaser of land specifically to perform his contract of purchase, although the land is situated abroad, and the contract was made and was to have been performed abroad, and the plaintiff is a nonresident; the defendant being duly served with process, and subject to the jurisdiction. *Cleveland v. Burrill*, 25 Barb. 532.

In a suit in the Federal courts for specific performance of telegraph right-of-way contracts with certain consolidated railroad companies, the necessary parties being subject to the court's jurisdiction, it is immaterial that a portion of the property affected is beyond the court's territorial jurisdiction. *Western U. Teleg. Co. v. Pittsburg, C. C. & St. L. R. Co.* 137 Fed. 435.

On a bill in equity for specific performance of an agreement to assign a bond for the conveyance of land in another state, the court will entertain jurisdiction against third persons residing in that state, who have taken a conveyance of the land pending the suit with notice of the plaintiff's rights, and, being made parties to the suit, have been served with process in the state, and have once appeared and answered without objecting to the jurisdiction. *Pingree v. Coffin*, 12 Gray, 288.

Penn v. Hayward, 14 Ohio St. 302, while conceding the general proposition that a court of one state may enforce specific performance of a contract to convey real property in another, refused to entertain such a suit, because only part of the persons by whom the conveyance must be executed in order to pass the complete title were personally subject to the ju-

isdiction of the court, the others being non-residents, and not served personally within the state.

Willhite v. Skelton (Ind. Terr.) 82 S. W. 932, held that a court of Indian territory should not take jurisdiction of a suit to enforce the specific performance of an agreement for the joint purchase and operation of a lease of oil lands in Oklahoma, where the terms of the contract as respects the manner of working, the extent to which the operations should be carried on, and the consequent royalty, were such that they could not be enforced so as to do justice between the parties without the constant supervision of the court.

Kansas & E. R. Constr. Co. v. Topeka, S. & W. R. Co. 135 Mass. 34, 46 Am. Rep. 439, held that a suit would not lie in Massachusetts for the specific performance by a railroad company of a construction contract with the complainant, whereby the former agreed to deliver certain bonds and certificates of stock in payment of work to be performed by the complainant in a foreign state. The decision is upon the ground that the liabilities which the defendant is under in regard to the construction of the roadway in the other state, as well as those which the complainant has assumed, must be determined by the local law of that state, as administered by its appropriate tribunals; and that at every step such tribunals must have the right to determine, as occasions for intervention arise, whether the duty imposed upon the railroad company is being performed and the laws of the state observed.

Port Royal R. Co. v. Hammond, 58 Ga. 523, held that a court of Georgia would not entertain a suit for the specific performance of an agreement by a railroad company, a domestic corporation, with respect to opening ditches on complainant's land in South Carolina, keeping them open to a certain depth, and constructing and keeping in repair cattle guards thereon. The court said that, if the act required to be done on the part of the defendant, in the sufficient execution of the contract, were required to be performed in Georgia, there would not seem to be any well-founded objection to the jurisdiction of the court, notwithstanding that the land was situated in another state.

c. Suit to remove cloud upon title; to cancel void mortgage.

See also *Monnett v. Turple*, 132 Ind. 482, 32 N. E. 328, *infra*, III., g. 1.

A United States court sitting in one state having personal jurisdiction of the defendant may entertain a suit to remove a cloud on the title of real property in another, the case being one of asserted fraud, or of a constructive trust created by operation of law. *Briggs v. French*, 1 Sumn. 504, Fed. Cas. No. 1,870.

A court of equity having jurisdiction of the parties has also jurisdiction to compel defendant to release and discharge an apparent cloud upon the title to land situated in another state. *Remer v. Mackay*, 35 Fed. 86. The court said: A suit to remove a cloud upon title is a proceeding in equity, and equity, as a rule, operates wholly *in personam*. It operates upon the conscience of the defendant by decreeing him to do, or refrain from doing, some special act; and the general effect and scope of a decree in a court of equity is aimed at the voli-

tion or conscience of the defendant. The court, therefore, having jurisdiction of the defendant, can direct its decree upon him, and compel him to do what is equitable and right, under the circumstances. The court is not asked to pass upon the title to the land, but only to say whether the defendant shall be compelled to release and discharge an apparent cloud upon title if the court shall find that in equity he ought to do so.

A court of chancery of one state having personal jurisdiction of all the necessary defendants may entertain a suit for the establishment of the right of the complainant to a tract of land in another state, and, as an incident of that relief, to restrain the defendants from interfering with the complainant's possession, and for a removal of their claim as a cloud upon the complainant's title. *Kirklin v. Atlas Sav. & L. Asso.* (Tenn. Ch. App.) 60 S. W. 149.

A court of Indiana, having personal jurisdiction of the parties, has power to declare a note and a mortgage securing the same void, because executed by a married woman as security for a debt of her husband, and to enjoin defendant from attempting to enforce either the note or mortgage, although the mortgaged land lies in another state. *Ft. Wayne Trust Co. v. Sihler* (Ind. App.) 72 N. E. 494.

A court of equity of one state has jurisdiction to compel the defendant to cancel and execute a discharge of a mortgage upon land in another, given to secure a usurious contract. *Williams v. Fitzhugh*, 37 N. Y. 444.

A court of one state has the right and power, in a proper case, to decree a mortgage upon real estate void for usury, and to compel the party holding it to surrender it up to be canceled, although the lands mortgaged lie in another state. *Williams v. Ayrault*, 31 Barb. 368.

It will be observed that the jurisdiction of a suit to remove a cloud on the title of real property beyond the territorial jurisdiction depends upon the proposition that such a suit is, or at least may be, a suit *in personam*, and not *in rem*; and support for this proposition is found in *Hart v. Sanson*, 110 U. S. 151, 28 L. ed. 101, 3 Sup. Ct. Rep. 586, which held that the decree in such a case, unless otherwise provided by statute, is clearly not *in rem*, establishing a title in land, but operates *in personam* only by restraining the defendant from asserting his claim, and by directing him to deliver up his deed to be canceled, or to execute a release to the plaintiff; and, because the decree, in the absence of statute, is *in personam* and not *in rem*, the court denied the power to render such a decree, even with respect to land within the jurisdiction, upon constructive service against a nonresident.

d. Foreclosure of mortgage or other lien.

It is clear that a court of equity may entertain a suit for the strict foreclosure of a mortgage upon land in another state or country, since a decree *in personam* is entirely adequate for the purpose.

A court in New York having jurisdiction of the parties may maintain an action for the strict foreclosure of a mortgage upon lands in another state. *House v. Lockwood*, 40 Hun. 532.

A foreclosure decree being a decree *in per-*

sonam depriving the mortgagor of his personal right to redeem, an English court of chancery has jurisdiction to make such a decree in respect to a mortgage between an English mortgagor and mortgagee upon land in one of the colonies. *Paget v. Ede*, L. R. 18 Eq. 118. The decision was upon the assumption that the legal title was in the mortgagee, and that the mortgagor merely had an equity of redemption, which was not, in the proper technical legal sense, an estate in the land.

A court of equity in England having jurisdiction of the person of the defendant may entertain a bill to require him to redeem a mortgage upon land outside of England, or be foreclosed. *Toller v. Carteret*, 2 Vern. 495.

But, a power of sale in a mortgage on land without the state, and proceedings under it, are not regulated by the New York statutes with reference to the foreclosure of mortgages by advertisement. *Elliott v. Wood*, 45 N. Y. 71.

Because of the principle referred to in IV., *infra*, that a sale or conveyance of real property in one state or country by a master, or commissioner, or other officer appointed by a court of another state or country, is entirely ineffectual, it has sometimes been supposed that a court of one state or country has no jurisdiction of a suit for the foreclosure of a mortgage upon land in another, if a judicial sale is necessary in order to make the decree of foreclosure effectual; and this principle would be fatal to the jurisdiction, in such a case. If the court were limited to a decree directing the sale of the property. But, while that is the usual form of a decree of foreclosure when the property is within the territorial jurisdiction, the court may add to it a direction that the mortgagor, or the owner of the equity of redemption, shall convey or release his title to the purchaser at the sale. While, therefore, a decree of foreclosure in the usual form, merely directing a sale of the property, is of itself void, and without effect so far as property beyond the territorial jurisdiction is concerned, the jurisdiction of a court of one state or country to decree a sale under a mortgage of property used as an entirety, lying in part in the state in which the suit is brought and in part in another state or states, and to direct the mortgagor or owner of the equity of redemption to execute a deed to the purchaser, has been upheld in a number of cases.

Thus, in a foreclosure of a mortgage upon a railroad lying partly in one state and partly in another, a court of equity in one state may decree a sale of the entire road lying in both states, and direct a deed to the purchaser. *Muller v. Dows*, 94 U. S. 444, 24 L. ed. 207. The action was brought in a Federal court sitting in Iowa, and the decree covered a part of the line in Missouri, as well as the part in Iowa. The decree directed a sale of the entire property covered by the mortgage, directed the master to execute a good and sufficient deed to the purchaser, declared that the defendants be barred and foreclosed from all interest in the property, directed the mortgagor to surrender to the purchaser the property sold and conveyed upon the execution, approval, and delivery of the master's deed, and, as a further assurance, directed the mortgagor to execute a deed of the property to the purchaser. The decision is expressly referred to the general principle that a court of equity, having ju-

risdiction of the person, may decree a conveyance by him of land in another state, and may enforce the decree by process.

A United States circuit court has jurisdiction of a suit to foreclose a mortgage upon a bridge located partly in Texas and partly in Mexico, as to that portion of the bridge lying in Mexico. *International Bridge & Tramway Co. v. Holland Trust Co.* 26 C. C. A. 469, 52 U. S. App. 240, 81 Fed. 422. The suit was brought by the trustee named in the mortgage, and the decree directed a sale by a master; and the bridge company, its officers and directors, were required to execute conveyances, good and sufficient under the laws of Texas, to the purchaser for such part of the property as was situated in that state, and good and sufficient conveyances, according to the law of Mexico, for such of the property as was in Mexico.

A court of chancery has jurisdiction of a bill for the foreclosure of a railroad mortgage, although embracing property out of the state as well as property within it. *Mead v. New York, H. & N. R. Co.* 45 Conn. 199.

A court having jurisdiction over a railroad corporation owning a continuous line located partly in the state and partly in an adjoining state may, in the exercise of its equitable powers, make a decree foreclosing a mortgage upon the road with respect to the property situated in both states; and may effectuate the decree by directing a sale of the whole property, and an execution of the proper conveyance to the purchaser by the receiver, the trustee, and the mortgagor. *McTighe v. Macon Constr. Co.* 94 Ga. 306, 32 L. R. A. 208, 47 Am. St. Rep. 153, 21 S. E. 701.

A state court has jurisdiction, where all the parties in interest are before it, to direct a sale as an entirety, under a power in a mortgage, of a canal and its franchises extending into another state; but, if the portion within that state is in the possession of receivers appointed therein, a concurring or ancillary decree must be obtained before a sale can be had. *Brown v. Chesapeake & O. Canal Co.* 73 Md. 567.

That a portion of a railroad covered by a mortgage lies in another state does not deprive a court of New York of jurisdiction of a suit to foreclose the mortgage. The decree of foreclosure cannot be directly executed in a foreign state; but the mortgagor, if subject to the jurisdiction, can be ordered to execute a conveyance in aid of the sale under it in the performance of a covenant for further assurance. *Union Trust Co. v. Olmsted*, 102 N. Y. 729, 7 N. E. 822.

The decree rendered by the supreme court in the last case was an ordinary decree of foreclosure, and the property in both states was sold in pursuance thereof. The court of appeals held that the order requiring the mortgagor to convey could be made after the report of sale and by way of amendment to the decree.

An ordinary decree of foreclosure of a mortgage, directing the sale of the part of the mortgaged premises that are situated in another state, as well as those that are situated in the state in which the decree is rendered, may be amended, even after a sale, by a provision requiring the mortgagor to execute to the purchaser a deed of the mortgaged property lying outside the state. *Ibid.*

A court has jurisdiction of an action to fore-

close a mortgage upon land located partly in the state and partly in another state, and may, when the mortgagors are residents of the state, and have personally been served with process therein, provide in the decree that the referee shall sell all the mortgaged land, and that the mortgagors shall convey the land in the other state to the purchaser. *Mead v. Brockner* 82 App. Div. 480, 81 N. Y. Supp. 594. The court said that the principle upon which the jurisdiction is exercised in such cases is that, while a court of equity has no power to transfer the title to the alien land by a judgment *in rem*, it can compel a conveyance by a decree *in personam* against a party who holds the title, and over whom it has acquired jurisdiction. The reason for its exercise is found in the necessity and convenience of disposing of property by a single sale where it cannot be advantageously sold in fragments, and it is quite as applicable in kind, if not in degree, to the case of a house and lot, or of a farm situated in two adjoining states, as to the case of a railroad.

A court having jurisdiction of the trustee under a mortgage covering railroad property in two or more states may, by its decree operating upon the trustee himself, authorize him to sell and convey whatever interest of the railroad company will pass under the terms of the mortgage, wherever the property may be situated. *McElrath v. Pittsburg & S. R. Co.* 55 Pa. 189.

King v. Tuscumbia, C. & D. R. Co. Fed. Cas. No. 7,808, denied the jurisdiction of a district court of the United States sitting in Alabama to decree foreclosure and sale of land in Mississippi under a mortgage. The court said that it might, in a proper case, compel the railroad company to convey to the complainants, but that it could make no decree which would operate directly upon the land, and that it therefore could not decree a foreclosure, nor a sale of the land lying in Mississippi.

Guarantee Trust & S. D. Co. v. Delta & P. Land Co. 43 C. C. A. 396, 104 Fed. 5, held that a sale of lands owned by a railroad company in Mississippi, by a master or commissioner appointed by a decree rendered in a United States circuit court for the western district of Tennessee, in a suit to foreclose a mortgage upon the property, does not affect the title, since the court had no jurisdiction to decree the sale. The case is distinguished from *Muller v. Dows*, 94 U. S. 444, 24 L. ed. 207, *supra*, upon the ground that in the latter case the sale was made at the instance of the trustees in the mortgage, who, notwithstanding the appeal, could be directed by the trial court to join in a conveyance; and that the mortgagor was required to execute a deed of assurance to the purchaser at the sale; whereas, in the case at bar the action was brought by a bondholder, and there was no deed of assurance either by the trustees or by the mortgagor. It is further pointed out that the property involved in the case at bar did not constitute a part of the railroad, but was wild and uncultivated land. This fact in itself, however, would not seem to be sufficient to distinguish the case, on principle, from the *Muller* Case, though it is obvious that there is a greater necessity for the exercise of the power to decree a sale of so much of the property as is within another state when the property constitutes a part of the line of the road, than when it is not a part of such line; and, therefore, such fact 69 L. R. A.

might affect the court's discretion as to the assumption of jurisdiction.

A decree of foreclosure rendered in New York, and a deed executed by a referee appointed pursuant to that decree, covering real property in New York and Connecticut, are invalid so far as the property in Connecticut is concerned, since the courts of the state in which land is situated will not recognize the right of the courts in other states to affect directly the title to real estate in the former. *Farmers' Loan & T. Co. v. Postal Teleg. Co.* 53 Conn. 334, 3 Am. St. Rep. 53, 11 Atl. 184. The decree in this case was simply the ordinary decree of foreclosure and sale, without any direction for a conveyance by the mortgagor or owner of the equity of redemption to the purchaser at the sale; and the decision is, therefore, not inconsistent with those above cited which sustain the jurisdiction.

A decree of sale of real property upon foreclosure of a mortgage and a deed made in pursuance of it are ineffective to pass the title to real property in another state, whether the sale is made through the instrumentality of some officer designated by statute, or appointed by the court. *Pittsburgh & State Line R. Co. v. Rothschild*, 8 Sadler (Pa.) 83, 4 Atl. 385. This decision seems to be explainable in the same way as the preceding one.

In the two cases next cited the court seems to have been of the opinion that it was impossible to make a decree of foreclosure effective with respect to property beyond the jurisdiction, though neither expressly denies the power to make the decree thus effective by the requisition of a conveyance or release from mortgagor or owner of the equity of redemption.

The courts of Ohio have no jurisdiction to enforce the remedy of bondholders by the foreclosure of a mortgage upon the part of a railroad in another state. *Eaton & H. R. Co. v. Hunt*, 20 Ind. 457. The court said that, although the court of one state may act *in personam* upon an individual touching real property owned by him in another state, even to ordering him to sell it, yet, if he refuses obedience to the order, the court cannot appoint a commissioner to make the sale in his stead, and is powerless to effect the sale.

A court of New York has no jurisdiction, in a suit for foreclosure of a mortgage covering real property situated in New York and other states, and used as an entirety by a telegraph company, to decree a sale of so much of the property as is situated beyond the limits of the state. *Farmers' Loan & T. Co. v. Bankers' & M. Teleg. Co.* 44 Hun, 400. The decree in this case, in addition to the direction of a sale, adjudged that the purchaser of the property should be let into the possession and enjoyment thereof, and that every person in possession thereof should surrender the same upon the production of the referee's deed, and that the purchaser should hold and enjoy the property. The court intimated that there was no way in which such provision could be enforced or made effective.

In *Cook v. Welgley* (N. J. Eq.) 59 Atl. 1029, it seems to be assumed that the jurisdiction of a suit in New Jersey to foreclose a mortgage upon an island in the Hudson river was dependent upon whether the island, under the boundary agreement between New York and New Jersey, was within the latter's jurisdic-

tion. As a matter of fact, however, it was held that the defendants were already precluded as to the jurisdictional question by the foreclosure decree.

Whether or not the parties to a mortgage covering real property in New York and other states may, with respect to the property in New York, exclude the jurisdiction of the court to foreclose the mortgage by an express provision therein making a sale of the premises by the mortgagee the exclusive remedy in case of default in payment, they may do so with respect to land in the other states in the absence of statutes of such other states upon the subject. *Farmers' Loan & T. Co. v. Bankers' & M. Teleg. Co.* 44 Hun, 400.

A court of a province has no power to order a sale as an entirety of a division of a railway, part of which is within and part without its jurisdiction. *Grey v. Manitoba & N. W. R. Co.* [1897; P. C.] A. C. 254, 66 L. J. P. C. N. S. 66. The court said in this case: "The thing asked for by the bill is a judicial sale of land partly within and partly out of the jurisdiction as an entire thing, and with specific directions by the court. It is impossible to do that; the decree of the court below does not do it directly, and it has been hardly more than suggested at the bar that there is any principle or authority to justify it." The question was not presented as to the power to grant a decree directing a sale of land beyond the jurisdiction, in connection with a decree requiring a conveyance by the mortgagor or owner of the equity of redemption to the purchaser at the sale.

In *Strange v. Radford*, 15 Ont. Rep. 145, an action in Ontario for sale, for delivery of possession, and for relief under a covenant in a mortgage upon land in Manitoba, the court said that the plaintiff might have a judgment of foreclosure, as such judgment would operate *in personam* to extinguish the mortgagor's personal right of redemption; but that the court would not go further and decree a sale of the property.

A suit to foreclose a lien created by the transfer to plaintiff, as collateral security, of a receipt evidencing the ownership of an equitable estate in common in lands in New York, is *in rem* and local, and cannot, therefore, be maintained in Michigan. *Richard v. Boyd*, 124 Mich. 396, 83 N. W. 106. The Michigan statute provides that actions for the recovery of any real estate, or for the recovery of the possession of real estate, shall be tried in the county where the subject of the action shall be situated.

It will be observed that in the cases above cited, which sustained the jurisdiction of a court of one state or country of a suit to foreclose a mortgage in respect of real property in another state or country, the property in question was part of a parcel used as an entirety, and another part of which was within the territorial jurisdiction of the court; and such fact to some extent undoubtedly qualifies and limits those decisions. As a matter of principle, however, and so far as the absolute right to take jurisdiction is concerned, it would seem to make no difference whether all, or only part, of the property covered by the mortgage is beyond the territorial jurisdiction. When, however, the mortgaged property, which is used as an entirety, is partly within and partly without the territorial jurisdiction, the inconvenience

and disadvantage of selling it in parcels furnish a strong reason for the exercise of discretion in favor of the jurisdiction,—a reason which is lacking when the entire mortgaged property is beyond the territorial jurisdiction.

Thus, *Eaton v. McCall*, 86 Me. 346, 41 Am. St. Rep. 561, 29 Atl. 1103, asserted the jurisdiction of a court in a proper case to foreclose a mortgage upon land in another state, and to make the decree effective by a deed requiring the mortgagor to convey; but held that the court will not exercise such jurisdiction where the entire property is situated without the state, and no reason is shown why the mortgage cannot be foreclosed according to the laws of the place where the land is situated, without loss or inconvenience.

e. Suit to redeem.

An action may be maintained in New York which is substantially to redeem from a forfeiture in a lease of land in another state; and the court will confer the final relief of possession, and may, as an incident, decree defendant to deliver up possession of the land to the owner. *Chase v. Knickerbocker Phosphate Co.* 32 App. Div. 400, 53 N. Y. Supp. 220.

A court having jurisdiction of the parties may relieve against the forfeiture of a lease of mining property in another state for nonpayment of rent, although it cannot restore the property to the possession of the lessee. *Sunday Lake Min. Co. v. Wakefield*, 72 Wis. 204, 39 N. W. 136.

It was held in *Henderson v. Bank of Hamilton*, 23 Can. S. C. 716, however, that a court of Ontario had no jurisdiction of a suit, by one who had recovered a judgment in Manitoba, which, being registered, was, by virtue of a statute of Manitoba, a lien upon real property there, to redeem from a prior mortgage upon the land. The decision was upon the ground that the charge upon the land was exclusively a real right, affecting the lands, unaccompanied by any personal liability or equity enforceable *in personam*; and that the courts of Manitoba restrict the right which they give in such cases to a sale of the lands.

f. Suit to reform deed; or to have deed declared a mortgage.

A court of one state has jurisdiction of a suit to reform a deed of land in another state by incorporating therein a personal covenant of seisin. *Bethell v. Bethell*, 92 Ind. 318. The decision is upon the ground that a decree correcting a mistake operates upon the contract and parties; and, where the contract is made in the state where the parties reside, the suit to reform it is properly brought in that state.

A court of equity of the state in which the parties reside has jurisdiction to decree that a deed, absolute in form, to property in another state, is, in effect, a mortgage merely. *Reed v. Reed*, 75 Me. 264.

So, *Clark v. Seagraves*, 186 Mass. 430, 71 N. E. 813, held that a bill would lie in Massachusetts to have a deed absolute on its face declared a mortgage, and to redeem therefrom, though the land lay outside the state, particularly where the deed was made in and between citizens of the state; since such a bill is one for relief against fraud, and is not a bill dealing with the title to an estate in land.

Findley v. O'Reilly, 50 N. J. L. 636, 1 L. R.

A. 79, 7 Am. St. Rep. 802, 15 Atl. 379, seems to assume that a bill to have a deed absolute on its face declared a mortgage, and to redeem therefrom, would lie in one state in respect of land in another, and that a reconveyance pursuant to the decree in such a case would be effectual; although it held that a decree rendered by a court of Pennsylvania, having jurisdiction of the parties, which declared that a deed of land in New Jersey, absolute on its face, was intended as a mortgage, and that the defendant secured had been paid, and which directed the executor of the deceased grantee to execute and deliver to the grantor a deed of reconveyance, though conclusive within Pennsylvania, could not be allowed to affect the title to the lands, and did not extinguish the grantee's title, in the absence of a conveyance pursuant to the decree.

Gunn v. Harper, 30 Ont. Rep. 650, while conceding that a bill would lie in Ontario to have a deed absolute on its face declared a mortgage, and for redemption, although the land affected was out of the province, if the action were against the original grantee alone, held that the suit would not lie where the original grantee had conveyed to other persons. The decision is upon the ground that the jurisdiction in case of land beyond the territorial jurisdiction is confined to cases in which there is either a contract between the parties, or something in the nature of a trust.

g. Relief from fraud.

1. As between parties or privies.

A court of equity of one state or country, having personal jurisdiction of the parties may grant relief to a party who has been fraudulently deprived of the title, or evidence of title, to real property in another state or country, by requiring a reconveyance.

Thus, it was held by Lord Chancellor Nottingham, in *Arglasse v. Muschamp*, 1 Vern. 75, that courts of equity in England may relieve against conveyances obtained by fraud, on land in Ireland. The decision was affirmed on rehearing by Lord Keeper North (1 Vern. 135), who said that the objection that the court was deficient in power to compel a performance of its decree because it could not sequester the lands in question was of no weight; and it did not appear but that the defendant had lands in England, and then those would be subject to a sequestration.

It was held in *King v. Pillow*, 90 Tenn. 287, 16 S. W. 469, that a court of chancery may compel a grantor within its jurisdiction to supply a conveyance to a tract of land in Arkansas, a deed of which he had obtained possession fraudulently, and destroyed after delivery.

The same position was taken in *Pillow v. King*, 55 Ark. 633, 18 S. W. 764, which held that the Tennessee court had jurisdiction to grant the decree involved in the last case.

McGee v. Sweeney, 84 Cal. 100, 23 Pac. 1117, held that a court of California, by reason of its control over the parties, had jurisdiction of a suit to have a deed to real property in Pennsylvania declared void, and for a reconveyance.

A court of Michigan, having jurisdiction of the person of defendant, has jurisdiction of a suit by the grantor to set aside a deed, and compel a reconveyance of land in Missouri on the ground of fraud. *Noble v. Grandin*, 125 Mich. 383, 84 N. W. 465. The court cites 60 L. R. A.

Roberts v. Roberts, 124 Mich. 414, 83 N. W. 132, to the effect that a suit to compel the production of a deed could be maintained in another county than where the lands lay, notwithstanding Mich. Comp. Laws, § 434, providing that a suit in chancery shall be commenced in the circuit court for the county in which the property in dispute is situated, if the subject matter is local.

In *D'Ivernois v. Leavitt*, 23 Barb. 63, involving an assignment for creditors, made in New York, covering real property in another state, the court said: "The rights relating to the acquisition, enjoyment, and disposition of real property are prescribed and regulated exclusively by the laws of the country in which the property is situated. Every community, independent and sovereign, possesses this power as an inherent and essential element of its sovereignty. No other community can interfere with the method by which real property may be acquired or lost, the tenure by which it may be held, the duration or quantity of interest in it, or the conditions to which the enjoyment of it is subject; but an instrument purporting to dispose of real property situated in another state or country may, nevertheless, be within the reach of the laws of the state in which the instrument is executed, and may be assailed on the ground, for instance, that the instrument was in fraud of its own citizens, or that it was obtained fraudulently from the grantor."

Mussina v. Alling, 11 La. Ann. 568, held that a court of Louisiana had no jurisdiction to compel a reconveyance of land in Texas upon the ground of fraud, although the defendant was within its jurisdiction. The court, while conceding that the courts of Louisiana have both common-law and equity jurisdiction in the sense that they are generally competent to afford such relief to parties as may be demanded in a judicial proceeding, either at law or in chancery, in those states which recognize the English division of remedies, said that it did not follow that all the prerogatives claimed by courts of common law and courts of chancery, and all artificial rules and peculiar dogmas, should be usurped by the courts of Louisiana. This decision, however, seems to have been overruled by *Selxas v. King*, 39 La. Ann. 510, 2 So. 416, *infra*.

In *Monnett v. Turple*, 132 Ind. 482, 32 N. E. 328, the plaintiff prayed a judgment disaffirming and canceling deeds to real property in other states, and asked that the title to lands by decree of the court be reinvested in the plaintiff, free and discharged from all claims of the defendants, upon the ground that the deeds were procured fraudulently and without consideration from the grantor, who was at the time a person of unsound mind. The only point involved in the appeal arose from the action of the trial court in refusing to grant the plaintiff a trial by jury; and the correctness of that ruling turned upon the question whether the action was one to quiet title, in which case, under the provision of the Code, it was triable by jury, or an action for the cancellation of the deeds, in which case it would fall within the exclusive jurisdiction of a court of equity, and therefore be triable by the court without a jury. The court said that the fact that the land lay beyond the territorial jurisdiction conclusively characterized the action as one for equitable relief, since it would be wholly beyond the jurisdiction of the courts

of the state to quiet the title to such land, whereas in an action in equity the court having jurisdiction of the person is able, by process against the defendants *in personam*, to enforce its decrees affecting land without, as well as within, the state.

A court of New York, having jurisdiction of the parties, may entertain a suit by the stockholders of a corporation to have declared void the action of such corporation, and of another corporation controlled by the same directors, in canceling a lease of real property in Mexico. *Jacobs v. Mexican Sugar Ref. Co.* 104 App. Div. 242, 93 N. Y. Supp. 776. The court said that the plaintiffs did not ask, nor could they have obtained, a judgment which would give them possession of the property.

Some of the cases that concede the jurisdiction of a court of equity of one state or country, having personal jurisdiction of the parties to grant relief from a conveyance, obtained by fraud, of land in another state or country, take the position that the decree must be in the form of one compelling the reconveyance, and that a decree merely canceling the conveyance which is attacked on the ground of fraud, would be beyond the power of the court.

Thus, in *Cooley v. Scarlett*, 38 Ill. 316, 87 Am. Dec. 298, the court said that it could not affirm a decree canceling, upon the ground of fraud, deeds to real property upon land in another state; but that the decree might be remodeled so as to bring it within the principles of chancery jurisdiction, and still afford some protection to the complainant. It then said that the court could compel the defendants, who were personally within the jurisdiction of the court, to execute to the complainant a release of all claims acquired through the deed from him; and that, if they refused to do so, they could be attached for contempt, and held in custody until they should execute the decree; and that if, in the meantime, it should be made to appear that they were seeking to encumber titles by conveyances to third persons, that also might be treated as a contempt for which the court could attach and punish them; and that, if they went beyond the jurisdiction, the court could appoint a special commissioner to make the conveyance in their stead.

A court of Kentucky has no jurisdiction to render a judgment declaring a deed to real property in New Jersey void; and has no jurisdiction to decree a conveyance or delivery of possession founded on that decree. *Davis v. Headley*, 22 N. J. Eq. 115. The judgment in this case, which the court of New Jersey refused to recognize or enforce, not only declared that the conveyance should be set aside and held for naught, but also provided that the grantee should be restrained from setting up that conveyance in any suit touching the property.

Seixas v. King, 39 La. Ann. 510, 2 So. 416, overruled an exception to the jurisdiction of a court of Louisiana over a suit against a resident of Louisiana to annul a transfer of real estate in Mississippi. It is implied, however, that the decree must be in the form of a personal decree against the defendant compelling a conveyance, rather than a direct decree *in rem* annulling the conveyance, to the defendant.

In *De Klyn v. Watkins*, 3 Sandf. Ch. 185, however, where it was held that a court of equity of one state has jurisdiction of a suit

to set aside a conveyance of land in another upon the ground of fraud, the court said that it was difficult to perceive how a bill to set aside a conveyance of land situated abroad related to the title of the land, any more than a bill to have a conveyance decreed; that in each case the object is to divest the title from the person who holds it, and in each case it is attained in the same mode, by process of the court against the person of the owner.

So, in *Guerrant v. Fowler*, 1 Hen. & M. 5, it was held that a person being within the commonwealth may be decreed to execute a conveyance for lands lying in another state, or to cancel a deed for such lands, obtained by fraud.

But a decree of a court of another state which had jurisdiction of the parties, declaring an exchange of lands void, and requiring reconveyances, does not of itself, and in the absence of conveyances pursuant to the decree, divest the title to land in Texas. *Fryer v. Meyers* (Tex.) 13 S. W. 1025.

Nor are the parties who procured the decree estopped to assert the title to the land conveyed to them in the exchange, they never having complied with the terms of the decree, nor claimed the lands which they conveyed in the exchange. *Ibid.*

A court of Texas has jurisdiction of a suit to rescind a sale of land therein on the ground of fraud and lack of consideration, notwithstanding that the purported consideration was the conveyance of land in Tennessee to which, it is alleged, the defendant had no title, and which therefore constituted no consideration for the conveyance of the land in Texas. *Paul v. Chenault* (Tex. Civ. App.) 59 S. W. 579. The objection made to the jurisdiction was that it involved an inquiry into the title of land in Tennessee, and that the court had no jurisdiction to determine that issue. The court, however, overruled the demurrer to the jurisdiction, and proceeded to pass upon the title to the Tennessee land for the purposes of the suit.

The decision in *Cumberland Coal & I. Co. v. Hoffman Steam Coal Co.* 30 Barb. 159, that a court of New York would not entertain a suit between two Maryland corporations to annul a conveyance of land in the latter state on the ground of fraud, the conveyance having been executed and acknowledged in Maryland and put upon record there, is not referable to general principles, but to a provision of the Code defining the rights of nonresidents to bring actions against foreign corporations.

In *Blake v. Blake*, 18 Week. Rep. 944, where the bill was filed to set aside certain deeds relating exclusively to property in Ireland, the parties being residents of Ireland, and the contract out of which the litigation arose having been made there, the court sustained a plea to the jurisdiction, upon the ground that the matter should be decided by the courts of Ireland. Some parts of the opinion in this case indicate that the court declined jurisdiction as a matter of discretion; but it is stated in the report of the case that the defendants were served out of the jurisdiction, and it is not stated that they appeared in the case except to plead to the jurisdiction; and the opinion states that the case is governed by *Cookney v. Anderson*, 32 L. J. Ch. N. S. 305, Affirmed in 32 L. J. Ch. N. S. 427 (*supra*, II., c), which would seem to indicate that the decision was upon the ground

that the defendants were not personally subject to the jurisdiction.

2. *As between one party and creditors of the other.*

As shown in the last subdivision, the requisition of a reconveyance affords an adequate means of granting relief from a fraudulent conveyance of real property in another jurisdiction, when the suit is between the parties to the original conveyance, or their privies. The situation is quite different when the suit is by creditors of a grantor, seeking to set aside a conveyance of real property in another jurisdiction as a fraud upon them, since the creditors, even if successful in maintaining their contention, are not entitled to a decree requiring the conveyance of the land to them, but at most are only entitled to a decree which will subject the land to the payment of their claims; and it is difficult to work out this relief by a decree *in personam*. According to the weight of authority, therefore, a creditor of the grantor cannot maintain a bill in one state or country to set aside a conveyance of land in another, upon the ground that the conveyance was fraudulent as to him.

Thus, a suit will not lie by a judgment creditor in one state to set aside a conveyance by the judgment debtor of land in another state, as a fraud upon the judgment creditor. *Gray v. Folwell*, 57 N. J. Eq. 446, 41 Atl. 869. The court said that it was quite beyond the power of the court to make any decree which would subject the land outside of the state to the lien, or by any decree apply it to the payment of the judgment.

A judgment creditor's suit cannot be brought in New York, founded upon a judgment in New York, to affect lands of the judgment debtor situated in another state, on the ground that the debtor had fraudulently conveyed them away. *Nicholson v. Leavitt*, 4 Sandf. 252. This was before the adoption of the Code, and the decision is upon the ground that a judgment creditor's suit proceeds on the footing of a lien, and that there is no such lien under a New York judgment with respect to lands in another state. The court said that it might be that, under the broad provisions of the Code, a judgment creditor may reach the real property of the debtor out of the state.

Lide v. Parker, 60 Ala. 163, held that the Alabama statute, enabling a creditor without a lien to file a bill to subject to the payment of his debt property fraudulently conveyed by his debtor, did not apply to realty in another state.

West Point Min. & Mfg. Co. v. Allen (Ala.) 39 So. 351, is to the same effect as the last case. An execution creditor cannot maintain a suit in a court of the defendant's domicile to set aside conveyances of land beyond the jurisdiction, upon the ground that they were fraudulent as against creditors. *Burns v. Davidson*, 21 Ont. Rep. 547. The court said: "Where fraud exists in respect to specific property out of the jurisdiction, whereby in conscience it should be the property of the rightful claimant as against the fraudulent holder, these being within the jurisdiction, a court of equity can decree according to the equities, and operate on the person of the defendant so that he shall convey the land to the one entitled. But where the manner of relief is, as here, not to order conveyances *inter partes*, but to sub-

ject land to the exigencies of execution, then no personal judgment can touch the real result to be accomplished. The distinction which separates between cases of fraud where the court will act and will not act is marked by *Lord Nottingham* in a case of *Carteret v. Petty*, 2 Swanst. 323, note. He said this court could proceed to a decree where the imprisonment of the person is the most proper means to effect that which is decreed to be done, *viz.*, the payment of money, making a conveyance, or the like. But where no obedience of the person imprisoned, or any act of his, can sufficiently execute such a decree, then it is in vain to hold such a plea."

In the subsequent case of *Pavey v. Davidson*, 23 Ont. App. Rep. 9, involving the same transaction that was considered in the last case, it appeared that the grantee of the property had given back a mortgage, containing a covenant for payment; and the attempt in this case was not to set aside the conveyance, but to have the mortgagee declared a trustee, for the execution debtor, of the mortgage debt and the moneys secured thereby. The majority of the court of appeals were of the opinion that the action could be maintained, notwithstanding that the mortgaged land was situated in a foreign jurisdiction. The decision was upon the ground that no relief was sought in respect of the mortgaged land, but that it was the debt that was sought to be reached; and the fact that it was secured by lands in another jurisdiction was a mere incident.

This decision was, however, reversed on appeal by the supreme court of Canada (*Purdum v. Pavey*, 26 Can. S. C. 412). It is difficult to determine the exact ground of the supreme court's decision. In one part of the opinion, it seems to be put upon the ground that the bill sought a declaration of trust, not of the debt alone, but of the security,—that is, of the foreign lands so far as they were a security; in another part, however, the court said that the validity or invalidity of the transaction must depend upon the *lex rei sitæ*, and that there was no allegation that, according to that law, a constructive trust by operation of law would arise by reason of the intent to hinder or delay creditors, or that even an express trust must necessarily inure to the benefit, or be available to the satisfaction, of creditors; and that no presumption to that effect could be indulged. This would seem to indicate that the plaintiff must fail on the merits even, and without reference to the jurisdiction; but the court said in this connection that, from the fact alone that the question depended upon the *lex rei sitæ*, it followed that the forum of the situs was the proper forum.

Carpenter v. Strange, 141 U. S. 87, 35 L. ed. 640, 11 Sup. Ct. Rep. 980, held that a decree of a court of New York which had personal jurisdiction of the parties, declaring a deed executed by testator to real property in Tennessee void as to a debt due by testator to plaintiff, but not directing a conveyance of the land, nor in any other way attempting to exert control over defendant with respect to land, was not binding upon the courts of Tennessee.

Kirdahl v. Basha, 36 Misc. 715, 74 N. Y. Supp. 383, upheld the jurisdiction of a court of New York over a suit in equity by a judgment creditor to have a mortgage, executed by the debtor upon land in New Jersey, declared

fraudulent and void, and to compel the mortgagee to execute and deliver a satisfaction of it, and restraining both mortgagor and mortgagee from transferring or assigning any interest in the land pending an action in a New Jersey court to obtain satisfaction of the judgment out of the land in that state. The decision, which rests upon the idea that a decree compelling a release of the mortgage operates *in personam*, is of doubtful authority, since such a release would extinguish the mortgage, which, at the most, is only invalid as against the judgment creditor, and is valid as between the parties to it.

In *Jones v. Geddes*, 1 Phill. Ch. 724, where a bill was filed by assignees of a bankrupt to set aside, on the ground of fraud, a heritable bond charged upon the real estate in Scotland, and to enjoin defendants from prosecuting a process of ranking and sale for the enforcement of the bond, which they had commenced in a court of Scotland, the Lord Chancellor said that, the parties being residents of England, the English court of chancery might take jurisdiction; but, in the exercise of discretion, he declined to entertain the suit because the matter could be more conveniently litigated in Scotland.

b. Injunction.

See also *Thomas v. Hukill*, 181 Pa. 298, 18 Atl. 875; *Chase v. Knickerbocker Phosphate Co.* 32 App. Div. 400, 53 N. Y. Supp. 220,—*supra*, II., a; *Kirklin v. Atlas Sav. & L. Assn.* (Tenn. Ch. App.) 60 S. W. 149; *Ft. Wayne Trust Co. v. Sihler* (Ind. App.) 72 N. E. 494.—*supra*, III., c; *Kirdahi v. Basha*, 36 Misc. 715, 74 N. Y. Supp. 388, *supra*, III., g. 2; *Bowers v. Durant*, 43 Hun, 348, *infra*, III., j.

An injunction is strictly *in personam*; and therefore, if a proper case for an injunction is otherwise made out, jurisdiction of the court to grant the same will not be defeated by the fact that it has reference to real property beyond the territorial jurisdiction.

A court of equity of Illinois has jurisdiction of a bill to enjoin defendant from interfering with the right of way claimed by the complainant over land situated in another state, if the defendant is personally served, since the jurisdiction in equity by way of injunction is strictly *in personam*. *Alexander v. Tolleston Club*, 110 Ill. 65.

A resident of a state may be enjoined from going into another state and committing acts injurious to the property of the plaintiffs there. *Great Falls Mfg. Co. v. Worster*, 23 N. H. 462.

A court of equity, at the instance of a grantee in a deed which is sufficient to pass the legal title to real property in another state, but is so defectively acknowledged that it cannot be recorded so as to charge third persons with constructive notice, may enjoin the grantor from conveying the property to third persons. *Frank v. Peyton*, 82 Ky. 150.

A court of equity of one state has jurisdiction of a suit, by one of its citizens holding a mortgage upon real property in another state, to enjoin a citizen from removing from the property alleged fixtures which he had furnished under a conditional contract of sale,—at least where the nonresident mortgagor voluntarily comes in and submits to the jurisdiction. 69 L. R. A.

Schmaltz v. York Mfg. Co. 204 Pa. 1, 59 L. R. A. 907, 93 Am. St. Rep. 782, 53 Atl. 522.

In *Binney's Case*, 2 Bland, Ch. 99, 148, the court said: "The dam, the erection of which is complained of, is to be extended entirely across the River Potomac, and, therefore, one part of it must rest upon the territory of Maryland, and the other upon that of Virginia; consequently, to that extent each state must have an exclusive jurisdiction, so far as it may be necessary to prevent its erection by injunction. But the object of preventing the erection of this dam is to put a stop to the expenditure of the funds of the body politic, for other than corporate purposes, within the District of Columbia; and consequently, so far only as the body politic [the Chesapeake & Ohio Canal Company which was proposing to build the dam] may be restrained by injunction from making such illegal expenditures anywhere, the courts of justice of each government must be allowed to have equal and concurrent jurisdiction."

Willey v. Decker, 11 Wyo. 496, 100 Am. St. Rep. 939, 73 Pac. 210, held that a court of Wyoming had jurisdiction, at the instance of owners of land in Montana who had acquired by prior appropriation the right to use the water of a stream for irrigation by means of a ditch and headgate in Wyoming, to restrain others from diverting the water by means of ditches located in Wyoming or in Montana.

So *Miller v. Rickey*, 127 Fed. 573, held that a Federal court sitting in Nevada had jurisdiction, at the instance of the owners of land in that state, to enjoin defendant from wrongfully diverting in California waters of a stream which flowed through the complainants' land.

Northern Indiana R. Co. v. Michigan C. R. Co. 15 How. 233, 14 L. ed. 874, however, held that the United States circuit court of the district of Michigan had no jurisdiction of a suit by an Indiana corporation, claiming an exclusive right under its charter to build and maintain a railroad in a certain part of Indiana, to enjoin the defendant from constructing a road within such territory. The court said that it would be readily admitted that no action at law could be sustained in the district of Michigan for injuries done in Indiana; and that no action of ejectment, or for trespass on real property, could have a more decidedly local character than the appropriate remedy for the injuries complained of; and that such character was not changed by a bill in chancery. The case is distinguished from *Massie v. Watts*, 6 Cranch, 148, 3 L. ed. 181, apparently upon the ground that the controversy did not arise out of a contract, or fraud, and was not connected with a trust, express or implied.

In *Mariposa Co. v. Garrison*, 26 How. Pr. 448, it was said that the court, having obtained jurisdiction of the person of defendant, has jurisdiction to compel specific performance of a contract in relation to lands situate in another state; but that the granting of a preliminary injunction is a matter of discretion; and, where the plaintiff has adequate remedies for the preservation and enforcement of all his rights in the courts of the state in which the land is situated, it is not sound discretion to aid, by injunction, in drawing within the jurisdiction of the court of another state the decision of those questions which can more appropriately be investigated and determined in the state where the land is situated.

In a number of instances the court of equity of one state or country has exercised its jurisdiction to enjoin proceedings in another state or country with respect to real property located in the latter.

In *Bunbury v. Bunbury*, 1 Beav. 318, an injunction was granted, on terms, to restrain proceedings instituted in a foreign country to recover real estate there. It was said, however, that, if nothing more than an insulated question of title to the land were in litigation between the parties, the injunction would be denied; but that the controversy between the parties involved the determination of questions relating to the conflict of laws, and the effect of the laws of England upon the rights of the parties.

In *Beckford v. Kemble*, 1 Sim. & Stu. 7, all the parties being in England, an injunction was granted to restrain mortgagees of a West India estate from proceeding on a bill of foreclosure in a colonial court, filed after a decree made in England which directed an inquiry to ascertain the amount of the mortgage debt on a bill to redeem.

In *Hope v. Carnegie*, L. R. 1 Ch. 320, an order restraining the administration of real and personal estate in the Netherlands, of a decedent who died domiciled in England, was affirmed as to both species of property, though one of the two judges who heard the appeal was of the opinion that the appellant ought to have been left at liberty to carry on the administration as to the real estate, if she could do so without proceeding as to the personal estate. The other judge was of the opinion that, if it were possible to proceed as to the real estate without proceeding as to the personal estate, it was incumbent upon the appellant to show that fact. He also queried whether proceedings, even as to real estate only, ought not to be restrained.

A court of New York has jurisdiction to restrain a trust company incorporated in that state, its officers, agents, and attorneys, from proceeding, in a suit brought by it in another state, to foreclose a mortgage upon real property in the latter state, pending the final hearing and determination of an action in New York for its removal as trustee upon the ground that it had acted in bad faith in the prosecution of the foreclosure action. *Gibson v. American Loan & T. Co.* 58 Hun, 443, 12 N. Y. Supp. 444.

But a court of one state, having jurisdiction of the parties, will not enjoin the prosecution of a suit pending in another state for the foreclosure of a mortgage upon real property in the latter state, merely because the court of the latter state entertains different views of the law covering the rights than those entertained by the courts of the state in which the injunction is sought, and by the United States Supreme Court. *Carson v. Dunham*, 149 Mass. 32, 3 L. R. A. 203, 14 Am. St. Rep. 307, 20 N. E. 312.

A court has no power to enjoin a citizen of a foreign state or sovereignty from causing a levy to be made on lands which are situated in the foreign state and beyond its territorial jurisdiction, because it has appointed a receiver of such property, unless the person so enjoined is a party, either in person or by representation, to the litigation in which the receiver has been appointed. *Schindelholz v. Cullum*, 5 C. A. 203, 12 U. S. App. 242, 55 Fed. 885. 69 L. R. A.

The right to take jurisdiction of a suit for an injunction affecting lands in another state is to be distinguished, upon the one hand, from the discretion with respect to the exercise of such jurisdiction, and, upon the other, from the merits of the case,—in other words, the question whether a proper case for interference by injunction has been made out. In a number of cases the court while assuming, or at least not denying the right to assume jurisdiction, has, in the exercise of its discretion, refused to entertain the suit, or has denied the injunction on the merits. Thus, the court, in *Moor v. Anglo-Italian Bank*, L. R. 10 Ch. Div. 681, held that an encumbrancer of immovable property situate in a foreign country, who has instituted legal proceedings in that country for the purpose of enforcing his rights, will not be restrained by injunction from prosecuting such proceedings, even though the mortgagor is a company in the course of winding up; at all events, if the party seeking to restrain him may appear before the foreign tribunal and assert his rights.

In *White v. Hall*, 12 Ves. Jr. 321, the Lord Chancellor refused an injunction to restrain a sale, under a decree of the colonial court, of real property in Demerara, which had been made security for the discharge of a debt in instalments, although he intimated that, if he had had jurisdiction, he would have held, contrary to the decision of the colonial court, that there had been no such default as to subject the property to sale.

So in *Jones v. Geddes*, 1 Phill. Ch. 724, an injunction granted on a suggestion of fraud, to restrain a resident of England from prosecuting a suit in Scotland to enforce a legal security against lands in that country, was dissolved on appeal, because the question between the parties could be more conveniently litigated in Scotland.

In *Norton v. Florence Land & Public Works Co.* L. R. 7 Ch. Div. 332, the court denied a motion on behalf of the holders of obligations of a company with an office in London and having real property in Italy, to restrain a bank, also having a London office, from enforcing, in priority to the holders of the obligations, a mortgage held by it upon the Italian property. The decision, was not upon the ground of absolute lack of jurisdiction, but was made as a matter of discretion.

Durant v. Pierson, 19 N. Y. Civ. Proc. Rep. 203, 12 N. Y. Supp. 145, refused a motion by defendant, pending an appeal by him from a judgment in favor of plaintiff to set aside an assignment as fraudulent, to stay proceedings taken by the plaintiff in another state to collect his claim out of real estate there situated. *Bowers v. Durant*, 43 Hun, 348,—*infra*, III. J. is distinguished by reason of the agreement in that case that the courts of New York should have jurisdiction.

In *Harris v. Pullman*, 84 Ill. 20, 25 Am. Rep. 416, and *Mead v. Merritt*, 2 Paige, 402, the jurisdiction to enjoin the further prosecution of actions already commenced in other states with respect to real property was denied, upon the ground that, under the rule in the United States, one state has no power, by process of injunction, to restrain proceedings previously commenced in the court of another state. The general question of jurisdiction suggested by these cases, whether a court of one state may in any case entertain a suit to

restrain legal proceedings already commenced in another, is beyond the scope of the *note*, since the question is the same whether real property is involved or not. It may, however, be remarked that the position taken in these cases is contrary to the weight of modern authority. See, especially, *Cole v. Cunningham*, 133 U. S. 107, 33 L. ed. 538, 10 Sup. Ct. Rep. 269.

1. Accounting and incidental relief by requisition of conveyance.

See also *Henderson v. McBee*, 79 N. C. 219; *Dickinson v. Hoomes*, 8 Gratt. 353, 410; *Clopton v. Booker*, 27 Ark. 482,—*supra*, III., a.

A court of equity has ample jurisdiction of a suit for an accounting of the proceeds and profits arising from real property in another state or country. Thus:

An action may be brought in behalf of an infant for an account of the proceeds of real property in *St. Christophers*. *Roberdeau v. Rous*, 1 Atk. 543.

A bill between joint tenants of land in Ireland, for an accounting of the profits and for a partition of the lands, is good as to the profits, which are in the personality, but not so as to the partition, which is in the realty; for a commission to make partition cannot be awarded into Ireland. *Cartwright v. Pettus*, 2 Ch. Cas. 214, 1 Eq. Cas. Abr. 133.

In *Mercantile Invest. & General Trust Co. v. River Plate Trust Loan & Agency Co.* [1892] 2 Ch. 303, the court asserted the jurisdiction of an English court to compel, at the instance of the holders of debenture debts secured by an equitable charge on land in Mexico, an accounting in respect of the proceeds of such property by an English company which purchased the land subject to the payment of the obligations, though, as a matter of discretion, the court refused to appoint a receiver upon the ground that such relief would be useless.

The court, in *Re Hawthorne*, L. R. 23 Ch. Div. 743, dismissed for want of jurisdiction, a suit for an accounting of the proceeds of a sale of real property in Saxony, notwithstanding that the parties were temporarily in England and within the jurisdiction of the court; it appearing that the rights of the parties depended primarily upon the law of Saxony, as to the devolution of property in that country, there being no contract, fraud, or trust in the case.

The California superior court has jurisdiction of an action to compel an accounting of the profits realized by a California corporation from its operation of a cannery and the use of the personal property of its debtor, under an agreement entered into as security for a debt then due, although the property is situated in Alaska. *Peninsular Trading & Fishing Co. v. Pacific Steam Whaling Co.* 123 Cal. 689, 56 Pac. 604.

In *Hayden v. Yale*, 45 La. Ann. 362, 40 Am. St. Rep. 232, 12 So. 633, the court, in the exercise of its jurisdiction *in personam*, compelled a resident creditor of an insolvent to turn over to a syndic or assignee the proceeds of real property of the insolvent in another state, which such creditor had procured to be sold under attachment in the latter state.

A court of equity of the state in which de-

fendants reside, and which has jurisdiction over their persons by their appearance, has jurisdiction to compel an accounting with respect to the proceeds and profits arising from land outside the state. *Wood v. Warner*, 15 N. J. Eq. 81.

The courts of one state have jurisdiction of an action for an accounting as to the management and disposition of lands in another state, and the uses made of their proceeds, where the defendant is within the former state. *Reading v. Haggin*, 58 Hun, 450, 35 N. Y. S. R. 585, 12 N. Y. Supp. 368.

A court of equity of one state may maintain a suit against a railroad company and a mortgage trustee to compel an accounting, in order to determine what amount of net earnings of the railroad has been wrongfully diverted from the payment of the bonds secured by the mortgage, and to restrain similar further payments, although the mortgaged property is in another state. *Buel v. Baltimore & O. S. W. R. Co.* 24 Misc. 646, 53 N. Y. Supp. 749.

It was held in *Moss's Estate*, 138 Pa. 646, 21 Atl. 206, that a court of Pennsylvania had jurisdiction to require the application of the proceeds of a sale of land in West Virginia to the discharge of liens covering both that land and land in Pennsylvania, in order to protect subsequent encumbrancers having liens on the Pennsylvania land only.

Local courts have jurisdiction of a fund arising from the sale of real property in another country, when the fund is in the hands of a citizen of whose person they have jurisdiction. *Kessler v. Kessler*, 3 Pa. Co. Ct. 522.

An objection, in a suit for an accounting and settlement of the partnership business, to an order for the sale of the partnership lands, upon the ground that, as the lands lie in different states, the order cannot be enforced except as to lands within the state in which the court is sitting, is not well founded. Such order does not require the agency of an officer out of the jurisdiction of the court; the order is to act upon the parties in the cause; and the transfer of title is to come from them, and not from the person through whose agency the sale shall be made. *Lyman v. Lyman*, 2 Paine, 11, Fed. Cas. No. 8,628.

In the last case the bill, in addition to a prayer for an accounting, contained a prayer for the sale of the land in order to pay the amount due the complainants. The decree, however, did not direct such a sale; and the court said that it was unnecessary to consider whether it could at all interfere either with the sale of the land, or with the disposition of the proceeds of such sale.

The jurisdiction of the courts of equity extends to all matters necessary to wind up the affairs of a partnership, including the sale of real estate; and the jurisdiction is not local, even though a part of the assets consists of real property situated in another state. While the decree itself in such case would not directly effect the transfer of title, it binds the consciences of the parties, and can be enforced by the court within the territory where the property is located. *Dunlap v. Byers*, 110 Mich. 109, 67 N. W. 1067. In this case a court of Michigan gave effect to a decree rendered in Ohio in a suit for a dissolution of a partnership and an accounting, which directed a sale of land of the partnership in Michigan, the land having been purchased by one of the par-

ties to the suit, and the other party having been ordered to quitclaim, but never having done so.

The courts of Wisconsin have jurisdiction of an action *in personam*, though it may indirectly relate to lands in a foreign state or country, by seeking to compel the defendant to convey such land, or some interest therein, to the plaintiff. *Gates v. Paul*, 117 Wis. 170, 94 N. W. 55. This was an action for the dissolution of, and an accounting under, a partnership formed for the purpose of dealing in land in other states.

In *Harris v. Pullman*, 84 Ill. 20, 25 Am. Rep. 416, it was held that a court of equity of Illinois should not take jurisdiction of a suit to compel an accounting in respect of real property in another state, and to require the surrender of the possession of the property to the complainant; but this was upon the ground that the court had personal jurisdiction of only part of the defendants necessary to enable it to grant the relief prayed for, some of them, who were nonresidents, having been merely served by publication. As a further reason why a court of Illinois should not entertain the jurisdiction, it was said that the same litigation was pending in the courts of the state where the property was situated, and that the parties ought to resort to that jurisdiction.

J. Partition.

The jurisdiction of a court of equity of one state or country over a suit for partition of land in another has been uniformly denied, generally upon the ground that a partition cannot be accomplished without giving the decree a direct extraterritorial effect.

In *Cartwright v. Pettus*, 2 Ch. Cas. 214, the plaintiff and defendant were joint tenants of land in Ireland. The plaintiff prayed an account of profits and a partition of lands. The Lord Chancellor declared that, as to the profits, the bill was good, the person being in England; but, as to the partition, which was in the reality, he could not proceed in England, for he could not award a commission into Ireland.

So in *Kennedy v. Cassilis*, 2 Swanst. 323, on a bill for a partition of lands in Ireland, and an account of waste committed there, a demurrer was allowed as to the partition, and overruled as to the account.

If a defendant be found within the jurisdiction, he may be decreed to pay money, or to account for the rents and profits of land lying in another or a foreign country, which he has held and enjoyed; or, if a deed of land in a foreign country be found to be fraudulent, it may be ordered to be delivered up and canceled; or, in specific performance of a contract for land in another state, such a conveyance may be ordered as shall be sufficient, according to the law of the state where it lies. But the court will not decree a partition of such land, or in any manner directly decide upon the title to it, or upon the validity of a deed or will as a material part of the title: nor found the relief granted upon the strict title to such property itself. *Bluney's Case*, 2 Bland, Ch. 99.

Proceedings under the Nebraska statute for the partition of lands involve a division of the lands by referees appointed by the court, and, under certain circumstances, a sale thereof by such referees. Such proceedings, therefore, are essentially *in rem*, and the rule that the courts of one state have no jurisdiction of lands ly-

ing in another applies with full force. *Schick v. Whitcomb* (Neb.) 94 N. W. 1023. The appellant conceded that the court would have no jurisdiction of lands in another state, but insisted that a personal adjudication would bind the parties as in the case of a decree for specific performance for the conveyance of land in another state enforceable by injunction, attachment, or like process against the person, or which would be available in an action between the same parties in such other state concerning the title to the lands lying there. The court said that such argument was based on the assumption that the maxim, Equity operates *in personam*, and not *in rem*, applies to cases of partition; but that such was not the case.

A court of one state has no jurisdiction to make a decree which will directly affect either legal or equitable title to lands situated in another state. The doctrine is that, if the person to do the act decreed is within the jurisdiction of the court, and the act may be done without the exercise of any authority *operating territorially* within the foreign jurisdiction the court may act *in personam*, and oblige the party to convey, or otherwise comply with its decree. But it is not competent to the court to decree touching a foreign subject when the act to be done can be accomplished and perfected only by an authority *operating territorially*. Thus, a conveyance may be decreed of lands abroad if the defendant is within the jurisdiction of the court, but not a partition of land as between joint tenants, tenants in common, or coparceners. *Polndexter v. Burwell*, 82 Va. 507.

A court of Virginia has no jurisdiction to partition lands situated in another state, although all the parties have appeared and answered. *Wimer v. Wimer*, 82 Va. 890, 3 Am. St. Rep. 126, 5 S. E. 536. The court said that, in order to make a partition, the court must invade, by its officers, the soil of another state, and divide up its lands to suit the views of another jurisdiction. The decree in this case, which was reversed, appointed commissioners to make the partition, and they did make and report such partition, as well of the lands lying in West Virginia, as of those lying in Virginia.

A court of Virginia has no jurisdiction to decree a partition of so much of a tract of land as lies beyond the limits of the state. *Pillow v. Southwest Virginia Improv. Co.* 92 Va. 145, 53 Am. St. Rep. 804, 23 S. E. 32.

In *Johnson v. Kimbro*, 3 Head, 557, 75 Am. Dec. 781, commissioners appointed in North Carolina had partitioned lands of a decedent in Tennessee, as well as those in North Carolina. The report of the commissioners was affirmed by the North Carolina court, but there was no decree vesting the title in the heirs in severalty to the lands allotted to them respectively. It was held that such proceedings were ineffectual, so far as the land in Tennessee was concerned, since they were *in rem*. The court said that it was not necessary to consider what would have been the legal effect of a decree of the court, based upon the partition divesting and vesting the title in severalty, pursuant to the allotments made by the commissioners.

As a matter of discretion, at least, the court ought, undoubtedly, under ordinary circumstances, to decline to entertain a suit for the partition of real property in another state or country; but it is not apparent why the court

cannot, if desirable, assume jurisdiction of the suit, even if the land is beyond the territorial jurisdiction, if the circumstances are such that it can do justice between the parties by requiring mutual conveyances and releases in severalty without sending commissioners into the state where the property is located; nor why, if a partition in kind is inexpedient, the court cannot, in analogy to foreclosure cases, grant effective relief by a decree requiring a judicial sale and conveyances to the purchaser by the owners of the undivided interests,—at least, if the parties sustain contractual relations toward each other so as to bring the case within the rule as stated by Chief Justice Marshall. See *supra*, II., a.

In *Page v. McKee*, 3 Bush, 135, 96 Am. Dec. 201, the court held that the title of minor heirs to real property in Kentucky was not devastated by a decree of a court of Indiana (where the intestate and all the parties were domiciled), in a suit for the partition of the Kentucky land and land in Indiana; and that a conveyance by the guardian of the minors was equally ineffectual to devast them of their title. The Kentucky court said that the Indiana court had jurisdiction of all the parties and all the subject-matter of the suit, save the Kentucky land; that, while it could not perfect its judgment of partition by an enforced conveyance, yet the adult heirs were voluntarily bound by the judgment, and then voluntarily joined in the conveyance; and that, so far as they were concerned, they were estopped to set up any claim; but that it was otherwise as to the minor heirs. The intimation that an enforced conveyance from the adults would not have devastated their title is *obiter*. The principle referred to in *infra*, IV., that the conveyance, in order to be effectual, must be made by the very person whose title or interest is to be affected, would be sufficient to justify the decision as to the minor heirs, without disputing the general proposition that a court of one state, having jurisdiction of parties *sui juris*, may grant effective relief in a suit, the purpose of which is to partition lands in another state or country, by the requisition of mutual conveyances or releases.

A court of one state has no jurisdiction, in a suit in chancery for the construction of a will, to determine the manner in which lands in another state belonging to the testator at the time of his death, or the proceeds thereof in case of sale, are to be distributed. *Parsons v. Millar*, 189 Ill. 107, 59 N. E. 606.

In *Bowers v. Durant*, 43 Hun, 348, which affirmed an order restraining defendant from prosecuting partition suits in Iowa and Nebraska in respect of lands situated in those states in violation of his agreement that a partition might be brought in the courts of New York for the purpose of partitioning all the real estate of his father, whether the same was situated in that state or elsewhere; and that the agreement might be pleaded as conferring jurisdiction; and that he would execute deeds in accordance with any judgment that might be rendered in such action,—the court said that, having secured, by means of such agreement, his ends in securing the probate of his father's will, he is estopped from denying the jurisdiction of the courts of New York.

k. Appointment of receiver.

This subdivision treats only of the jurisdiction L. R. A.

tion over suits, the specific purpose of which is to secure the appointment of a receiver of real property situated in another state or country, or to subject such property to a receivership; and does not deal with the general subject of the power of a receiver appointed in one state or country over real property in another. It will be observed that this distinction is a specific application of the distinction outlined at the beginning of the *note* in defining its scope.

In *_____ v. Lindsey*, 15 Ves. Jr. 91, a receiver was appointed of an estate in the East Indies, no question being raised as to the jurisdiction.

In *Hibbert v. Hibbert*, 8 Meriv. 681, a receiver was appointed of the real and personal estate of the testator in the West Indies, no question being raised as to the jurisdiction.

In *Houlditch v. Donegal*, 8 Bligh, N. R. 301, 2 Clark & F. 479, the Lord Chancellor held that the court of chancery of England, acting *in personam*, had jurisdiction to appoint a receiver of real property in Ireland, which was subject to a trust for the payment of debts; although he assumed that the assistance of a court of Ireland would be necessary to make such appointment effectual, since a foreign judgment is merely *prima facie* evidence or ground of an action, and is not conclusive.

The supreme court of New York has power to compel a judgment debtor to convey lands in another state to a receiver for the benefit of his creditors in such a manner as to vest in the grantee the legal title. *Bailey v. Ryder*, 10 N. Y. 363.

Smith v. Tozer, 11 N. Y. Civ. Proc. Rep. 343, denied the power of a court to direct a conveyance to a receiver, appointed in supplementary proceedings, of lands of the debtor in another state. The decision, however, was upon the ground that under the Code of Civil Procedure, the property of a judgment debtor cannot be reached in supplementary proceedings, unless the judgment is a lien thereon.

1. Miscellaneous.

In *Tulloch v. Hartley*, 1 Younge & C. Ch. Cas. 114, the court, without mentioning any doubt as to the jurisdiction, entertained a bill to settle the boundaries of real estate in Jamaica.

In *Athol v. Derby*, 1 Ch. Cas. 220, a contract respecting the Isle of Man, though out of the jurisdiction, was enforced by a court of chancery in England.

That land of a testator, charged by his will with the payment of legacies, is beyond the limits of the state and of the district in which a Federal court is sitting, does not prevent it from granting appropriate relief to the legatee. It is true that the court cannot, in such a case, order the land to be sold for payment of any decree which it may make in favor of the plaintiff; but it is not without power to act efficiently to cause the defendants to pay any such decree. *Lewis v. Darling*, 16 How. 1, 14 L. ed. 819.

A residuary legatee in a will executed in North Carolina by a person domiciled in that state, which appointed four executors (two of whom resided in Tennessee), and directed the executors to raise from land in the latter state such sum as would be sufficient to pay all his debts, cannot maintain a bill in North Carolina against the acting executor there for the

sale of the land in Tennessee, in order to reimburse him for the portion of the residue of the estate which had been applied, by the acting executor in North Carolina, to the payment of the testator's debts. The court conceded that the residuary legatee was clearly entitled to be reimbursed; but held that his right could not be vindicated in a suit in North Carolina. *Blount v. Blount*, 8 N. C. (1 Hawks) 365.

A court of equity may entertain a suit by a wife to obtain a settlement out of her equitable estate if the husband is within its jurisdiction, notwithstanding that the real property involved is in another jurisdiction. *Guild v. Guild*, 16 Ala. 121.

The courts of a state have jurisdiction of a suit to rescind promissory notes, executed and made payable in that state to a resident thereof, which are secured by a mortgage, recorded therein, of land therein situated, although they were given to secure payment of the purchase price of land situated in a foreign country, notwithstanding that the restoration by the plaintiffs of the property in the foreign country for which the notes were given is a condition of relief. *Loatza v. Superior Court*, 85 Cal. 11, 9 L. R. A. 376, 20 Am. St. Rep. 197, 24 Pac. 707.

In *Pike v. Hoare*, 1 Ambl. 428, the Lord Chancellor dismissed a bill by an heir at law for an issue to try the validity of a will, mainly because the land lay in Pennsylvania; though he said that, under the circumstances of the case, he would have dismissed the bill even if the will had concerned lands in England.

An English court will not entertain a bill of discovery to obtain inspection of documents in the defendant's possession in England, in aid of proceedings about to be taken for the recovery of land in India the defendant being capable of being sued in India. *Reiner v. Salisbury*, L. R. 2 Ch. Div. 378.

A bill cannot be maintained in behalf of an infant to compel the delivery of possession of lands in a foreign country. *Roberdeau v. Rous*, 1 Atk. 543.

A suit to subject land descended to an heir to the payment of a debt of the ancestor is *in rem*, and can only be maintained in the jurisdiction in which the land is situated. *Williams v. Ewing*, 31 Ark. 229.

Ross v. Ross, 23 Ont. Rep. 43, denied a motion for judgment by plaintiff in a suit asking for a declaration that real property in the Northwest territory the title to which was in the name of the plaintiff's father at the time of his death, belonged to the plaintiff, and praying that defendants, the administrators and heirs of the deceased, be ordered to convey it to him, notwithstanding that the adult defendants admitted the plaintiff's right to the land, and that the guardian of the infant defendants submitted their rights to the court. *Street, J.*, said that the action was one for directly determining the title to land lying outside of the province; and, in reply to the contention that, the defendants all being residents of the province, the court could act upon them *in personam*, he said he would first of all have to inquire whether, by the *lex rei sitæ*, the land belonged to the plaintiff or defendants, and that, if he found that point in favor of plaintiff, he would then have to find some method of effectually vesting in him the estate then vested in the infant defendants.

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IV. Form of relief; effect and enforcement of decree.

As to the form and effect of the decree in the various kind of suits, see the appropriate subdivision of III.

As has been shown in *supra*, II., b, the ability to grant effective relief by a decree *in personam* is the test of the jurisdiction of a court of equity of a suit, the purpose of which is to affect land in another state or country. The mere fact however, that, if the land to be affected were in the state or country where the court is sitting a decree *in rem*, acting directly upon the land, would be the appropriate form of relief, does not necessarily defeat the jurisdiction when the land to be affected is in another state or country; for the powers of a court of equity are adequate to adjust the form of relief to the exigencies of the case arising from the location of the property beyond the territorial jurisdiction, so long as it does not undertake to grant, in the form of an equitable decree *in personam*, relief to which the parties are not entitled in any form of action, or which is properly only obtainable in an action at law. It would not be competent for a court of equity to grant relief, in respect of land beyond the territorial jurisdiction, by the requisition of a conveyance or other decree *in personam*, in a suit which was, in substance, ejectment directly involving the title to the property, and presenting no ground of equitable intervention. In a suit for the foreclosure of a mortgage, however, which is essentially an equitable suit, and in which the relief, when the land is within the territorial jurisdiction, is usually granted in the form of a decree *in rem* directing the sale of the property without requiring a conveyance or release by the mortgagor or owner of the equity of redemption, the court may, if the property is beyond the territorial jurisdiction, mould the relief into the form of a personal decree by the requisition of such a conveyance.

Enos v. Hunter, 9 Ill. 211, though merely involving the jurisdiction of a court of one county in respect of land situated in another county in the same state, contains a clear statement of the scope and extent of the jurisdiction of suits affecting land beyond the territorial jurisdiction, and of the mode and manner in which such jurisdiction may be effectively exercised. It said, in this connection, speaking of the suit for the specific performance: "The court can grant the necessary relief by coercing the person of the defendant no matter where the land may be situated. The fact that the land is beyond the control of the court makes no difference in relation to the extent of the relief which the court may give, except that probably the court will not compel the defendant to deliver possession to the complainant after the execution of the deed, which it might do if the premises were within its own jurisdiction. That, however, is not essential to the substantial part of the relief sought, and is a matter of discretion with the court, rather than of strict right to the party. The inability to give the party possession will not prevent the court from securing to him the legal title, which the party may convey as well in one place as in another."

In some instances, when the land is beyond the territorial jurisdiction, the court grants a decree which is both *in rem* and *in personam*.

though conceding that the decree *in rem*, if it stood alone, would be entirely ineffective. An illustration of this is furnished in suits for the foreclosure of mortgages upon land lying partly without the jurisdiction, where the usual form of relief is a decree directing the sale of the property (which in itself would be ineffectual to transfer the title so far as the land in the other state or country is concerned), and requiring the mortgagor or owner of the equity of redemption to convey or release to the purchaser at the sale.

If a court of equity, having personal jurisdiction of the necessary parties in a suit presenting a proper case for equitable intervention, requires a conveyance, by the owner of the title or interest to be affected, of land in another state or country, such conveyance, when duly executed pursuant to the decree, and in the manner required by the *lex rei sitæ*, is as effective, not only in the state or country where the decree is rendered, but in that where the land is located, as if it had been voluntarily executed. This is assumed in all of the cases cited at the close of *supra*, II., b.

A decree of the court of one state, requiring and directing lands in another state to be conveyed, or charged, or otherwise disposed of, may be enforced by their process; and when enforced or submitted to by the execution of a conveyance, mortgage, or other instrument, as directed, such conveyance, mortgage, or other instrument is effective in the *situs rei*. *Bullock v. Bullock*, 52 N. J. Eq. 561, 27 L. R. A. 213, 46 Am. St. Rep. 528, 30 Atl. 676.

A court of equity may compel a person of whom it has jurisdiction either to bring property in dispute, or to which the complainant claims an equitable title, within the jurisdiction of the court, or to execute such a conveyance or transfer thereof as will be sufficient to vest the legal title, as well as the possession of the property, of the *lex loci rei sitæ*. *Mitchell v. Bunch*, 2 Paige, 606, 22 Am. Dec. 669.

A court of equity which has jurisdiction of the person may, by the ordinary process of injunction and attachment for contempt, compel him to desist from commencing a suit at law, either in the state or in any foreign jurisdiction; and it may, in the same manner, compel him to execute a conveyance or release in such form as may be necessary to transfer the legal title to the property according to the laws of the place where the same is situated, or which may be sufficient in law to bar an action in any foreign tribunal. *Mead v. Merritt*, 2 Paige, 402.

It is the conveyance pursuant to the decree, however, and not the decree itself, that passes the title; and the decree without the conveyance does not affect the legal title. *Watkins v. Holman*, 16 Pet. 25, 10 L. ed. 873; *Corbett v. Nutt*, 10 Wall. 464, 19 L. ed. 976; *Carpenter v. Strange*, 141 U. S. 87, 35 L. ed. 640, 11 Sup. Ct. Rep. 960; *Tardy v. Morgan*, 3 McLean, 358, Fed. Cas. No. 13,752; *Bullock v. Bullock*, 52 N. J. Eq. 561, 27 L. R. A. 213, 46 Am. St. Rep. 528, 30 Atl. 676; *Lindley v. O'Reilly*, 50 N. J. L. 636, 1 L. R. A. 79, 7 Am. St. Rep. 802, 15 Atl. 379; *Johnson v. Kimbro*, 3 Head, 557, 75 Am. Dec. 781; *Paschal v. Acklin*, 27 Tex. 173; *Morris v. Hand*, 70 Tex. 481, 8 S. W. 210.

In cases of contract, trust, or fraud, the equity courts of one state, having jurisdiction 69 L. R. A.

of the parties, are competent to entertain a suit for specific performance, or to establish a trust, or for a conveyance, although the contract, trust, or fraudulent title pertains to lands in another state or country. But a decree in such a suit imposes a mere personal obligation enforceable by injunction, attachment, or other like process, against the person, and cannot operate upon lands in another jurisdiction to create a transfer or vest a title. *Lindley v. O'Reilly*, 50 N. J. L. 636, 1 L. R. A. 79, 7 Am. St. Rep. 802, 15 Atl. 379.

A decree of a court of chancery is not erroneous so far as it adjudges that a deed for land in another state is inoperative and without legal force for want of delivery, where it further directs that either of the parties shall be at liberty to apply to the court of chancery for further aid and direction as occasion may require. *Vreeland v. Vreeland* (N. J.) 24 Atl. 551. The court said that the decree could not change or affect the title to the Missouri land directly, but that the chancellor could render the decree effective by constraining the grantee in the deed referred to, to execute a reconveyance.

Under the law of Ohio, a decree for the conveyance of land operates as a conveyance; but, in order that a decree shall thus operate, the land itself must be within the jurisdiction of the court. If the land is within a foreign jurisdiction, the decree cannot operate as a conveyance; it must be enforced by attachment, or otherwise, as the case may require. *Daniels v. Stevens*, 19 Ohio, 222.

In *Burnley v. Stevenson*, 24 Ohio St. 474, 15 Am. Rep. 624, however, it was held that the decree, even without such a conveyance, is conclusive of all the rights and equities of the parties who acted therein, when pleaded in the courts of the state in which the land is situated; and may be relied upon as a defense in a suit in the latter state for the possession of the land, where the statute of that state allows equitable, as well as legal, defenses.

A court of equity may enforce obedience to its decree requiring a conveyance of land beyond the territorial jurisdiction by a proper process against the defendant. See *Corbett v. Nutt*, 10 Wall. 464, 19 L. ed. 976; *Selxas v. King*, 39 La. Ann. 510, 2 So. 416. This is, of course, implied in all the cases which uphold the jurisdiction to decree a conveyance of land in another state or country.

A decree *in personam*, requiring a conveyance, must, however, be enforced by the courts of the state or country in which it was granted; and the courts of the state or country in which the land is located will not ordinarily enforce the decree by compelling a conveyance. *Davis v. Headley*, 22 N. J. Eq. 115; *Burnley v. Stevenson*, 24 Ohio St. 474, 15 Am. Rep. 621.

A decree rendered in New York, directing defendant to execute a mortgage, as security for the payment of alimony, upon lands in New Jersey, does not affect the lands; and a court of equity of New Jersey will not compel the defendant to perform the obligation imposed upon him by the New York decree. *Bullock v. Bullock*, 52 N. J. Eq. 561, 27 L. R. A. 213, 46 Am. St. Rep. 528, 30 Atl. 676.

In *Dunlap v. Byers*, 110 Mich. 109, 67 N. W. 1067, however, a court of Michigan gave effect to a decree rendered in Ohio, in a suit for the dissolution of a partnership and an ac-

counting, which directed a sale of land of the partnership in Michigan; the land having been purchased by one of the parties to the suit, and the other party having been ordered by the decree to quitclaim, but never having done so.

So, it was held in *Roblin v. Long*, 60 How. Pr. 200, that a court of New York, having acquired jurisdiction of the person of defendant, may compel him to convey lands in Canada, as required by a decree of a court of Canada.

Not only is a decree without a conveyance ineffectual to pass a title, but the conveyance must be executed by the very person whose title or interest is to be affected. A conveyance by a master, or commissioner, or other officer appointed by the court for that purpose is ineffectual. *Watkins v. Holman*, 16 Pet. 25, 10 L. ed. 873; *Corbett v. Nutt*, 10 Wall. 464, 19 L. ed. 976; *Watts v. Waddle*, 1 McLean, 200, Fed. Cas. No. 17,295; *Farmers' Loan & T. Co. v. Postal Teleg. Co.* 55 Conn. 334, 8 Am. St. Rep. 53, 11 Atl. 184; *McLawrin v. Salmons*, 11 B. Mon. 96, 52 Am. Dec. 563; *Burnley v. Stevenson*, 24 Ohio St. 474, 15 Am. Rep. 621; *Moseby v. Burrow*, 52 Tex. 396; *Morris v. Hand*, 70 Tex. 481, 8 S. W. 210.

The last point is also illustrated by the cases cited in *supra* III., a, holding that a trustee appointed by the court of one state cannot pass the title to real estate in another state; and by cases holding that a court of one state or country cannot confer upon an administrator power to sell the real property of the decedent in another. *Watkins v. Holman*, 16 Pet. 26, 10 L. ed. 873; *Sheldon v. Rice*, 30 Mich. 296, 18 Am. Rep. 136; *Nowler v. Colt*, 1 Ohio, 519, 13 Am. Dec. 640; *Allen v. Shanks*, 90 Tenn. 359, 16 S. W. 715; *Brown v. Edson*, 23 Vt. 435.

A deed of real property in Alabama, executed by the widow and administratrix of the deceased owner (she having, by the law of Alabama, no power to dispose of the real estate of her husband, except for the payment of the debts of his estate), pursuant to a decree rendered by a court of Massachusetts, in proceedings under a statute of that state founded on a title bond given by the deceased, is not valid, and does not affect the title. *Watkins v. Holman*, 16 Pet. 25, 10 L. ed. 873.

The chancery court of Tennessee cannot compel the heirs of a decedent to convey land located in another state to a commissioner appointed by the court for the purpose of having the land sold for the payment of the debts of the estate. *Robinson v. Johnson* (Tenn. Ch. App.) 52 S. W. 704.

A curatrix, acting under authority of the probate court of Louisiana, cannot make a valid conveyance of land belonging to the ward situated in Texas. *Wren v. Howland* (Tex. Civ. App.) 75 S. W. 894.

So, a committee of a lunatic appointed in one state cannot convey land in another. *Morris v. Hand*, 70 Tex. 481, 8 S. W. 210; *Hotchiss v. Middlekauf*, 96 Va. 649, 43 L. R. A. 806, 32 S. E. 36.

Nor may a court of equity in one state charge the land of a lunatic in another state, or its proceeds in the hands of his heir, for his past support. *Allison v. Campbell*, 21 N. C. (1 Dev. & B. Eq.) 132.

In *McGee v. Sweeney*, 84 Cal. 100, 23 Pac. 1117, the California supreme court affirmed a decree, which directed defendant, in whom the title stood, to convey the title to real property

in Pennsylvania to the plaintiff; and provided that, in default of such payment, a commissioner appointed by the court should execute a conveyance. Nothing is said in the opinion, however, with respect to the portion of the decree directing a conveyance by a commissioner, the court merely saying that a court of equity has power to compel a reconveyance of property outside of its jurisdiction by reason of its control over the parties before it.

Van Dyke's Appeal, 60 Pa. 481, illustrates the manner in which equity may, in suits indirectly affecting real property in another state, mould its decree so as to give the parties adequate relief, without exceeding its jurisdiction in respect of the land. The will of a testator domiciled in Pennsylvania gave certain legacies to the testator's daughters, and attempted to devise certain real property in New Jersey to his sons. It, however, was not executed in the manner required to pass the title to real property in New Jersey, and the prayer of the bill was that the daughters (some of whom were minors) should be put to their election either to give effect to the whole will by relinquishing their claim upon the New Jersey property, or from their legacies to compensate the sons for their loss in consequence of the daughters sharing with them the New Jersey property. The court said that, as its decree could not authorize the guardians of the minors to execute releases of their right and title to the New Jersey lands which would be effectual in that state, the last alternative of the prayer furnished the more appropriate form of relief, and, accordingly, decreed that the executors pay to the daughters such sum less than the amount of their respective legacies as would compensate the sons for the value of the daughters' shares in the New Jersey real estate.

V. Summary.

The foregoing review of the authorities seems to warrant the following propositions with respect to the jurisdiction of equity over suits the avowed purpose of which is to affect real property in another state or country:

1. The case must, independently of the location of the land beyond the territorial jurisdiction, be a proper one for equitable intervention; and, according to the usual form of statement with respect to this jurisdiction, must have arisen out of fraud, trust, or contract. The jurisdiction does not extend to a suit that, in its essence, involves merely the title or possession of the land, and presents no ground of equitable intervention. (II., a.)

2. The jurisdiction is confined to suits *in personam*, and does not extend to suits *in rem*. (I.)

3. The ability to grant effective relief by a decree *in personam* is a necessary condition of the jurisdiction. (II., b.)

4. The defendant, whose title or interest is to be affected, must be personally subject to the jurisdiction of the court. If a nonresident, he must either have appeared, or have been personally served within the jurisdiction; constructive or substituted service outside of the state is not sufficient in case of a nonresident. (II. b.)

5. The residence within the jurisdiction of the person whose title or interest is to be affected is not on principle a necessary condi

tion of the jurisdiction, though his nonresidence may prevent the court from obtaining personal jurisdiction over him, and thus defeat the jurisdiction of the suit; and the non-residence of such party, even when personally subject to the jurisdiction of the court, may affect the exercise of the court's discretion in respect of assuming jurisdiction. (II. c.)

6. The decree, in order to be effective, must be *in personam*. (IV.)

7. A deed of land in one state or country, executed by the owner of the title or an interest therein pursuant to a decree of a court of equity of another state or country, which had jurisdiction of his person in a proper case for equitable intervention, is as binding and effective in both jurisdictions as if it had been voluntarily executed. (IV.)

8. The decree requiring the conveyance, however, without the conveyance itself, does not affect the legal title. (IV.)

9. Obedience to the decree requiring the conveyance must be enforced by the courts of the state or country where it was rendered, and will not be enforced by the courts of the state or country in which the land is located. (IV.)

10. The conveyance must be executed by the very person whose title or interest is to be affected; a conveyance by an officer of the court is ineffectual. (IV.)

11. The relief may be varied to suit the exigencies of the case arising from the location of the land beyond the territorial jurisdiction, so long as it does not undertake to grant, in the form of an equitable decree *in personam*, relief to which the parties are not entitled in any form of action, or which is properly procurable only in an action at law. (IV.)

12. For the specific application of these principles to particular classes, see the various subdivisions of *supra*, III. G. H. P.

George McBEATH *et al.*, Appts.,

v.

Margaret RAWLE, Admr., *etc.*, of Thomas Rawle, Deceased.

(192 Ill. 626.)

Merely knowledge of an employee of a contractor for the setting of the stone work of a building, of a custom that the scaffolding shall be furnished by the brick contractors, does not amount to a waiver of his right to hold his employer responsible for the safety of a scaffold furnished for him to work upon.

(October 24, 1901.)

A PPEAL by defendants from a judgment of the Appellate Court, First District, affirming a judgment of the Superior Court for Cook County in favor of plaintiff in an action brought to recover damages for the alleged negligent killing of plaintiff's intestate. *Affirmed*.

The facts are stated in the opinion.

NOTE.—As to duty of master to furnish safe scaffolding, see *Beesley v. F. W. Wheeler & Co.* 27 L. R. A. 266.
60 L. R. A.

Messrs. Walker & Payne, for appellants:

A servant, in order to recover for an injury for defects in appliances, is required to establish three propositions: (1) That the appliances were defective; (2) that the master had notice thereof, or ought to have had; (3) that the servant did not know of the defect, and had not equal means of knowing with the master.

Goldie v. Werner, 151 Ill. 551, 38 N. E. 95; *Howe v. Medaris*, 183 Ill. 288, 55 N. E. 724.

There is no rule for building scaffolds; they must be adapted to each locality and purpose.

There is not one word of evidence to show whether inspection was ever made or not, or that the defect in the material was one which a proper inspection would have revealed, had it been made; which proof is essential before recovery can be had.

Sack v. Doless, 35 Ill. App. 636, *Affirmed* in 137 Ill. 129, 27 N. E. 62.

That an accident occurs, does not prove that, if an inspection had been made, a defect would have been discovered, and the misfortune averted.

Devlin v. Smith, 89 N. Y. 470, 42 Am. Rep. 311; *Butler v. Townsend*, 126 N. Y. 105, 26 N. E. 1017; *Schultz v. Pacific R. Co.* 36 Mo. 32.

Counsel, having chosen to try this case upon the issue as to negligent construction, cannot submit the case on negligence in providing improper material for the construction of the scaffold.

Wabash Western R. Co. v. Friedman, 146 Ill. 583, 30 N. E. 353, 34 N. E. 1111; *Bloomington v. Goodrich*, 88 Ill. 558; *Ayers v. Chicago*, 111 Ill. 406; *Illinois O. R. Co. v. McKee*, 43 Ill. 119.

Appellee cannot recover against these appellants for the negligence relied upon.

A custom prevails in Chicago, of more than a quarter of a century's duration, that, when work is being performed upon buildings of this kind, it is the brick-mason contractor's duty to provide and maintain the scaffolding on the building; and the stone-setting contractors never provide a scaffold for their work, but use the brick mason's scaffold, the brick-mason contractor retaining control of the scaffold, making all repairs and changes necessary.

Unless the evidence shows that appellants undertook, promised, or agreed to furnish a scaffold for deceased's use, or assumed charge or control of the one actually used, appellants cannot be held liable for defects in the material, or in the construction of it.

Appellants could not have built a scaffold if they wanted it. The owner paid the

brick-mason contractor for furnishing one on the building, to be used by the other contractors, and only one scaffold could be placed on the premises at the same time. There was only one thing to do, and that was to use the brick mason's scaffold, or abandon the work. Deceased knew it, accepted the employment with full knowledge of it, knew that appellants spent but little time at the building, that there was no one in appellants' employ whose duty it was to inspect the scaffold, unless himself; and, in accepting and continuing in the employment, he assumed the risk.

Channon v. Sanford Co. 70 Conn. 573, 41 L. R. A. 200, 66 Am. St. Rep. 133, 40 Atl. 462; *Coughtry v. Globe Woolen Co.* 56 N. Y. 124, 15 Am. Rep. 387; *Brady v. Norcross*, 172 Mass. 331, 52 N. E. 528; *Kelly v. Howell*, 41 Ohio St. 438.

If a servant cannot recover against a master for a defective scaffold when the scaffold was constructed by an independent contractor, how can a recovery be had against the master in this case, where the custom of the trade provides that the stone-setting contractor shall not furnish the scaffold, but the owner shall contract with the brick-mason contractor to furnish the scaffold for the stone setters?

Scammon v. Chicago, 25 Ill. 424, 79 Am. Dec. 334; *Hale v. Johnson*, 80 Ill. 185; *Jefferson v. Jameson & M. Co.* 165 Ill. 138, 46 N. E. 272; *Foster v. Wadsworth-Holland Co.* 168 Ill. 514, 48 N. E. 163; *Whitney & S. Co. v. O'Rourke*, 172 Ill. 177, 50 N. E. 242; *East St. Louis v. Giblin*, 3 Ill. App. 219; *Arasmith v. Temple*, 11 Ill. App. 39; *Chicago City R. Co. v. Hennessy*, 16 Ill. App. 153; *Pack v. New York*, 8 N. Y. 222; *Hexamer v. Webb*, 101 N. Y. 377, 54 Am. Rep. 703, 4 N. E. 755; *Connors v. Hennessey*, 112 Mass. 96; *Morgan v. Smith*, 159 Mass. 570, 35 N. E. 101; *Hilliard v. Richardson*, 3 Gray, 349, 63 Am. Dec. 743; *Barry v. St. Louis*, 17 Mo. 121; *Painter v. Pittsburgh*, 46 Pa. 213; *Declin v. Smith*, 89 N. Y. 470, 42 Am. Rep. 311; *Mulchey v. Methodist Religious Soc.* 125 Mass. 487; *Killea v. Faxon*, 125 Mass. 485; *Builer v. Townsend*, 126 N. Y. 105, 20 N. E. 1017.

On petition for rehearing.

He who provides the working place or appliance is the party liable for their non-safety.

Then we have, (1) an invitation to use; (2) an overt act affecting another; both of which must, by diligence, be safe-guarded by the providing party.

Bright v. Barnett & R. Co. 88 Wis. 299, 26 L. R. A. 524, 60 N. W. 418.

Messrs. William Garnett, Jr., and Ira C. Wood, for appellee:

Where a master adopts and uses machin-

ery or appliances furnished and built by another contractor, the liability of the master for their safety and sufficiency is the same as if the master had built the machine or appliances himself.

Chicago, B. & Q. R. Co. v. Avery, 109 Ill. 314; *Chicago & A. R. Co. v. Maroney*, 170 Ill. 520, 62 Am. St. Rep. 396, 48 N. E. 953; *Chicago & A. R. Co. v. Scanlan*, 170 Ill. 107, 48 N. E. 826; *Wisconsin C. R. Co. v. Ross*, 142 Ill. 9, 34 Am. St. Rep. 49, 31 N. E. 412; *Pullman Palace Car Co. v. Laack*, 143 Ill. 242, 18 L. R. A. 215, 32 N. E. 285; *Rice & B. Malting Co. v. Paulsen*, 51 Ill. App. 123; *East St. Louis Ice & Cold Storage Co. v. Crow*, 52 Ill. App. 573.

The duty of the master to furnish a safe place in which, and a safe appliance with which, to do the work, cannot be delegated to another.

Chicago, B. & Q. R. Co. v. Avery, 109 Ill. 314; *Wisconsin C. R. Co. v. Ross*, 142 Ill. 9, 34 Am. St. Rep. 49, 31 N. E. 412; *Chicago & A. R. Co. v. Maroney*, 170 Ill. 521, 62 Am. St. Rep. 396, 48 N. E. 953; *Chicago & A. R. Co. v. Scanlan*, 170 Ill. 107, 48 N. E. 826; *Rice & B. Malting Co. v. Paulsen*, 51 Ill. App. 124; *Pullman Palace Car Co. v. Laack*, 143 Ill. 243, 18 L. R. A. 215, 32 N. E. 285.

It is the duty of the master to inspect the machinery, and see that it is safe. The same rule applies whether the appliance belongs to other persons, or is furnished by the master himself.

Whitney & S. Co. v. O'Rourke, 172 Ill. 177, 50 N. E. 242; *Sack v. Dolese*, 137 Ill. 129, 27 N. E. 62; *Chicago, B. & Q. R. Co. v. Avery*, 109 Ill. 314; *Pullman Palace Car Co. v. Laack*, 143 Ill. 243, 18 L. R. A. 215, 32 N. E. 285.

The master is chargeable with notice of all defects in the machinery or appliance (not latent) if the defect existed at the time the appliance was built.

Chicago & A. R. Co. v. Maroney, 170 Ill. 521, 62 Am. St. Rep. 396, 48 N. E. 953; *Chicago & E. I. R. Co. v. Hines*, 132 Ill. 161, 22 Am. St. Rep. 515, 23 N. E. 1021; *Edward Hines Lumber Co. v. Ligas*, 172 Ill. 315, 64 Am. St. Rep. 38, 50 N. E. 225.

The master cannot delegate this duty, although the appliance is built by an independent contractor, if the master assumes use and possession of it.

Chicago & A. R. Co. v. Maroney, 170 Ill. 521, 62 Am. St. Rep. 396, 48 N. E. 953; *Monmouth Min. & Mfg. Co. v. Evling*, 143 Ill. 521, 39 Am. St. Rep. 187, 36 N. E. 117; *Wisconsin C. R. Co. v. Ross*, 142 Ill. 9, 34 Am. St. Rep. 49, 31 N. E. 412; *Chicago & A. R. Co. v. Scanlan*, 170 Ill. 107, 48 N. E. 826; *Rice & B. Malting Co. v. Paulsen*, 51 Ill. App. 124; *Pullman Palace Car Co. v. Laack*, 143 Ill. 243, 18 L. R. A. 215, 32 N.

E. 285; *Edward Hines Lumber Co. v. Ligas*, 172 Ill. 315, 64 Am. St. Rep. 38, 50 N. E. 225.

If two methods are used in doing the work, and both are considered about equally safe, the employee may choose either.

Rice & B. Malting Co. v. Paulsen, 51 Ill. App. 124; *Monmouth Min. & Mfg. Co. v. Erling*, 148 Ill. 521, 39 Am. St. Rep. 187, 36 N. E. 117; *East St. Louis Ice & Cold Storage Co. v. Crow*, 52 Ill. App. 573; *Pullman Palace Car Co. v. Laack*, 143 Ill. 243, 18 L. R. A. 215, 32 N. E. 285.

Where there are several methods of doing work, and competent judges are not agreed as to their relative merits, the selection by the master, or servant, of one rather than the other, cannot be regarded as negligence.

East St. Louis Ice & Cold Storage Co. v. Sculley, 63 Ill. App. 147.

Actual notice to the master of defects is not necessary to render the master liable.

Whitney & S. Co. v. O'Rourke, 172 Ill. 177, 50 N. E. 242.

The master is bound to provide a reasonably safe place, and is liable for neglect so to do, unless the servant actually knows of the danger, and thereafter remains in the exposed position.

Pioneer Fireproof Constr. Co. v. Howell, 189 Ill. 123, 59 N. E. 535.

The material question is whether the employee knew of the danger. This is a question for the jury.

Chicago & A. R. Co. v. Stevens, 189 Ill. 226, 59 N. E. 577.

Even in manufactured appliances bought from a reputable maker, of standard make, the master is bound to inspect, and is chargeable with notice of visible and patent defects.

Bailey, Mast. & S. pp. 98-100.

Wilkin, Ch. J., delivered the opinion of the court:

This is an action by appellee, as administratrix of the estate of Thomas Rawle, deceased, in the superior court of Cook county, to recover damages for wrongfully causing the death of her intestate. Appellants were stone-setting contractors, and had a contract for setting the cut stone on the Historical Building in the city of Chicago. Thomas Rawle, the deceased, was in their employ, working upon this building by the day, as an expert stone setter. The first count of the declaration avers that on the 16th day of May, 1893, the defendants were prosecuting the work on this building, and provided the said Thomas Rawle with a certain scaffold upon which to stand while at work; that said scaffold

"was improperly and carelessly constructed," and that the defendants failed to test it to see that it was safe; and while the deceased, with due care and diligence, was using said scaffold, pursuing his work, it broke, throwing him to the ground, causing his death. The second count is substantially the same, except that it avers "that it then and there became and was the duty of the defendants, as employers of the said Thomas Rawle, to provide and maintain proper, suitable, secure, strong, and safe scaffolding to be used by him in the prosecution of his work; yet they provided him with an improper, unsuitable, insecure, weak, and unsafe scaffolding." On a plea of not guilty issue was joined, and the cause submitted to a jury, resulting in a verdict of \$5,000 for plaintiff. From a judgment of affirmance in the appellate court, defendants prosecute this appeal.

The theory of plaintiff's case is that it was the duty of appellants to furnish the deceased, as their servant, a safe place in which to work, and that his death was caused by their failure so to do. Several defenses were relied upon at the trial, and urged before the appellate court, predicated upon the evidence; but, all controverted questions of fact being now settled adversely to those defenses, the only grounds of reversal urged in this court are, that the trial court erred in refusing to direct the jury to return a verdict of not guilty, and in refusing to give certain instructions asked on behalf of defendants. The first of these grounds is based upon the proposition that the plaintiff failed to prove, or introduce testimony tending to prove, that it was the duty of defendants to furnish the deceased a scaffold upon which to do the work which he was employed to perform. The uncontradicted evidence offered by plaintiff shows, and respective counsel so agreed upon the trial, that in the construction of a stone-veneer building, such as this was, a recognized custom prevailed in Chicago that it is the duty of the persons in charge of the brick work to build the scaffold to be used by both the brick masons and the stone setters. The brick masons erect the scaffold, and as the building progresses the stone setters place the stone in position, and are followed by the brick masons, who back up the work with brick. It also appeared from the evidence that such custom was followed in the construction of the building in question, the scaffolds for each floor, as the building rose, being built by brick masons. While the deceased was setting stone on a scaffold some 40 feet above the ground, the scaffold

gave way, and he fell, receiving injuries from which he died. The contention of counsel for the appellants is that, by the uncontradicted evidence,—in fact, the admission of the plaintiff of the existence of the custom as above stated,—there was no duty devolving upon the defendants to furnish the scaffold upon which the deceased worked, but that that duty rested upon the brick masons; and that if, by reason of the negligent construction of the same, deceased lost his life, the remedy of the plaintiff below was against them, and not against defendants. With this contention we cannot agree. We have examined the testimony contained in the record with care, and are unable to discover anything in the agreement of counsel at the trial, or in the evidence, tending to prove that the deceased's contract of employment was made with reference to the custom among builders, or that the deceased waived or relinquished any legal right which he had to expect of his employers a safe and secure place or scaffold upon which to work. Conceding to the fullest extent that the custom existed, and that it was known to exist by the deceased at the time he was employed and during the time he was engaged in the work, in the absence of all proof to that effect we are unable to see how it can be said that such knowledge in any way amounted to a waiver of his right, under the law, to hold his employers responsible for the safety of the scaffold. The fact that he knew that it was built by the brick masons in pursuance of a duty which they owed the stone setters under the existing custom in no way estopped him from saying to his employers: "As between you, as master, and myself, as employee, the law imposes upon you the duty of providing me with a sufficient scaffold; and, although another party may have constructed it in pursuance of a duty which it owed you, still it was your duty to me to see that it was securely and safely built." *Chicago & A. R. Co. v. Maroney*, 170 Ill. 520, 62 Am. St. Rep. 396, 48 N. E. 953, Citing *Hess v. Rosenthal*, 160 Ill. 621, 43 N. E. 743, and *Chicago, B. & Q. R. Co. v. Avery*, 109 Ill. 314. We are not unmindful of the fact that cases arise in which it is not the duty of the employer to furnish a safe place for his employee to work,—as where the duty to see that the place or scaffolding on which the labor is to be performed devolves upon the workman himself, and not upon the employer. If a party should be employed to paint a house, there being no agreement as to who should furnish the scaffolding, the duty would doubtless fall upon the painter him-

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self. In *Channon v. Sanford Co.* 70 Conn. 573, 41 L. R. A. 200, 66 Am. St. Rep. 133. 40 Atl. 462, relied upon by counsel for appellant where a servant engaged in decorating a church was injured by the falling of a scaffold constructed by a third person, who was an independent contractor, under the peculiar facts of that case it was held that the duty of seeing that the scaffold was safe did not rest upon the employer: and it has been so held in other cases cited by counsel for appellants. But we are unable to see how it can be said here as an original proposition, that the defendants were not under the legal duty of furnishing the scaffolding upon which the deceased was to work. Suppose we leave out of consideration the proof or stipulation as to the prevailing custom in the city of Chicago, and consider the case as though the deceased had been employed (as he was) by the defendants to set stone upon the building by the day, there being no agreement as to who should furnish the scaffold; could it be doubted that, by reason of that employment, the legal duty devolved upon the master (that is, the defendants) to provide the scaffolding, and see that it was safe and secure? We think not. Then the question in the case must be, on the first proposition. Does the proof in this case show, so as to establish it as a matter of law, that they had been relieved of that duty? Unless it can be so held, then clearly the court properly refused to withdraw the case from the jury. On the contrary, as we have already said, to our minds there is nothing in the case fairly tending to show that the deceased in any way waived his right in that regard, or that defendants were relieved from the legal obligation resting upon them. We are satisfied no error was committed in refusing to give peremptory instruction to find for the defendants.

In view of the instructions given at the request of the defendants, and in view of what we have already said, the court properly refused to give those asked by the defendants of which complaint is now made. One of these instructions will suffice to point out what we regard as a fatal objection to each of them. The one which perhaps most nearly approaches the law is as follows: "The court instructs the jury that, if you find, from the evidence, that there was a general custom prevailing among mason and stone-setting contractors in the city of Chicago at the time of the injury to said Thomas Rawle, whereby scaffolding in the erection of buildings upon which mason and stone-setting contractors were employed was to be furnished by

the brick-mason contractor, and not by the stone-setting contractor, which custom was well known to persons engaged in the said building trades, and was known to said Thomas Rawle, or by the exercise of reasonable and ordinary care on his part might have been known, then you are instructed that no duty devolved upon the defendants to furnish scaffolding for the said Rawle to work upon; and if you further find that the said Thomas Rawle worked upon scaffolding built and furnished by the mason contractor without complaint, and because of the falling of such scaffolding was injured, then you are instructed that the plaintiff cannot recover in this case, and your verdict should be for the defendants." The rule announced in this instruction is that the mere knowledge of Rawle as to the custom between brick masons and stone-setting contractors, making it the duty of the former to construct the scaffold, would be sufficient to relieve the defendants of the duty of providing Rawle a safe and secure place in which to work, whether he, by words or acts, consented or agreed that they should be relieved from that duty. What we have already said will sufficiently indicate our dissent from that view of the law.

Perceiving no error in the record, the judgment of the Appellate Court will be affirmed.

Petition for rehearing denied December 5, 1901.

PEOPLE of the State of Illinois *ex rel.*
Charles S. DENEEN, State's Attorney,
v.

Leslie A. GILMORE.

(214 Ill. 569.)

1. The pardoning of a lawyer who has been convicted of embezzling funds from his client does not efface the moral turpitude and want of professional honesty involved in the crime, nor obliterate the stain upon his moral character.
2. A license to practise law will be revoked which is secured by a fraudulent concealment of the fact that the plaintiff has recently been convicted of embezzling funds from a client in another state,—especially if,

NOTE.—For other cases in this series as to disbarment of attorneys, see *Fairfield County Bar ex rel. Fessenden v. Taylor*, 13 L. R. A. 767, and *note*; *State ex rel. Fowler v. Finley*, 18 L. R. A. 401; *People ex rel. Atty. Gen. v. MacCabe*, 19 L. R. A. 231; *Re Kirby*, 39 L. R. A. 856; *Re Lentz*, 50 L. R. A. 415; and *Rc Evans*, 53 L. R. A. 952.
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since its issuance, the plaintiff has been guilty of professional misconduct evincing such lack of personal integrity and professional honor as to establish that he is unworthy to be allowed to hold it.

(February 21, 1905.)

PROCEEDINGS to disbar defendant.
Disbarment ordered.

The facts are stated in the opinion.

Messrs. **Harry D. Irwin** and **John L. Fogle**, with **Mr. Charles S. Deneen**, for the People:

The conviction of an attorney of a felony or misdemeanor, involving want of integrity, is sufficient to justify the disbarment of such attorney.

People ex rel. Johnson v. George, 186 Ill. 122, 57 N. E. 804; *People ex rel. Johnson v. Schintz*, 181 Ill. 574, 54 N. E. 1011; *People ex rel. Deneen v. Hahn*, 197 Ill. 137, 64 N. E. 342; *People v. Hill*, 182 Ill. 425, 55 N. E. 542; *People ex rel. Chipperfield v. Comstock*, 176 Ill. 192, 52 N. E. 67; *Re McCarthy*, 42 Mich. 71, 51 N. W. 693; *Walker v. Com.* 8 Bush, 86; 2 Am. & Eng. Enc. Law, 2d ed. p. 304; *Ex parte Wall*, 107 U. S. 265-280, 27 L. ed. 552-558, 2 Sup. Ct. Rep. 569.

Mr. Francis M. Burwash, for respondent:

Former conviction does not require disbarment.

People ex rel. Deneen v. Coleman, 210 Ill. 79, 71 N. E. 693.

The Missouri record of conviction is null and void on account of the fraud in its affirmation.

Wonderly v. Lafayette County, 150 Mo. 635, 45 L. R. A. 386, 73 Am. St. Rep. 474, 51 S. W. 745.

Pardon blots out a crime and all its consequences. It reaches both the punishment prescribed for the offense and the guilt of the offender. It obliterates, in legal contemplation, the offense itself.

Ex parte Garland, 4 Wall. 333, 18 L. ed. 366; *Carlisle v. United States*, 16 Wall. 147, 21 L. ed. 426; *Sanborn v. Kimball*, 64 Me. 140; *Knapp v. Thomas*, 39 Ohio St. 377, 48 Am. Rep. 462; *Hildreth v. Heath*, 1 Ill. App. 82.

The judgment of conviction, being met by a pardon, ceases to be evidence; hence, there is no proof of the first count, and it should be disregarded.

Scott v. State, 6 Tex. Civ. App. 343, 25 S. W. 337.

Mere failure to disclose possession within any limit of time does not constitute an element of the crime of embezzlement.

State v. Reilly, 4 Mo. App. 392; *McElroy v. People*, 202 Ill. 473, 66 N. E. 1058.

Where great length of time has elapsed between the alleged misconduct and the in-

stitution of the proceedings, the law will not lend its favor.

People ex rel. Noyes v. Allison, 68 Ill. 151; *Re Lentz*, 65 N. J. L. 134, 50 L. R. A. 415, 46 Atl. 761.

The courts do not look with favor on applications of this character where the party alleged to have been injured by the misconduct of the attorney is not complaining.

People ex rel. Wright v. Lamborn, 2 Ill. 123; *People ex rel. Noyes v. Allison*, 68 Ill. 151.

Where the misconduct does not relate to a professional engagement, courts will usually not interfere unless the conduct is atrocious.

People ex rel. Hughes v. Appleton, 105 Ill. 474, 44 Am. Rep. 812.

When the charges are denied by respondent, or the act done is given a proper or harmless motive, a mere preponderance of the evidence as to either act or motive is not sufficient.

People ex rel. Miller v. Harvey, 41 Ill. 277; *People ex rel. Shufeldt v. Barker*, 56 Ill. 209; *State ex rel. Fowler v. Finley*, 30 Fla. 325, 18 L. R. A. 404, 11 So. 674; *State ex rel. Johnson v. Gebhardt*, 87 Mo. App. 542.

Boggs, J., delivered the opinion of the court:

This is a petition filed originally in this court for the disbarment of the respondent, Leslie A. Gilmore. The respondent filed his answer, and the cause was referred to a master to take and report the proofs, and the proofs have been heard and reported, and the respective parties have filed their briefs. The testimony discloses that in the year 1889 the respondent was a resident of Kansas City, Jackson county, Missouri, and was a member of the bar of that state and engaged in the practice of his profession there. At the September term, 1890, of the criminal court of Jackson county, an indictment was returned against him charging him with the crime of embezzling certain moneys belonging to one Mrs. Eva Abbott, which came into his hands in his capacity as the attorney of said Mrs. Abbott. At the December term, 1890, of the said criminal court of Jackson county Missouri, he was placed on trial before the court and a jury, and was adjudged to be guilty of the offense charged in the indictment, and was convicted and sentenced to be imprisoned in the penitentiary of the state of Missouri for the period of five years. He prosecuted an appeal to the supreme court of the state of Missouri, and, under the statutes of that state, was permitted to go at liberty during the pendency of the appeal. He absented himself from the state of Missouri, and went to Colorado.

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On the 28th day of March, 1892, the judgment of his conviction and sentence to the penitentiary were affirmed by the supreme court. He was then absent from the state of Missouri, and was in Colorado, and did not return to Missouri, but, in January, 1893, came to the city of Chicago. On the 4th day of June, 1894, he was arrested in the city of Chicago as a fugitive from justice, and was taken by the officers to the state of Missouri, and committed to the penitentiary of that state to serve the term of imprisonment to which he had been sentenced in the said criminal court of Jackson county. He remained a convict in the penitentiary of Missouri until August 21, 1896, a period of about twenty-six months, when he received a pardon from the then acting governor of the state. He returned to Chicago, and within about two months presented his application for admission to the bar of this state. The circuit court of Cook county, acting on the motion and testimony of a member of the bar of that county, entered an order to the effect that the respondent was a person of good moral character, and a copy of that order was presented with his application. He did not make known to the circuit court, the appellate court (before whom he was examined) or to this court that he had been sentenced to and served as a convict in the penitentiary of the state of Missouri. His name was ordered to be placed on the roll of the members of the bar of this state, and a license as an attorney at law of this state was issued to him on the 6th day of November, 1896.

The crime of which the respondent was convicted and imprisoned in the penitentiary of the state of Missouri was an infamous offense, which involved not only moral turpitude, but also the lack of professional integrity. The conviction of that crime had the effect to degrade him, and to establish that he was of bad moral character as a man and as a lawyer. The pardon granted him by the then acting governor of the state of Missouri did not efface the moral turpitude and want of professional honesty involved in the crime, nor obliterate the stain upon his moral character. *People ex rel. Johnson v. George*, 186 Ill. 122, 57 N. E. 804. He obtained the certificate from the circuit court of Cook county that he was possessed of a good moral character by concealing from the court the fact that he had been adjudged guilty by the court of final resort of a sister state of an offense involving his guilt of personal dishonesty in his dealings as an attorney with a client, and also by concealing from that court that he had but so recently served as a convict in the penitentiary of the state of Missouri until relieved from such punishment by a

pardon. His concealment of these facts was a fraud on the circuit court. He practised a further fraud upon the appellate court and upon this court by presenting that certificate of good moral character so deceitfully and fraudulently obtained by him. Had this court been advised, when the respondent asked an order admitting him to the bar, that he had but only about two months before obtained his release from the penitentiary of the state of Missouri, where he had been imprisoned, because adjudged to be guilty of the crime of embezzlement of funds which had been intrusted to him by a client, he would not have been admitted as a member of the bar of the state. He obtained his certificate of admission by deceitfully and falsely inducing this court to believe that he enjoyed and possessed a good moral character, knowing at the same time that he was purposely concealing a fact which would demonstrate that his assertion was untrue. To permit him to longer hold that certificate of admission would be to allow him to enjoy the fruits of his own fraud and deceit.

The respondent, in his answer, asserts that he was innocent of any actual wrongdoing in the transaction with his client in Missouri, and that his conviction was not justified by the proofs, and was wrongful. The respondent and the relator have presented to us the testimony of the witnesses heard on the trial of the charge of embezzlement, as preserved in the record of that proceeding. Without conceding that any reason exists for declining to give full faith and credit to the adjudications of the courts of Missouri, we are unwilling to say that this testimony demonstrates that the respondent was innocent of the charge of which he was convicted. He was a member of the bar of Missouri, and was employed by Mrs. Abbott as her attorney to collect an indebtedness due to her. He collected \$500 from her debtor on the 22d day of October, 1889. He saw her within three days thereafter, and saw and consulted with her and advised her frequently during the nine months which intervened before an accusation of the crime was lodged against him, and did not at any time inform her that he had collected any money for her, but, on the contrary, led her to believe that he had not received any money for her, until after she had caused a warrant to issue against him. He did not repay any of the money until after the affirmance by the supreme court of the judgment of conviction. While in the city of Chicago, a few months before he was seized as a fugitive from justice, he sent \$240.75 to a friend in Kansas City, Missouri, to be paid to Mrs. Abbott on condition that she would sign a letter to the governor of 69 L. R. A.

the state which he had prepared and which he inclosed with the money. This letter contained some statements of alleged fact, and a recommendation of the writer that the respondent should be pardoned. Mrs. Abbott signed the letter and received the money, but the pardon was not granted. About eight months thereafter the respondent was extradited from Illinois, and placed in the penitentiary of Missouri.

It is true that in *People ex rel. Deneen v. Coleman*, 210 Ill. 79, 71 N. E. 693, we decline to accept the view urged upon us by the relator that the respondent ought to be disbarred on the charge, made in the petition and admitted in the answer, that the respondent had, previous to his application for admission to the bar of this state, been convicted in the courts of Indiana of a felonious offense involving moral turpitude, had served a portion of a term of imprisonment in the penitentiary of that state, had been pardoned, and had obtained license to practise the profession of law in this state, without having made known to the courts of this state that he had been so convicted of a felonious offense in the sister state. But in that case it appeared from the petition a period of thirteen years had elapsed between the time of the conviction and the time of the application for admission to the bar of this state, and the answer averred that for eight years of that time just preceding the application the respondent had been a resident of the state of Illinois; that he had during the eight years during which he had lived in Illinois before the license issued to him, and during the years since receiving the license, conducted himself as an honorable, upright, and law-abiding citizen, and had thereby established and enjoyed, and was entitled to enjoy, the reputation of a man of good moral character. In this state of the pleadings the relator moved that judgment of disbarment be entered on the averments of the petition and answer thereto. This motion we declined to grant, for the reason that it admitted the averments of the answer to be true, and, if true, it appeared from such averments that the respondent had repented of the wrong he had done, had reformed his evil ways, and had by years of good conduct and honorable practices restored himself to public confidence as an honorable and worthy man before he sought admission to the bar of this state. The case of this respondent and that of *Coleman* are alike in the fact that neither of them advised the court that he had been convicted of a crime which affected his moral character, and we now distinctly say that such an omission cannot, in any instance, be regarded otherwise than as the reprehensible concealment

of a fact which it is the duty of an applicant for admission to the bar to disclose. In the *Coleman Case*, acting, as we did, upon the averments of the petition and the answer, it appeared to us that Coleman had, before applying to this court for license, by years of upright and honorable life, recovered his standing as an honorable and moral man; and it also further appeared from the answer in his case that, in the years that had elapsed after his admission to the bar in Illinois, and before the petition for his disbarment had been filed, his life as a lawyer and as a citizen had been such as to demonstrate that his reformation had been complete and permanent and that he had maintained a good moral character. In these latter respects the case of this respondent is entirely unlike that of Coleman. He did not, after being released from further punishment in the penitentiary, devote any of the years of his life to the upbuilding of a moral character and to the obliteration of the bad moral reputation which had attached to him by reason of his conviction of a crime which involved a want of personal and professional integrity. On the contrary, he came almost directly from the doors of the penitentiary in Missouri to the presence of the courts in Illinois, and deceitfully and fraudulently imposed himself upon our courts as a man of good moral character. And, furthermore, the record in this cause discloses that he has, since receiving his license to practise law from this court, persisted in his evil and wicked ways. It appears from the testimony produced in this record that in 1899,—some three years after his admission to the bar of this state,—an indictment was returned against him by the grand jury of Carroll county, in this state, charging him and others with having entered into a criminal conspiracy to obtain the money of two citizens of that county by false pretenses and by means and use of the confidence game. On a trial before a jury in the circuit court of Carroll county the respondent and three others, who were indicted as coconspirators with him, were adjudged to be guilty of the crime charged, and the respondent and two other of his coconspirators were sentenced to be imprisoned in the penitentiary of this state at Joliet. This conviction was reviewed on a writ of error issued out of the appellate court for the second district, and the judgment of conviction was reversed for two reasons, as appears in the opinion of the appellate court, reported in 87 Ill. App. 128, to which respondent, in his answer, especially refers for the information of the court. The two grounds of reversal were, (1) the refusal of the trial court to require the people to apprise the respondent, by a bill of particu-

lars, more definitely and particularly of the nature of the accusation against him, and (2) that the state's attorney, in his address to the jury, improperly referred to the failure of the respondent to testify as a witness on the hearing of the cause. Respondent alleges, in his answer, that after the reversal of the judgment of conviction a *nolle prosequi* was entered in the cause by the state's attorney.

We have, at the suggestion of the respondent, read the opinion in that case, and have also read the testimony taken by the respective parties on the reference made under this petition. The nature of the charges of which the respondent was convicted in the trial court in Carroll county was that the two prosecuting witnesses, who lived in Carroll county, and three other persons who resided in Chicago, had engaged in a scheme for tapping telegraph wires running to a pool room in Chicago and intercepting and delaying reports of the racing of horses, in order that they might win money by betting on the winning horses, and that the three Chicago conspirators conceived a plan of extorting money from their Carroll county confederates in wire tapping by inducing them to believe that two of the Chicago confederates had been arrested on a charge of tapping telegraph wires, and that the instruments and appliances for tapping the wires had been seized by the officers, and that, unless a large sum of money should be provided by the Carroll county confederates, to be used in corrupting the officers to surrender the possession of these instruments and appliances for tapping the wires, all of the confederates would be in danger of exposure, arrest, and conviction. It was contended by the prosecution that the respondent, in his assumed capacity as an attorney, was an actor in the conspiracy to obtain the money of the Carroll county confederates in the wire-tapping scheme, and was to share in the moneys that might thus be extorted from the Carroll county men. One George C. Mastin, a witness on the trial before the jury in Carroll county, testified that he was an attorney at law in Chicago, and was consulted by a friend of the Carroll county men; that the Carroll county men had drawn a draft for \$2,100 in response to a telephone message from the respondent that that amount would be required; that he (the witness) induced the holder of the draft to deliver it to him, and then called upon the respondent to ascertain the facts as to the alleged necessity of the payment of that sum of money by his clients; that the respondent told him that the story that two of the Chicago conspirators had been "placed in the central station was a fake;"

that one of the Carroll county men was badly scared, and would "give up many thousands of dollars rather than be punished;" that the guilt of the parties was so evident that they could not be defended; that, if Mastin would advise his clients to give up the \$2,100, he (Mastin) should have one third of it, and the balance would be divided between himself (respondent) and another, whom he did not name; that the payment of \$2,100 would be much less punishment than they would suffer if they were arrested and sent to the penitentiary; that, if they paid the \$2,100, they would be relieved from all danger of prosecution and arrest. Mastin substantially repeated these statements in his testimony taken in this proceeding, and the respondent testified that the conversation as testified to by Mastin did not occur. The respondent admitted that he went to Carroll county, and had an interview with the conspirators in the wire-tapping scheme who lived there. His counsel, in his brief in this case, says that the respondent in that interview explained to the Carroll county men that "wire tapping and conspiracy to tap wires were crimes; and told them the penalties attached by statute to each; and recited what Roach and Vaughn [two of the Chicago conspirators] had already told him about a detective for the Western Union having taken the machinery, and suggested that, if the parties in possession of the machinery and those prosecuting would cease their activity and give up the machinery on payment of their losses, the strongest evidence of guilt would be out of the possession of the prosecution;" that, "while Gilmore has no recollection of the sum of \$2,000 being mentioned, the writer of this inclines to the

opinion that Gilmore did express the opinion that the sum mentioned by Chisholm would be sufficient." Respondent testified on the hearing that after he returned to Chicago he telephoned the Carroll county men that \$2,100 would be required to "get the machinery," etc.

If the testimony of Mastin be true, the respondent was guilty as a party to the conspiracy to extort money from the Carroll county confederates, and of prostituting his standing and position as a member of the bar to the furtherance of that criminal purpose. If the view urged by the respondent be true, it would appear he sought to obtain the money for the purpose of corrupting the public officers to surrender the evidence of the guilt of his clients, though it seems to be the better conclusion to be drawn from the evidence that the machinery and appliances for tapping the wires were never, in fact, in the hands of the police authorities. If the view of the respondent be accepted, there seems no escape from the conclusion that since his admission to the bar he has been guilty of professional misconduct evincing such lack of personal integrity and professional honor as to establish that he is unworthy to be longer allowed to hold a place in the ranks of an honorable profession.

The prayer of this petition will be granted, and judgment will be entered herein ordering that the name of the respondent be stricken from the roll of attorneys in this state, and also that the respondent pay the costs of this proceeding.

Rule made absolute.

Petition for rehearing denied April 5, 1905.

UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT.

Robert B. F. PEIRCE, Receiver of Toledo, St. Louis, & Kansas City Railroad Company, *Plff. in Err.*,

v.

Edward VAN DUSEN.

(24 C. C. A. 280, 47 U. S. App. 339, 78 Fed. 693.)

1. A receiver of a Federal court in charge of a railroad company, who, by act Cong. March 3, 1887, chap. 373, corrected by act August 13, 1888, chap. 866, is required to manage and operate the property according to the requirements of the valid laws of the state in which it is situated, in

the same manner as the owner or possessor thereof would be bound to do if in possession, is subject to any rule prescribed by the state imposing on railroad corporations a liability for the negligence of employees having superior authority over other employees.

2. An action against a receiver of a railroad corporation is within the provisions of Ohio act April 2, 1890, making railroad companies liable in certain cases for the negligence of fellow servants or employees who have power or authority to direct or control the one injured.

3. Railroad companies engaged in interstate commerce are subject to a state statute making railroad companies liable for injuries to employees on account of the negligence of others having control or direction of them, so long as Congress does not deal with that subject.

NOTE.—As to liability of receiver for injuries caused by operation of railroad, see note to Turner v. Cross, 15 L. R. A. 262.

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4. A constitutional provision requiring all laws of a general nature to have a uniform operation throughout the state is not violated by Ohio act April 2, 1890, relating to the liability of railroad companies for injuries to employees, since it applies to all railroad corporations operating railroads within the state, and to all of a common class of railroad employees.
5. Negligence of a superior servant of a railroad company, causing injury to an employee under his control, renders the employer liable under Ohio act April 2, 1890, although the negligence was in respect of the performance of work of the kind done by the injured person, and not in the performance of any duty imposed by law on the master personally.
6. A verdict for damages will not be disturbed on writ of error on the ground that they were excessive, when the trial court did not disturb it.
7. Declarations of a train conductor tending to show that his negligence caused an injury to an employee whose hand was caught between cars is admissible as part of the *res gestæ* when made as he met the injured man with his hand still bleeding, immediately after he had come from between the cars, and had walked only six or seven car lengths toward the engine.

(February 2, 1897.)*

ERROR to the Circuit Court of the United States for the Northern District of Ohio to review a judgment in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by negligence for which defendant was alleged to be responsible. *Affirmed.*

The facts are stated in the opinion.

Argued before *Harlan*, Circuit Justice, and *Taft* and *Lurton*, Circuit Judges.

Messrs. Brown & Geddes, for plaintiff in error:

The negligence complained of was the negligence of a fellow servant.

The mere exercise of authority by one servant over another does not create the relation of vice principal.

Baltimore & O. R. Co. v. Baugh, 149 U. S. 368, 37 L. ed. 772, 13 Sup. Ct. Rep. 914; *Northern P. R. Co. v. Hambly*, 154 U. S. 360, 38 L. ed. 1013, 14 Sup. Ct. Rep. 983; *Harley v. Louisville & N. R. Co.* 57 Fed. 144; *Central R. Co. v. Keegan*, 160 U. S. 259, 40 L. ed. 418, 16 Sup. Ct. Rep. 269; *Texas & P. R. Co. v. Rogers*, 6 C. C. A. 403, 13 U. S. App. 547, 57 Fed. 378; *McGrath v. Texas & P. R. Co.* 9 C. C. A. 133, 23 U. S. App. 86, 60 Fed. 555; *Bailey, Master's Liability for injuries to servant*, 239 *et seq.*

The Ohio statute as to fellow servants is confined to corporations owning or operating a railroad in Ohio. It does not apply to

any employer carrying on any other kind of business; nor to an individual owning or operating a railroad. It applies only to a railroad or railway corporation. It is limited to classes of employers and employees which do not include either the plaintiff or the defendant in this case. It does not apply to a court of chancery having possession of a railroad property, and operating the same through a receiver.

Henderson v. Walker, 55 Ga. 481; *Thurman v. Cherokee R. Co.* 56 Ga. 376; *Campbell v. Cook*, 86 Tex. 630, 40 Am. St. Rep. 878, 26 S. W. 486; *San Antonio & A. P. R. Co. v. Reynolds* (Tex. Civ. App.) 30 S. W. 846; *Central Trust Co. v. East Tennessee, F. & G. R. Co.* 69 Fed. 353; *Turner v. Cross*, 83 Tex. 224, 15 L. R. A. 262, 18 S. W. 578; *Texas & P. R. Co. v. Collins*, 84 Tex. 121, 19 S. W. 365; *Texas & P. R. Co. v. Cox*, 145 U. S. 606, 36 L. ed. 833, 12 Sup. Ct. Rep. 905.

May a court insert in a penal statute persons not named? If it may be extended to an individual operating a railroad by virtue of his appointment as receiver by a Federal court, might not a court also enlarge the statute so as to include an individual not so appointed?

Priestman v. United States, 4 Dall. 28, 1 L. ed. 727; *The Paulina v. United States*, 7 Cranch, 60, 3 L. ed. 268; *Denn v. Reid*, 10 Pet. 524, 9 L. ed. 519; *United States v. Hartwell*, 6 Wall. 385, 18 L. ed. 830; *Hadden v. The Collector (Hadden v. Barney)* 5 Wall. 111, 18 L. ed. 518; *Lake County v. Rollins*, 130 U. S. 662, 32 L. ed. 1060, 9 Sup. Ct. Rep. 651; *United States v. Fisher*, 2 Cranch, 358, 2 L. ed. 304; *Doggett v. Florida R. Co.* 99 U. S. 72, 25 L. ed. 301; *People ex rel. Jackson v. Potter*, 47 N. Y. 375; *Hills v. Chicago*, 60 Ill. 86; *Newell v. People*, 7 N. Y. 97; *King v. Poor Law Comrs.* 6 Ad. & El. 1; *Leonard v. Eiffe*, 3 Q. B. 910; *Everett v. Wells*, 2 Scott, N. R. 531.

Where the right to recover damages occasioned by death is conferred by statute against certain persons only, the right can be asserted and enforced against such persons, and no others.

Chicago & N. E. R. Co. v. Sturgis, 44 Mich. 538, 7 N. W. 213; *Shaw v. Clark*, 49 Mich. 384, 43 Am. Rep. 474, 13 N. W. 786; *Dent v. Ross*, 52 Miss. 188; *Detroit v. Putnam*, 45 Mich. 263, 7 N. W. 815; *Detroit v. Chaffee*, 70 Mich. 80, 37 N. W. 882; *Scott v. Simons*, 70 Ala. 352; *Lair v. Killmer*, 25 N. J. L. 522; *Swift v. Luce*, 27 Me. 285; *Emerson v. Com.* 108 Pa. 111; *Tynan v. Walker*, 35 Cal. 634, 95 Am. Dec. 152; *Sedgw. Stat. & Const. Law*, 194, 195, 263, 265; *Turner v. Cross*, 83 Tex. 218, 15 L. R. A. 262, 18 S. W. 578.

*This case was taken to the Supreme Court of the United States, but settled before it was heard there.
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When the property of a railroad company is in the hands of a receiver, who has full possession and entire charge of its affairs, the corporation itself is not liable for damage or injury caused by the acts of negligence of such a receiver, or of any of his agents or employees.

Washington A. & G. R. Co. v. Brown, 17 Wall. 445, 21 L. ed. 675; *Davis v. Duncan*, 19 Fed. 477; 20 Am. & Eng. Enc. Law, p. 387.

The Federal statute does not enlarge the state statute. If the latter does not by its terms apply to a receiver, the Federal statute will not so apply it.

Where state statutes impose a liability upon a railway company as owner, which does not exist as against a receiver of the railway, the Federal courts will not place the receiver upon the same plane of liability as the owner.

Central Trust Co. v. East Tennessee, V. & G. R. Co. 69 Fed. 353; *Baltimore Trust & G. Co. v. Atlanta Traction Co.* 69 Fed. 358; *Allen v. Dillingham*, 8 C. C. A. 544, 23 U. S. App. 167, 60 Fed. 176.

A state legislature cannot impose liabilities upon a court of chancery of the United States charged with the administration of property or funds in the custody of the court, in a matter governed by general law.

A suit against a receiver is a suit against the receivership.

McNulta v. Lochridge, 141 U. S. 327, 35 L. ed. 796, 12 Sup. Ct. Rep. 11.

The question whether certain persons are fellow servants of an employer so as to preclude one from recovering against the employer for injuries caused by the negligence of the other is not a question of local law, but is one of general law, as to which the Federal court will exercise an independent judgment.

Baltimore & O. R. Co. v. Baugh, 149 U. S. 368, 37 L. ed. 772, 13 Sup. Ct. Rep. 914.

The act of April 2, 1890 (87 Ohio Laws, 149), is in conflict with § 26 of art. 2 of the Constitution of Ohio, providing that all laws of a general nature shall have a uniform operation throughout the state.

Hiason v. Burson, 54 Ohio St. 470, 43 N. E. 1000; *Kelley v. State*, 6 Ohio St. 269; *Cooley*, Const. Lim. 6th ed. 481; *Shaver v. Pennsylvania Co.* 71 Fed. 931; *State v. Julow*, 129 Mo. 163, 29 L. R. A. 257, 50 Am. St. Rep. 443, 31 S. W. 781.

Even if Van Dusen were injured by the negligence of Bartley in the manner charged, still he is not entitled to recover, for the reason that Bartley was not negligent in the performance of any duty which the law imposed on the master personally, but only

in respect of the performance of work which pertained to him as a fellow servant.

Central R. Co. v. Keegan, 160 U. S. 267, 40 L. ed. 422, 16 Sup. Ct. Rep. 269; *Taylor v. Evansville & T. H. R. Co.* 121 Ind. 124, 6 L. R. A. 584, 16 Am. St. Rep. 372, 22 N. E. 876; *Justice v. Pennsylvania Co.* 130 Ind. 321, 30 N. E. 303; *Crispin v. Babbitt*, 81 N. Y. 516, 37 Am. Rep. 521; *Hussey v. Coger*, 112 N. Y. 614, 3 L. R. A. 559, 8 Am. St. Rep. 787, 20 N. E. 556; *Holden v. Fitchburg R. Co.* 129 Mass. 268, 37 Am. Rep. 343; *Wilson v. Merry*, L. R. 1 H. L. Sc. App. Cas. 326; *Stockmeyer v. Reed*, 55 Fed. 259; *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 385, 37 L. ed. 780, 13 Sup. Ct. Rep. 914; *Northern P. R. Co. v. Hamblly*, 154 U. S. 349, 38 L. ed. 1009, 14 Sup. Ct. Rep. 983; *Northern P. R. Co. v. Peterson*, 162 U. S. 346, 40 L. ed. 994, 16 Sup. Ct. Rep. 843.

Plaintiff was permitted to testify that, in a conversation after the accident, and after the plaintiff had got his hand cut, and had walked six or seven car lengths, Mr. Bartley, the conductor, said to him that which, plaintiff claims, amounted to admission of negligence on his part. That testimony was wholly incompetent.

Northwestern Union Packet Co. v. Clough, 20 Wall. 528, 22 L. ed. 406; *Vicksburg & M. R. Co. v. O'Brien*, 119 U. S. 99, 30 L. ed. 299, 7 Sup. Ct. Rep. 118; *Luby v. Hudson River R. Co.* 17 N. Y. 131; *Adams v. Hannibal & St. J. R. Co.* 74 Mo. 553, 41 Am. Rep. 333; *Williamson v. Cambridge R. Co.* 144 Mass. 148, 10 N. E. 790; *Richstain v. Washington Mills Co.* 157 Mass. 538, 32 N. E. 908; *Cleveland, O. & C. R. Co. v. Mara*, 26 Ohio St. 185.

Messrs. Hurd, Brumback, & Thatcher, for defendant in error:

Because a superior participates in the work with his subordinates, this in no wise detracts from his authority and control over his subordinates.

Berea Stone Co. v. Kraft, 31 Ohio St. 287, 27 Am. Rep. 510.

It is not necessary that a superior officer should have authority to discharge a subordinate in order to constitute him such superior.

Moore v. Wabash, St. L. & P. R. Co. 85 Mo. 588; *Hoke v. St. Louis, K. & N. R. Co.* 88 Mo. 360; *Dowling v. Gerard B. Allen & Co.* 74 Mo. 13; *Shearm. & Redf. Neg.* §§ 226, 227.

The 3d section of the judiciary act of March 3, 1887 (24 Stat. at L. 554, chap. 373, U. S. Comp. Stat. 1901, p. 582), authorizing suits to be brought against receivers of railroads without special leave of the court by which they were appointed, was intended to place receivers upon

the same plane with railroad companies, both as respects their liability to be sued for acts done while operating a railroad, and as respects the mode of service.

Eddy v. Lafayette, 163 U. S. 456, 41 L. ed. 225, 16 Sup. Ct. Rep. 1082; *Hornsby v. Eddy*, 5 C. C. A. 560, 12 U. S. App. 404, 56 Fed. 461; *Eddy v. Lafayette*, 1 C. C. A. 441, 4 U. S. App. 247, 49 Fed. 807; *Rouse v. Hornsby*, 14 C. C. A. 377, 32 U. S. App. 111, 67 Fed. 219; *Rouse v. Harry*, 55 Kan. 589, 40 Pac. 1007; *Central Trust Co. v. Wabash, St. L. & P. R. Co.* 26 Fed. 12; *Murphy v. Holbrook*, 20 Ohio St. 137, 5 Am. Rep. 633; *Campbell v. Cook* (Tex. Civ. App.) 24 S. W. 977.

The Ohio statute is applicable to the case at bar because of the provisions of § 2 of the act of Congress of August 13, 1888, 1 U. S. Rev. Stat. Supp. 613, U. S. Comp. Stat. 1901, p. 582.

The act of April 2, 1890 (87 Ohio Laws, 149), is not unconstitutional because of being a law of a general nature without a uniform operation.

Shaver v. Pennsylvania Co. 71 Fed. 931; *Johnson v. Philadelphia & R. R. Co.* 163 Pa. 127, 29 Atl. 854; *Donald v. Chicago, B. & Q. R. Co.* 93 Iowa, 284, 33 L. R. A. 492, 61 N. W. 971; *Fuller v. Baltimore & O. Employees' Relief Asso.* 67 Md. 433, 10 Atl. 237.

Where a statute does not relate to persons or things as a class, but to particular persons or things of a class, it is special, as contradistinguished from general, law.

State ex rel. Lionberger v. Tolle, 71 Mo. 645; *State ex rel. Harris v. Herrmann*, 75 Mo. 340.

Very few statutes apply equally to every person in the state.

Adler v. Whitbeck, 44 Ohio St. 539, 9 N. E. 672; *Senior v. Ratterman*, 44 Ohio St. 661, 11 N. E. 321; *State v. Portsmouth & C. Turnp. R. Co.* 37 Ohio St. 481; *Re New York Elev. R. Co.* 70 N. Y. 327; *Sandford v. Poe*, 60 L. R. A. 641, 16 C. C. A. 305, 37 U. S. App. 378, 69 Fed. 546; *Leep v. St. Louis, I. M. & S. R. Co.* 58 Ark. 407, 23 L. R. A. 264, 41 Am. St. Rep. 109, 25 S. W. 75; *Union P. R. Co. v. Porter*, 38 Neb. 226, 56 N. W. 808; *Gulf, C. & S. F. R. Co. v. McCown* (Tex. Civ. App.) 25 S. W. 435; *Jacksonville, T. & K. W. R. Co. v. Prior*, 34 Fla. 271, 15 So. 760; *Missouri P. R. Co. v. Humes*, 115 U. S. 512, 29 L. ed. 463, 6 Sup. Ct. Rep. 110.

The hazardous character of the business of operating a railway would seem to call for special legislation with respect to railroad corporations, having for its object the protection of their employees as well as the safety of the public.

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Missouri P. R. Co. v. Mackey, 33 Kan. 298, 6 Pac. 291, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161.

The legislature is well justified in segregating railroad employees into a separate class for legislation, for the reason that they are subject to hazards and dangers peculiarly incident to their employment (which is of a public nature); and, by reason thereof, in the interest of their welfare and safety, is the duty of the legislature to pass proper laws for their protection.

Hoben v. Burlington & M. River R. Co. 20 Iowa, 562; *Deppe v. Chicago, R. I. & P. R. Co.* 36 Iowa, 52; *Frandsen v. Chicago, R. I. & P. R. Co.* 36 Iowa, 372; *Schroeder v. Chicago, R. I. & P. R. Co.* 41 Iowa, 344; *McKnight v. Iowa & M. R. Constr. Co.* 43 Iowa, 406; *Lombard v. Chicago, R. I. & P. R. Co.* 47 Iowa, 494; *Moore v. Central R. Co.* 47 Iowa, 688; *Smith v. Humeston & S. R. Co.* 78 Iowa, 583, 43 N. W. 545; *Missouri P. R. Co. v. Haley*, 25 Kan. 35; *Union P. R. Co. v. Harris*, 33 Kan. 416, 6 Pac. 571; *Union Trust Co. v. Thomason*, 25 Kan. 1; *Austin Rapid Transit R. Co. v. Groethe* (Tex. Civ. App.) 31 S. W. 197; *Lavallee v. St. Paul, M. & M. R. Co.* 40 Minn. 249, 41 N. W. 974; *Johnson v. St. Paul & D. R. Co.* 43 Minn. 222, 8 L. R. A. 419, 45 N. W. 156; *Smith v. St. Paul & D. R. Co.* 44 Minn. 17, 46 N. W. 149; *Steffenson v. Chicago, M. & St. P. R. Co.* 45 Minn. 355, 11 L. R. A. 271, 47 N. W. 1068.

The admissibility in evidence of any declarations or statements made and relating to any act or accident occurring, or to any injury done, is determined by the character of the declarations made, and by certain limitations of time.

Any fact or circumstance growing out of and substantially concurrent with the accident and injury, tending to show negligence, and to fix the liability on the party responsible therefor; and every subsequent fact and circumstance showing and establishing the extent of the injury,—are admissible.

Hermes v. Chicago & N. W. R. Co. 80 Wis. 590, 27 Am. St. Rep. 69, 50 N. W. 584; *Hanover R. Co. v. Coyle*, 55 Pa. 396.

Any declarations of the injured party, or of the master or his employee, made at the time and place, as to the circumstances and causes incident and contributing to the accident and wrong done, are admissible.

Travellers' Ins. Co. v. Mosley, 3 Wall. 397, 19 L. ed. 437; *Hermes v. Chicago & N. W. R. Co.* 80 Wis. 590, 27 Am. St. Rep. 69, 50 N. W. 584; *Keyser v. Chicago & G. T. R. Co.* 66 Mich. 390, 33 N. W. 867; *O'Connor v. Chicago, M. & St. P. R. Co.* 27 Minn. 166, 38 Am. Rep. 288, 6 N. W. 481;

Ward v. White, 86 Va. 212, 19 Am. St. Rep. 883, 9 S. E. 1021; *Northern P. R. Co. v. Umlin*, 158 U. S. 271, 39 L. ed. 977, 15 Sup. Ct. Rep. 840; *North American Acci. Asso. v. Woodson*, 12 C. C. A. 392, 24 U. S. App. 364, 64 Fed. 691; *State v. Mathews*, 98 Mo. 125, 10 S. W. 144, 11 S. W. 1135; *Lewis v. State*, 29 Tex. App. 201, 25 Am. St. Rep. 720, 15 S. W. 642; *State v. Molisee*, 38 La. Ann. 381, 58 Am. Rep. 181; *Anderson v. New York & T. S. S. Co.* 47 Fed. 38; *International & G. N. R. Co. v. Anderson*, 82 Tex. 516, 27 Am. St. Rep. 902, 17 S. W. 1039.

Such declarations may be separated from the causal act by a short lapse of time when there are connecting circumstances.

Travellers' Ins. Co. v. Mosley, 8 Wall. 397, 19 L. ed. 437; *Harriman v. Stowe*, 57 Mo. 93.

There is no absolute, ironclad, or invariable rule of limitation of time when such declarations are, or are not, admissible.

Rawson v. Haigh, 2 Bing. 99; *Ward v. White*, 86 Va. 212, 19 Am. St. Rep. 883, 9 S. E. 1021; *Wharton*, Neg. § 258; *North American Acci. Asso. v. Woodson*, 12 C. C. A. 392, 24 U. S. App. 364, 64 Fed. 691; *Hill v. Com.* 2 Gratt. 605; *Quincy Horse R. & Carrying Co. v. Gnuse*, 137 Ill. 264, 27 N. E. 190; *Hanover R. Co. v. Coyle*, 55 Pa. 402; *Koetter v. Manhattan Elev. R. Co.* 36 N. Y. S. R. 611, 13 N. Y. Supp. 458, Affirmed in 129 N. Y. 668, 30 N. E. 65; *Hooker v. Chicago, M. & St. P. R. Co.* 76 Wis. 542, 44 N. W. 1085; *Brownell v. Pacific R. Co.* 47 Mo. 239; *Keyser v. Chicago & G. T. R. Co.* 66 Mich. 390, 33 N. W. 867; *Omaha & R. Valley R. Co. v. Chollette*, 41 Neb. 578, 59 N. W. 921; *Elledge v. National City & O. R. Co.* 100 Cal. 282, 38 Am. St. Rep. 290, 34 Pac. 720; *Linderberg v. Crescent Min. Co.* 9 Utah, 163, 33 Pac. 692; *Wabash Western R. Co. v. Brown*, 13 C. C. A. 222, 31 U. S. App. 192, 65 Fed. 941; *State v. Molisee*, 38 La. Ann. 381, 58 Am. Rep. 181; *East St. Louis Connecting R. Co. v. Allen*, 54 Ill. App. 27; *Louisville & N. R. Co. v. Foley*, 94 Ky. 220, 21 S. W. 866; *Shafer v. Lacock*, 168 Pa. 497, 29 L. R. A. 254, 32 Atl. 44; *McLeod v. Ginther*, 80 Ky. 399; *Baltimore & O. R. Co. v. State*, 81 Md. 371, 32 Atl. 201; *Louisville, N. A. & C. R. Co. v. Buck*, 116 Ind. 566, 2 L. R. A. 520, 9 Am. St. Rep. 883, 19 N. E. 453; *Augusta Factory v. Barnes*, 72 Ga. 217, 53 Am. Rep. 838; *People v. Simpson*, 48 Mich. 474, 12 N. W. 662; *Keyser v. Chicago & G. T. R. Co.* 66 Mich. 390, 33 N. W. 867; *Little Rock, M. R. & T. R. Co. v. Leverett*, 48 Ark. 333, 3 Am. St. Rep. 230, 3 S. W. 50; *Kirby v. Com.* 77 Va. 681, 46 Am. Rep. 747; *Durkee v. Central P. R. Co.* 69 Cal. 533, 58 Am. Rep. 562, 11 Pac. 130; *Elkins v. McKean*, 79 Pa. 60 L. R. A.

501; *Entwhistle v. Feighner*, 60 Mo. 215; *McLeod v. Ginther*, 80 Ky. 399; *Cleveland, C. & C. R. Co. v. Mara*, 26 Ohio St. 185; *Union Cent. L. Ins. Co. v. Cheever*, 36 Ohio St. 201, 38 Am. Rep. 573.

Five thousand five hundred dollars is not excessive for loss of a hand.

Murtaugh v. New York C. & H. R. R. Co. 49 Hun, 456, 3 N. Y. Supp. 483; *Chicago & A. R. Co. v. Wilson*, 63 Ill. 167; *Western & A. R. Co. v. Young*, 81 Ga. 397, 12 Am. St. Rep. 320, 7 S. E. 912; *Silberstein v. Houston, W. Street & P. Ferry R. Co.* 4 N. Y. Supp. 843; *Dougherty v. Missouri R. Co.* 97 Mo. 647, 8 S. W. 900, 11 S. W. 251; *Newport News & M. Valley R. Co. v. Campbell*, 15 Ky. L. Rep. 714, 25 S. W. 267.

Harlan, Circuit Justice, delivered the opinion of the court:

This action was brought by Edward Van Dusen against R. B. F. Peirce, as the receiver of the Toledo, St. Louis, & Kansas City Railroad Company, a corporation organized under the laws of the state of Ohio.

The order appointing Peirce as receiver was made by the court below in the suit of *Continental Trust Co. v. Toledo, St. L. & K. C. R. Co.* 72 Fed. 92. It directed the receiver to operate the railroad, and do all things necessary to carry on the business of the company. He was so engaged on the 26th day of February, 1895, when Edward Van Dusen, the plaintiff, a yard brakeman, in the employ of the receiver, was so seriously and permanently injured while in the discharge of his duties—being himself without fault—that he lost entirely the use of his right hand. These injuries, it is alleged, were caused solely through the carelessness and negligence of one Hugh Bartley, a conductor employed by the receiver, and under whose control and direction the plaintiff was placed at the time of his being injured.

The defendant denied the allegations imputing negligence to him, and denied that the plaintiff was without fault.

A verdict was returned in favor of the plaintiff for \$5,500 in damages. A motion for a new trial having been made and overruled, judgment was entered upon the verdict.

The principal question before us is whether the statute of Ohio passed April 2, 1890 (87 Ohio Laws p. 149), entitled "An Act for the Protection and Relief of Railroad Employees; Forbidding Certain Rules, Regulations, Contracts, and Agreements, and Declaring Them Unlawful; Declaring It Unlawful to Use Cars or Locomotives Which Are Defective, or Defective Machinery or Attachments thereto Belonging; and Declaring Such Corporation Liable, in Certain

Cases, for Injuries Received by Its Servants and Employees on Account of the Carelessness or Negligence of a Fellow Servant or Employee,"—is applicable to cases against the receiver of a railroad corporation, especially one acting under the orders of a Federal court.

The 1st section of the act provides that "it shall be unlawful for any railroad or railway corporation or company owning and operating, or operating, or that may hereafter own or operate, a railroad in whole or in part in this state, to adopt or promulgate any rule or regulation for the government of its servants or employees, or make or enter into any contract or agreement with any person engaged in, or about to engage in, its service, in which, or by the terms of which, such employee in any manner, directly or indirectly, promises or agrees to hold such corporation or company harmless, on account of any injury he may receive by reason of any accident to, breakage, defect, or insufficiency in, the cars or machinery and attachments thereto belonging, upon any cars so owned and operated, or being run and operated by such corporation or company, being defective, and any such rule, regulation, contract, or agreement shall be of no effect. It shall be unlawful for any corporation to compel or require, directly or indirectly, an employee to join any company association whatsoever, or to withhold any part of an employee's wages or his salary for the payment of dues or assessments in any society or organization whatsoever, or demand or require either as a condition precedent to securing employment or being employed; and said railroad or railway company shall not discharge any employee because he refuses or neglects to become a member of any society or organization. And if any employee is discharged he may, at any time within ten days after receiving a notice of his discharge, demand the reason of said discharge; and said railway or railroad company shall thereupon furnish said reason to said discharged employee in writing. And no railroad company, insurance society or association, or other person, shall demand, accept, require, or enter into any contract, agreement, or stipulation with any person about to enter or in the employ of any railroad company whereby such person stipulates or agrees to surrender or waive any right to damages against any railroad company thereafter arising for personal injury or death, or whereby he agrees to surrender or waive in case he asserts the same any other right whatsoever; and all such stipulation and agreements shall be void, and every corporation, association, or person violating, or aiding or abetting in the violation of, this 69 L. R. A.

section shall for each offense forfeit and pay to the person wronged or deprived of his rights hereunder the sum of not less than fifty dollars (\$50) nor more than five hundred dollars (\$500), to be recovered in a civil action."

By the 2d section it is made "unlawful for any such corporation to knowingly or negligently use or operate any car or locomotive that is defective, or any car or locomotive upon which the machinery or attachments thereto belonging are in any manner defective. If the employee of any such corporation shall receive any injury by reason of any defect in any car or locomotive, or in the machinery or attachments thereto belonging, owned, and operated, or being run and operated, by such corporation, such corporation shall be deemed to have had knowledge of such defect before and at the time such injury is so sustained; and when the fact of such defect shall be made to appear at the trial of any action in the courts of this state, brought by such employee, or his legal representatives, against any railroad corporation for damages, on account of such injuries so received, the same shall be prima facie evidence of negligence on the part of such corporation."

The 3d section, which is the one whose scope and meaning is involved in this action, provides that "in all actions against the railroad company for personal injury to, or death resulting from personal injury of, any person, while in the employ of such company, arising from the negligence of such company or any of its officers or employees, it shall be held, in addition to the liability now existing by law, that every person in the employ of such company actually having power or authority to direct or control any other employee of such company, is not the fellow servant, but superior, of such other employee; also that every person in the employ of such company having charge or control of employees in any separate branch or department shall be held to be the superior, and not fellow servant, of employees in any other branch or department who have no power to direct or control in the branch or department in which they are employed."

At the trial below it was contended on behalf of the plaintiff that the conductor and switchmen or yard brakemen, even when engaged together, at the same time and place, in operating the same train of cars, were not to be deemed fellow servants within the rule exempting an employer from liability to one servant for an injury caused by the negligence of a fellow servant. The circuit court, held by Judge Hammond, without deciding this question as one of general law,

held that the case was governed by the 3d section of the above act of April 2, 1890, and, consequently, that Bartley, the conductor, having power to direct and control the work in which Van Dusen was engaged, was the superior, not the fellow servant, of Van Dusen, and was, therefore, the representative of the receiver.

The contention of the receiver is that that act by its terms applies only to corporations owning or operating railroads in whole or in part in Ohio by their own officers; and that it cannot properly be construed as applying to receivers operating railroads under the orders of a court of chancery. There are adjudged cases arising under statutes similar to the Ohio statute which seem to sustain this contention of the receiver. *Henderson v. Walker*, 55 Ga. 481; *Campbell v. Cook*, 86 Tex. 630, 634, 40 Am. St. Rep. 878, 26 S. W. 486.

If the reasoning of the Georgia and Texas courts be applied to the Ohio statute, it cannot be held to embrace employees acting under the receiver of a railroad corporation. But, in our judgment, the statute is applicable to actions against receivers of railroad corporations. To hold otherwise would be to subordinate the reason of the law altogether to its letter. While the intention of the legislature must be ascertained from the words used to express it, the manifest reason and the obvious purpose of the law should not be sacrificed to a literal interpretation of such words. If the Ohio statute is construed as applicable only to actions for personal injuries brought directly against railroad corporations, the result would be that in an action brought in one of the courts of Ohio the employees of a railroad corporation would be accorded rights that would be denied in another action of like kind, perhaps in the same court, to employees of the receiver of a railroad corporation under exactly similar circumstances. Could such a result have been contemplated by the legislature of Ohio? We think not. The avowed object of the statute was the protection and relief of railroad employees. To that end, it declared that in the actions mentioned in it every person employed by the railroad company, and invested with power or authority to direct or control other employees, should be deemed the superior, not the fellow servant, of those under his direction and control. The legal effect, as well as the object, of this declaration was, in the cases specified, to make the negligence of the superior the negligence of the company. No violence is done to the ordinary meaning of the words of the statute if it be held that the legislature had in mind actions against receivers of railroad corpo-

rations, as well as actions directly against such corporations. The appointment of a receiver of a railroad does not change the title to the property, or work a dissolution of the corporation. Although the creature of the court, and acting under its orders, the receiver, for most purposes, stands in the place of the corporation, exercising its general powers, asserting its rights, controlling its property, carrying out the objects for which it was created, discharging the public duties resting upon it, and representing the interests as well of those who own the railroad as of those who have claims against the corporation or its property. The corporation remains in existence notwithstanding a provisional receivership established by an order of court; and for the purpose of effectuating the will of the state, as manifested by the act of 1890, an action against the receiver arising out of his management of the property may be regarded as one against the corporation "in the hands of," or "in the possession of," the receiver. *McNulta v. Lochridge*, 141 U. S. 327, 331, 35 L. ed. 796, 799, 12 Sup. Ct. Rep. 11.

In *Central Trust Co. v. Wabash, St. L. & P. R. Co.* (1886) 26 Fed. 12, it was held that the statute of Missouri giving double damages against "every railroad corporation" which did not erect and maintain fences, openings, gates, farm crossings, and cattle guards on the line of its road (the validity of which act was sustained in *Missouri P. R. Co. v. Humes*, 115 U. S. 512, 29 L. ed. 463, 6 Sup. Ct. Rep. 110,) was applicable to a railroad in the hands of a receiver. To the same effect was *Hornsby v. Eddy*, 5 C. C. A. 560, 572, 12 U. S. App. 404, 56 Fed. 461, where the question was as to the applicability to Federal receivers of a railroad of a statute of Kansas providing that "every railroad company" organized or doing business in that state "shall be liable for all damages done to any employee of such company, in consequence of any negligence of its agents, or by any mismanagement of its engineers or other employees, to any person sustaining such damage." In that case, the circuit court of appeals for the eighth circuit well said: "It is clear that, with respect to persons employed by a railway company as railway operatives, the statute last above quoted changes the rule of the common law that the master is not liable to a servant for an injury sustained in consequence of the negligence of a fellow servant. Does the fact that a receiver is appointed to temporarily operate a railroad forthwith alter the status of all of its employees, and re-establish as to them the rule of the common law, so long as the receiver remains in charge? Viewing the question in

the light of those considerations of public policy which probably gave birth to the statute, we cannot conceive of any reason why the appointment of a receiver should have such effect. It is a fact of which we may well take judicial notice that great railway systems, which employ thousands of men, are frequently operated for a term of years through the agency of a receiver. Such receivers do not, as a general rule, change the working force of the road, or the rules and regulations by which trains are run, or by which the other business of the road is transacted. The men whom they employ are engaged in the same quasi-public service as other railway employees, and daily encounter the same risks and hazards. Furthermore the receiver of a railroad operates it for the immediate benefit of the company by which it is owned, in that he discharges all of the public duties of the corporation, and appropriates the income of its road to the preservation of its property and franchises, and to the payment of its debts."

So much as to the scope and true meaning of the Ohio statute, without reference to the courts in which it may be enforced. If the statute means what we hold it to mean, must not full effect be given to it in actions for personal injuries brought against a receiver in a court of the United States? This question must be answered in the affirmative. Such legislation is not liable to the objection that it encroaches upon Federal authority, or upon the jurisdiction or power of the United States court. The statute does nothing more than to prescribe a rule of action to be observed by all within the state. The authority to enact it is derived from the general power of the state to regulate the exercise of the relative rights and duties, and to provide for the safety, of all persons within its territorial jurisdiction. It is the duty of the Federal court sitting in this state to enforce all enactments having such objects in view, unless they encroach upon the powers and authority of the United States. That duty arises out of the statute declaring that "the laws of the several states, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply." Rev. Stat. § 721, U. S. Comp. Stat. 1901, p. 581; *Baltimore & O. R. Co. v. Camp*, 13 C. C. A. 233, 31 U. S. App. 213, 65 Fed. 952. Indeed, if Congress had not so declared, this court, upon principles of comity, and in support of the public policy of the state, might well recognize and enforce, in actions brought against receivers of railroads, any

rule established by the state for like actions brought against railroad companies.

The Ohio statute is not applicable alone to railroad corporations of Ohio engaged in the domestic commerce of this state, It is equally applicable to railroad corporations doing business in Ohio and engaged in commerce among the states although the statute, in its operation, may affect in some degree a subject over which Congress can exert full power. The states may do many things affecting commerce with foreign nations and among the several states until Congress covers the subject by national legislation. This principle is illustrated in many cases; as in *Cooley v. Port Wardens*, 12 How. 299, 320, 13 L. ed. 996, 1005, where the pilot laws of Pennsylvania were sustained, and were held to have been enacted by virtue of the power residing in the state to legislate, Congress not having abrogated them or established regulations inconsistent with them; as in *Sherlock v. Alling*, 93 U. S. 99, 104, 23 L. ed. 819, 820, where the court held that a statute of Indiana, giving a right of action to the personal representatives of a deceased when his death was caused by the wrongful act or omission of another, was applicable to the case of death resulting from collisions between vessels engaged in interstate commerce; and in which case it was said, generally, "that the legislation of a state, not directed against commerce or any of its regulations, but relating to the rights, duties, and liabilities of citizens, and only indirectly and remotely affecting the operations of commerce, is of obligatory force upon citizens within its territorial jurisdiction, whether on land or water, or engaged in commerce, foreign or interstate, or in any other pursuit;" as in *Morgan's L. & T. R. & S. S. Co. v. Board of Health*, 118 U. S. 455, 463, 30 L. ed. 237, 241, 6 Sup. Ct. Rep. 1114, where a quarantine statute of Louisiana, directly affecting commerce among the states and with foreign nations, was held not to be void as a regulation of commerce, but was valid under the power of the state to protect the public health, and was to be respected until the system of quarantine established by it was abrogated or displaced by Congress; as in *Smith v. Alabama*, 124 U. S. 465, 31 L. ed. 508, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564, where a statute of Alabama was upheld that required all locomotive engineers in that state, whether they served on trains engaged in domestic commerce, or only on trains engaged in interstate commerce, to be examined and licensed by a state board before acting as engineers within that state; and as in *Nashville, O. & St. L. R. Co. v. Alabama*, 128 U. S. 96, 100, 32 L. ed. 352, 354, 2 Inters. Com. Rep.

238, 9 Sup. Ct. Rep. 28, in which the court held to be constitutional a state enactment requiring all locomotive engineers to be examined by a state board for color blindness, and in which case it was said that "wherever there is any business in which, either from the products created or the instrumentalities used, there is danger to life or property, it is not only within the power of the states, but it is among their plain duties, to make provision against accidents likely to follow in such business, so that the dangers attending it may be guarded against so far as is practicable;" and which local enactments were to be deemed valid until Congress took action on the subject. In *Western U. Teleg. Co. v. James*, 162 U. S. 650, 662, 40 L. ed. 1105, 1109, 16 Sup. Ct. Rep. 934, the Supreme Court of the United States held a statute of Georgia requiring every telegraph company with a line of wires wholly or partly within that state to receive despatches, and, on payment of the usual charges, to transmit and deliver them with due diligence, under a named penalty, to be a valid exercise of the police power of the state in relation to interstate messages. The court said: "While it is vitally important that commerce between the states should be unembarrassed by vexatious state regulations regarding it, yet, on the other hand, there are many occasions where the police power of the state can be properly exercised to insure a faithful and prompt performance of duty within the limits of the state upon the part of those who are engaged in interstate commerce. We think the statute in question is one of that class, and, in the absence of any legislation by Congress, the statute is a valid exercise of the power of the state over the subject."

In *Hennington v. Georgia*, 163 U. S. 299, 317, 41 L. ed. 166, 173, 16 Sup. Ct. Rep. 1086, in which a statute of Georgia forbidding the running of freight trains in that state on the Sabbath day was assailed as unconstitutional when applied to interstate commerce, the Supreme Court of the United States, upon a review of the adjudged cases, held it to be clear that "the legislative enactments of the states, passed under their admitted police powers, and having a real relation to the domestic peace, order, health, and safety of their people; but which, by their necessary operation, affect to some extent, or for a limited time, the conduct of commerce among the states,—are yet not invalid by force alone of the grant of power to Congress to regulate such commerce; and, if not obnoxious to some other constitutional provision, or destructive of some right secured by the fundamental law, are to be respected in the courts of the Union until they are superseded and displaced by some

act of Congress passed in execution of the power granted to it by the Constitution."

Undoubtedly, the whole subject of the liability of interstate railroad companies for the negligence of those in their service may be covered by national legislation enacted by Congress under its power to regulate commerce among the states. But, as Congress has not dealt with that subject, it was competent for Ohio to declare that an employee of any railroad corporation doing business here, including those engaged in commerce among the states, shall be deemed, in respect to his acts within this state, the superior, not the fellow servant, of other employees placed under his control. If the effect of the Ohio statute be, as undoubtedly it is, to impose upon such corporations, in particular circumstances, a liability for injuries received by some of its employees which would not otherwise rest upon them according to the principles of general law, that fact does not release the Federal court from its obligation to enforce the enactments of the state. Of the validity of such state legislation we entertain no doubt. In *Missouri P. R. Co. v. Mackey*, 127 U. S. 205, 208, 210, 32 L. ed. 107-109, 8 Sup. Ct. Rep. 1161, the Supreme Court had occasion to consider several objections to a law of Kansas making railroad companies liable for injuries suffered by employees through the negligence of their fellow servants. Replying to the objection that such legislation denies the equal protection of the laws to railroad companies, in that it did not apply alike to all corporations, the court said: "But the hazardous character of the business of operating a railway would seem to call for special legislation with respect to railroad corporations, having for its object the protection of their employees as well as the safety of the public. The business of other corporations is not subject to similiar dangers to their employees, and no objections, therefore, can be made to the legislation on the ground of its making an unjust discrimination."

There is another view of this matter, equally conclusive. By act Cong. March 3, 1887, chap. 373 (24 Stat. at L. 554), as amended by act August 13, 1888, chap. 866 (25 Stat. at L. 433, U. S. Comp. Stat. 1901, p. 582), it is provided:

"Sec. 2. That whenever in any cause pending in any court of the United States there shall be a receiver or manager in possession of any property, such receiver or manager shall manage and operate such property according to the requirements of the valid laws of the state in which such property shall be situated in the same manner the owner or possessor thereof would be bound to do if in possession thereof. Any receiver or manager

who shall wilfully violate the provisions of this section shall be deemed guilty of a misdemeanor, and shall, on conviction thereof, be punished by a fine not exceeding \$3,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

"Sec. 3. That every receiver or manager of any property appointed by any court of the United States may be sued in respect of any act or transaction of his in carrying on the business connected with such property, without the previous leave of the court in which such receiver or manager was appointed; but such suit shall be subject to the general equity jurisdiction of the court in which such receiver or manager was appointed, so far as the same shall be necessary to the ends of justice."

It would seem to be clear that, under this act of Congress, if a railroad in the possession of a Federal receiver is to be managed and operated according to the requirements of the laws of the state in which the property is situated, "in the same manner that the owner or possessor thereof would be bound to do if in possession thereof," such management and operation must be subject to any rule prescribed by the state imposing upon railroad corporations liability for the negligence of employees having superior authority over other employees.

This we understand to be the effect of the decision in *Eddy v. Lafayette*, 163 U. S. 456, 464, 41 L. ed. 225, 228, 16 Sup. Ct. Rep. 1082, in which the question arose whether the local statutes regulating the service of process against a railway corporation were applicable to actions against the receivers of such corporations. The trial court and the circuit court of appeals were of opinion that the 3d section of the judiciary act of March 3, 1887, chap. 373, § 2 (24 Stat. at. L. 552, 554, U. S. Comp. Stat. 1901, p. 582), authorizing suits to be brought against receivers of railroads without special leave of the court by which they were appointed, was intended to place receivers "upon the same plane with railroad companies," both as respects their liability to be sued for acts done while operating a railroad, and as respects the mode of service of process. [4 U. S. App: 247, 251.] This court said: "We concur in that view, and in the conclusion reached, that the service in the present case, on an agent of the receivers, was sufficient to bring them into court in a suit arising within the Indian territory."

But it is contended that the Ohio statute is repugnant to the provision of the Constitution of Ohio declaring that "all laws of a general nature shall have a uniform operation throughout the state." Art. 2. § 26. The argument made in support of 69 L. R. A.

this view by the learned counsel for the receiver may be thus summarized: That the act imposes a liability for damages for the negligence of fellow servants only as against a railroad company operating a railroad within Ohio; that it confers a right of action only upon employees of such railroad companies; that no other employer is subject to the liability, and no other employee is given the right; that the act selects from the general class of employers railroad companies operating railroads, and imposes upon them a special burden; that the act is special class legislation, not uniform throughout the state, and applies to no person or company engaged in any other occupation employing servants, although the occupation be equally hazardous. Consequently, the act is special in its operation and effect, is confined to particular corporations engaged in a specific business, does not cover the whole subject of the relations of master and servant, and is not, therefore, of a general nature, and of uniform operation throughout the state, within the meaning of the Constitution of Ohio.

In support of these views, counsel have referred to *Shaver v. Pennsylvania Co.* 71 Fed. 931, which was an action to recover damages for personal injuries alleged to have resulted from the negligence of a railroad corporation and its agents. The defense was that the plaintiff, by becoming a member of an organization known as the "Voluntary Relief Department of the Pennsylvania Lines West of Pittsburgh," and accepting the benefits of said association, had agreed that the railroad company should be discharged from any and all liability to him on account of such injuries. The plaintiff demurred to the answer upon the ground that the agreement referred to was invalid under the above statute of Ohio of 1890, which, as we have seen, provides in its 1st section that "no railroad company, insurance society, or association, or other person, shall demand, accept, require, or enter into any contract, agreement, stipulation, with any other person about to enter, or in the employ of any railroad company, whereby such person stipulates or agrees to surrender or waive any right to damages against any railroad company, thereafter arising for personal injury or death, or whereby he agrees to surrender or waive, in case he asserts the same, any other right whatsoever; and all such stipulations or agreements shall be void." etc.

Judge Ricks held that the contract relied on by the railroad company was valid, and that the statute of Ohio declaring it to be void was unconstitutional. "The Ohio statute," he said, "in denying to the employees of a railroad corporation the right

to make their own contracts concerning their own labor, is depriving them of 'liberty,' and of the right to exercise the privileges of manhood, 'without due process of law.' Being directed solely to employees of railroads, it is class legislation of the most vicious character. Laws must be not only uniform in their application throughout the territory over which the legislative jurisdiction extends, but they must apply to all classes of citizens alike. There cannot be one law for railroad employees, another law for employees in factories, and another law for employees on a farm or the highways. Class legislation is dangerous. Statutes intended to favor one class often become oppressive, tyrannical, and proscriptive to other classes never intended to be affected thereby; so that the framers of our Constitution, learning from experience, wisely provided that the laws should be general in their nature and uniform throughout the state." The court, elsewhere in its opinion, when considering the scope of the constitutional provision that all laws of a general nature shall have uniform operation throughout the state, said: "The act under consideration, while it is general in its nature, applies only to railroad companies and their employees, and is not, therefore, general in its application, and does not operate uniformly on all classes of citizens. Under this statute, railroad companies are prohibited from making contracts which other corporations in the state are allowed to make. . . . The act under consideration is certainly one which impairs the rights of a large number of the citizens of Ohio to exercise a privilege which is dear to all persons, namely, that of making contracts concerning their own labor and the fruits thereof, and, so far as it relates to such contracts already made, impairs their validity. The act seems to assume that a large class of the citizens of the state, namely, those employed by railroad corporations, are incapable of making contracts for their own labor."

It may be proper here to observe that in a case recently determined by the supreme court of Ohio a contract such as the one involved in *Shaver's Case* was held not to be interdicted by the above act of April 2, 1890 (87 Ohio Laws, 149), and not to be contrary to public policy. *Pittsburg, C. C. & St. L. R. Co. v. Cox*, 55 Ohio St. 497, 35 L. R. A. 507, 45 N. E. 641.

It is quite clear from an examination of Judge Ricks's opinion that he intended to decide nothing more—indeed, the case, under his view of the statute, required nothing more to be decided—than that the part of the act of 1890 relating to contracts or agreements, whereby a right to damages against

a railroad company, arising from personal injury or death, was surrendered or waived when the employee became a member of the relief association referred to, was unconstitutional, as depriving the employees of railroad corporations of their liberty without due process of law. He had no occasion, in the case before him, to consider the validity of the 3d section of that act. The 1st section might be held void, leaving the 3d section in full force. Even if the act of 1890 in the particulars involved in *Shaver's Case*, and for the reasons stated by Judge Ricks, were held to be unconstitutional,—upon which question it is unnecessary to express an opinion,—the statute, in respect of the matters mentioned in the 3d section, can be sustained as one of a general nature, and having uniform operation throughout the state.

This general question has been considered by the supreme court of Ohio. In *McGill v. State*, 34 Ohio St. 238, the court, referring to the constitutional provision requiring all laws of a general nature to have a uniform operation throughout the state, said: "A general law that land should not be sold upon execution for less than two thirds of its appraised value was excluded from operation in several counties by local enactment. There were different laws in different counties respecting the descent and distribution of intestate property. Some statutes defining legal offenses were excluded in their operation from a large part of the state; and different penalties for a violation of the same act were, in some instances, provided for different localities. These are examples of the legislation to prevent which in the future, and the mischief resulting from it, this provision of the Constitution was adopted. But no wider scope was claimed for it than to guard the future against the evils and inequalities resulting from legislation of the character complained of." See also *Lehman v. McBride*, 15 Ohio St. 573, 653; *Ex parte Falk*, 42 Ohio St. 638, 641; *Costello v. Wyoming*, 49 Ohio St. 202, 30 N. E. 613.

In *State v. Nelson*, 52 Ohio St. 88, 97, 26 L. R. A. 317, 39 N. E. 22, where the question was whether an act entitled "An Act Requiring Persons, Associations, and Corporations Owning or Operating Street Cars to Provide for the Well-being of the Employees"—the act, in its provisions, being made applicable only to electric street cars other than trail cars—was in conflict with the constitutional provision requiring all laws of a general nature to have a uniform operation throughout the state, the court said: "The act in question is clearly of a general nature, so that the only inquiry left is whether it is of uniform operation

throughout the state. And here, again, it is equally clear that the law is in operation throughout every part of the state, uniformly as to all classes therein named. Is this sufficient? Soon after the adoption of the Constitution it was said by this court that the scope and purpose of this section was to prevent laws of a general nature from being in force in some counties and not in others; and these early cases have been followed ever since." Again: "Of late years an effort has frequently been made to claim for this section of the Constitution a wider scope than to guard against the evils resulting from legislation of the character mentioned by Thurman, J., in *Cass v. Dillon*, 2 Ohio St. 607, Scott, J., in *Lehman v. McBride*, Boynton, J., in *McGill v. State*, and Okey, J., in *Ex parte Falk*; but such efforts have uniformly failed. The only statutes which have been declared in conflict with this section of the Constitution are statutes making different classes of different parts of the territory of the state, such as cities, villages, etc. This section of the Constitution requires that laws of a general nature shall have not only an operation, but a uniform operation, throughout the state; that is, the whole state, and not only in one or more counties. The operation must be uniform upon the subject-matter of the statute. It cannot operate upon the named subject-matter in one part of the state differently from what it operates upon it in other parts of the state. That is, the law must operate uniformly on the named subject-matter in every part of the state, and when it does that it complies with this section of the Constitution. That this is the scope and purpose of this section appears from its language, the debates of the constitutional convention, and the uniform construction placed thereon by this court in the cases above cited, and others hereinafter referred to. . . . In *Adler v. Whitbeck*, 44 Ohio St. 539, 9 N. E. 672, an effort was made to have the statute there under consideration declared unconstitutional because its classification included saloons and excluded distilleries and breweries; but the effort failed. A similar effort was made in *Senior v. Ratterman*, 44 Ohio St. 661, 11 N. E. 321, because wholesale dealers and manufacturers were not included within the same class; and the effort again failed. A similar effort was made in *State v. Portsmouth & O. Turnp. R. Co.* 37 Ohio St. 481, as to the classification of turnpikes; and the effort again failed. . . . The scope and force of this section of our Constitution being as herein indicated, it is clear that the statute in question is not in conflict therewith. The statute is in operation in every part of the state, and operates uni-

formly upon the classes of persons therein designated in every part of the state. The act is clearly authorized as a police regulation to protect the health and promote the comfort of those engaged in operating electric cars."

The question under consideration is somewhat like that presented in *Harwood v. Wentworth*, 162 U. S. 547, 563, 40 L. ed. 1069, 1074, 16 Sup. Ct. Rep. 890. There the question was whether an act of the legislature of Arizona fixing the compensation of county officers, and for that purpose classifying the counties of the state according to the assessed valuation of property in each county, was a local or special act. If so, it was void, as repugnant to an act of Congress declaring that the legislatures of the territories shall not pass local or special laws in certain cases. The practical effect of the act was to establish higher salaries for the particular officers named in some counties than for the same class of officers in other counties. "But," the Supreme Court said, "that does not make it a local or special law. The act is general in its operation; it applies to all counties in the territory; it prescribes a rule for the stated compensation of certain public officers; no officer of the classes named is exempted from its operation; and there is such a relation between the salaries fixed for each class of counties, and the equalized assessed valuation of property in them, respectively, as to show that the act is not local and special in any just sense, but is general in its application to the whole territory, and designed to establish a system for compensating county officers that is not intrinsically unjust, nor capable of being applied for purposes merely local or special."

We do not deem it necessary to pursue this subject further. We think it clear that the Ohio statute is not obnoxious to the constitutional provision requiring all laws of a general nature to have a uniform operation throughout the state. As it applies to all railroad corporations operating railroads within the state, it is, within the meaning of the state Constitution, general in its nature; and, as it applies to all of a given class of railroad employees, it operates uniformly throughout the state.

It is next contended by the plaintiff in error that, if Van Dusen was injured by the negligence of Bartley, the conductor, he is not entitled to recover, for the reason that the latter was not negligent in the performance of any duty imposed by law on the master personally, but only in respect to the performance of work pertaining to him and other employees in the same work. The principal authorities cited in support of this view are *Central R. Co. v. Keegan*, 160

U. S. 259, 40 L. ed. 418, 16 Sup. Ct. Rep. 269, and *Stockmeyer v. Reed*, 55 Fed. 259.

If this contention were sustained, the statute of Ohio would be deprived of all practical value, and the manifest object of the legislature in passing it would be defeated. The *Keegan* and *Stockmeyer Cases* enforced the general rule that a foreman or superintendent of a body of employees doing a particular service was a fellow servant of those under him; and, consequently, the common employer was not liable to one of them for the negligence of the other. The very object of the statute before us was to prevent the application of that rule in Ohio as between a railroad company and its employees. Hence it declared that every person in the employ of a railroad company, "having power or authority to direct or control any other employee of such company, is not the fellow servant, but the superior, of such other employee." If, by force of the statute, Bartley was not a fellow servant, but the superior, of Van Dusen, he did not become, within the meaning of the statute, a fellow servant simply because he did some work of the kind done by Van Dusen. The object of the statute was to make one to whom is committed by a railway company the authority to direct and control employees in the same service the representative, in respect of that service, of the common employer, so that his acts, within the scope of his employment, are the acts of the company, and his negligence its negligence.

That the evidence was such as to require the submission of the question of negligence to the jury is, in our judgment, too manifest to require discussion. Indeed, so far from there being no proof to support the allegation of negligence, the preponderance of evidence on that issue was with the plaintiff.

It is said that the damages found were excessive, and that the judgment below should, for that reason, be reversed. That was a question for the consideration of the trial court on a motion for a new trial. Upon a writ of error this court can deal only with questions of law. If there was a case of disputed facts upon which the plaintiff was entitled to go to the jury,—as undoubtedly there was,—it was for the jury to assess the damages; and, if the trial court did not disturb the verdict upon the ground that the damages were excessive, that was the end of the question of damages. As that court laid down no rule for the assessment of damages that was erroneous in law, this court is without power to revise the judgment in respect of the amount of damages. It is restricted in its consideration of the case to questions of law. *New York C. & H. R. R. Co. v. Fraloff*, 100 U. S. 24, 31, 25 L. ed. 531, 534.

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It is alleged that error was committed in permitting plaintiff, against the objection of the defendant, to prove what Bartley, the conductor, said just after the plaintiff was injured. The conductor and those under him were very near each other during the performance of the work committed to them. Van Dusen testified that his hand was caught and held fast while the car that mashed it backed up 5 or 10 feet. Getting his hand out as soon as the car backed, he came from between the cars, and walked towards the engine, holding his hand up. The engineer got off the engine, and, with Bartley, came towards Van Dusen. Being asked how long after the accident before Bartley met him, Van Dusen said: "It was not a minute,—that is, a minute after I got my hand out and walked towards the engine;" and that it may have been "six or seven car lengths" before he met Bartley. Being asked what Bartley said to him at that time, the question was objected to; but the court permitted him to answer, upon the ground that it came "within the rule of the *res gestæ*," and that "what was said by this plaintiff and what was said by the engineer or by the conductor in the very doing of this thing is a part of the thing itself." The plaintiff answered: "Well, I asked Mr. Bartley what in the world he was trying to do, coming back on me the second time without saying anything about making a second cut. He said: 'Ed, I am sorry. I was going to put this car on the elevator track. When I backed up, I did not see you. I did not know just where you was until I heard you holler.'"

We are of opinion that this evidence was properly admitted. Its exclusion was not required by the rule that "an act done by an agent cannot be varied, qualified, or explained, either by his declarations which amount to no more than a mere narrative of a past occurrence, or by an isolated conversation held, or an isolated act done, at a later period." *Northwestern Union Packet Co. v. Clough*, 20 Wall. 528, 540, 22 L. ed. 406, 408. The case is rather covered by the rule formulated by Greenleaf (1 Greenl. Ev. 14th ed. § 113), and sanctioned by the Supreme Court in *Vicksburg & M. R. Co. v. O'Brien*, 119 U. S. 99, 105, 30 L. ed. 299, 301, 7 Sup. Ct. Rep. 118, namely: "The party's own admission, whenever made, may be given in evidence against him; but the admission or declaration of his agent binds him only when it is made during the continuance of the agency in regard to a transaction then depending, *et dum ferret opus*. It is because it is a verbal act, and part of the *res gestæ*, that it is admissible at all, and therefore it is not necessary to call the agent to prove it; but wherever what he

did is admissible in evidence, there it is competent to prove what he said about the act while he was doing it."

Judge Hammond, in an opinion overruling the motion for a new trial, properly described the situation when he said that the conductor "almost immediately, and while the cars were moving, or had just stopped, and while the plaintiff was bleeding from the injury at that moment received, described his own part in bringing about the motion that effected the injury." The rule insisted upon for the exclusion of such declarations would, he said, "exclude everything from the *res gestæ* which did not occur on the very instant of the grinding of the flesh and bones by the colliding car." In *O'Brien's Case* the question was as to the admissibility of certain declarations of a railroad engineer as to the rate of speed at which his train was moving at the time of the accident. The court said: "Although the speed of the train was, in some degree, subject to his control, still his authority, in that respect, did not carry with it authority to make declarations or admissions at a subsequent time as to the manner in which, on any particular trip, or at any designated point in his route, he had performed his duty. His declaration, after the accident had become a completed fact, and when he was not performing the duties of engineer, that the train, at the moment the plaintiff was injured, was being run at the rate of 18 miles an hour, was not explanatory of anything in which he was then engaged. It did not accompany the act from which the injuries in question arose. It was, in its essence, the mere narration of a past occurrence, not a part of the *res gestæ*,— simply an assertion or representation, in the course of conversation, as to a matter not then pending, and in respect to which his authority as engineer had been fully exerted."

We recognize the difficulty of laying down a rule upon this subject that would apply in every case. But we do not doubt that, both upon principle and authority, the declarations of Bartley, tending to show that the

injury to Van Dusen was to be attributed to his (Bartley's) negligence, were admissible in evidence as part of the *res gestæ*.* These declarations cannot properly be characterized as hearsay, for they really accompanied the transaction out of which arose the injury. The principal matter was the doing of certain work under the supervision of one having authority to control those engaged in it. The statements of the conductor were made while the work was in progress, while the plaintiff was assisting him, and in presence of the fact necessary to be explained. They illustrated what had, up to the moment of such statements, been done by him in the prosecution of the work. What the conductor and Van Dusen set out together to do was not completed, and what the former said was almost simultaneous with the doing of the thing causing the injury. The infliction of the injury and his explanation of his conduct were so close together that they may be said to have occurred at the same time. His declarations, therefore, were not, in any proper sense, a mere narrative of past occurrences; but were part of the occasion out of which the plaintiff's cause of action arose. They served to disclose the nature and quality of the acts in question; and were made under circumstances precluding the possibility of premeditation, design, or deliberation on the part of the conductor. They were made on the spot where the injury occurred. To exclude them would be to make their admissibility in evidence depend wholly upon the matter of time, although the circumstances show such direct and immediate connection between the thing done and the declarations of the person having such thing in charge as to justify the court in characterizing the transaction as one continuous, uncompleted transaction, and such declarations to be part of it.

Having considered all the matters presented by the record which, in our judgment, require consideration, and perceiving no error of law in the record, the judgment is affirmed.

**Delaware, L. & W. R. Co. v. Ashley*, 14 C. C. A. 368, 28 U. S. App. 375, 67 Fed. 209; *Union Cent. L. Ins. Co. v. Cheever*, 38 Ohio St. 201, 207, 38 Am. Rep. 573; *Keyser v. Chicago & G. T. R. Co.* 68 Mich. 390, 33 N. W. 867; *Rockwell v. Taylor*, 41 Conn. 55, 59; *Waldele v. New York, C. & H. R. R. Co.* 95 N. Y. 274, 47 Am. Rep. 41; *Hanover R. Co. v. Coyle*, 55 Pa. 402; *Lund v. Tyngsborough*, 9 Cush. 36; *Quincy Horse R. & Carrying Co. v. Ghuse*, 137 Ill. 264, 27 N. E. 190; *Hermes v. Chicago & N. W. R. Co.* 80 Wis. 590, 27 Am. St. Rep. 69, 50 N. W. 584; *Hooker v. Chicago, M. & St. P. R. Co.* 76 Wis. 542, 44 69 L. R. A.

N. W. 1085; *Hill v. Com.* 2 Gratt. 594, 605; *Elledge v. National City & O. R. Co.* 100 Cal. 282, 38 Am. St. Rep. 290, 34 Pac. 720; *State v. Molisee*, 38 La. Ann. 381, 58 Am. Rep. 181; *McLeod v. Ginther*, 80 Ky. 399; *Louisville & N. R. Co. v. Foley*, 94 Ky. 220, 21 S. W. 866; *Shafer v. Laocock*, 168 Pa. 497, 32 Atl. 44; *Baltimore & O. R. Co. v. State*, 81 Md. 371, 32 Atl. 201; *Louisville, N. A. & C. R. Co. v. Buck*, 116 Ind. 508, 2 L. R. A. 520, 9 Am. St. Rep. 883, 19 N. E. 453; *Brounell v. Pacific R. Co.* 47 Mo. 289.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

W. W. WATSON, *Appt.*,

v.

J. J. MERRILL, Trustee, etc., of P. A. Brown, Bankrupt.

(136 Fed. 359.)

1. Rents which the bankrupt had agreed to pay at times subsequent to the filing of the petition in bankruptcy do not constitute a provable claim under the bankruptcy law of 1898, because they are not a "fixed liability . . . absolutely owing at the time of the filing of the petition against him," and because they do not constitute an existing demand; but both the existence and the amount of the possible future demand are contingent upon future events, such as default of lessee, re-entry of lessor, and assumption by trustee, so that they neither form the basis of an unliquidated, nor of a liquidated, provable claim. Act July 1, 1898, chap. 541, § 63, cls. a, b.
2. Damages for the breach of a contract of the bankrupt to pay rents at times subsequent to the filing of the petition in bankruptcy do not constitute a provable claim, for the same reason that the claim for the rents is not provable.
3. The retaking of the premises by the lessor releases the lessee from payment of all subsequently accruing rents, unless the contract expressly provides otherwise.
4. The trustee in bankruptcy has the option to assume or renounce the leases and other executory contracts of the bankrupt, as he may deem for the best interest of the estate.
5. An adjudication of bankruptcy absolves the bankrupt from no agreement, terminates no contract, and discharges no liability.
6. An adjudication of bankruptcy in a case in which there was no rent due at the time of the filing of the petition in bankruptcy does not constitute a breach at that time of the covenants of the bankrupt in his lease to pay rents accruing thereafter.

(March 18, 1905.)

A PPEAL by petitioner from a decree of the District Court of the United States for the District of Kansas reversing an order of the referee in bankruptcy allowing a claim for alleged breach of contract. *Affirmed.*

Statement by **Sanborn**, Circuit Judge:
This is an appeal from a decree of the

*Headnotes by **SANBORN**, Circuit Judge.

NOTE.—On the question whether claims for unaccrued rents are fixed liabilities which may be proved in bankruptcy proceedings, see also, in this series, *Atkins v. Wilcox*, 53 L. R. A. 118, and cases in note to *Cobb v. Overman*, 54 L. R. A. 374.
69 L. R. A.

district court, sitting in bankruptcy, which reversed an order of the referee, that the appellant, Watson, should be allowed a claim of \$1,437.50 for damages for the breach by P. A. Brown, by means of his adjudication as a bankrupt, of a lease which he had taken from the appellant. On May 1, 1902, Brown leased of Watson a store-room in a building about to be erected for a term of ten years from October 1, 1902, and agreed to pay a monthly rental of \$60 in advance during the term. He paid this rent to March 1, 1903. On February 6, 1903, a petition in bankruptcy was filed against him, and receivers were appointed, who took possession of his personal property in the rented premises. On April 2, 1903, he was adjudged a bankrupt, and a trustee was appointed. On March 2, 1903, Watson and Brown made a written contract which recited that it had become impossible for Brown to comply with the terms of his lease, and that he was obligated to his lessor thereby in the sum of \$6,900, and in which he acknowledged himself to be indebted to Watson in the sum of \$2,300, and surrendered to him all his rights and privileges under the lease; while Watson, by the same contract, released Brown from any further obligation to pay rent for the leased premises. Afterwards Watson filed his proof of claim for \$2,300 against the estate of Brown, which was founded on the lease and on the contract of March 2, 1903. He also filed a petition for the liquidation of this claim, in which he alleged that he had incurred extraordinary expense in the construction of the building in expectation of the rental, that the rental value of the premises was only \$40 per month, and that he had sustained damages to the amount of \$20 per month from March 1, 1902, until the end of the term of the lease, which amounted in the aggregate to \$2,300. The referee found the rental value of the premises to be \$47.50 per month, and allowed the claim of Watson for \$1,437.50 for damages for a breach of the lease. Upon a petition for a review, the district court reversed this decision, and directed the referee to disallow the claim.

Argued before **Sanborn** and **Van Devanter**, Circuit Judges, and **Philips**, District Judge.

Mr. David Ritchie, for appellant:

The institution of proceedings in bankruptcy dissolves all of the contractual relations of the bankrupt.

Re Jefferson, 2 Am. Bankr. Rep. 206, 93 Fed. 948; *Bray v. Cobb*, 3 Am. Bankr. Rep.

788, 100 Fed. 270; *Re Hays, F. & W. Co.* 117 Fed. 879.

Then it must create a breach of the contract, and, the adjudication relating back to the filing of the petition, the breach of the contract occurs simultaneously with the commencement of the bankrupt proceedings; and the cause of action arising for the breach of the contractual relationship between the bankrupt and the claimant also arises simultaneously with the institution of the bankruptcy proceedings.

Re Swift, 50 C. C. A. 234, 112 Fed. 315.

All damages may be recovered that may have accrued by reason of this breach of the contract now.

Rochm v. Horst, 178 U. S. 1, 44 L. ed. 953, 20 Sup. Ct. Rep. 780; *Re Stern*, 54 C. C. A. 60, 116 Fed. 604; *Re Frederick L. Grant Shoe Co.* 66 C. C. A. 78, 130 Fed. 881; *Schrandt v. Young*, 2 Herdman (Neb.) 546, 89 N. W. 607; *Rule v. McGregor*, 117 Iowa, 419, 90 N. W. 811.

Messrs. H. C. Tobey, W. S. McClintock, I. J. Ringolsky, and Thomas L. Bond, for appellee:

The adjudication in bankruptcy of the tenant did not terminate the contract of lease.

Re Ells, 2 N. B. N. Rep. 360, 98 Fed. 967; *Re Mitchell*, 8 Am. Bankr. Rep. 324, 116 Fed. 89; *Re Pennewell*, 55 C. C. A. 571, 9 Am. Bankr. Rep. 490, 119 Fed. 139; *Re Collignon*, 4 Am. Bankr. Rep. 250; *Re Curtis*, 109 La. Ann. 171, 9 Am. Bankr. Rep. 286, 94 Am. St. Rep. 445, 33 So. 125; *Witthaus v. Zimmerman*, 91 App. Div. 202, 11 Am. Bankr. Rep. 314, 86 N. Y. Supp. 315; *White v. Griffing*, 44 Conn. 437; 16 Am. & Eng. Enc. Law, 2d ed. p. 776; Beach, Modern Law of Contracts, § 407; *Re Webb*, 6 Nat. Bankr. Reg. 302, Fed. Cas. No. 17,315; *Re Mahler*, 3 N. B. N. Rep. 39, 105 Fed. 428.

The lessor, by his own act, terminated the lease, and not the adjudication in bankruptcy.

Re Arnstein, 101 Fed. 706; *Ex parte Houghton*, 1 Low. Dec. 554, Fed. Cas. No. 6,725.

Appellant's claim is one for future rent, and as such is not provable under the bankruptcy act.

Re Mahler, 3 N. B. N. Rep. 39, 105 Fed. 432; *Re Arnstein*, 101 Fed. 706; *Re Hevonor*, 144 N. Y. 271, 39 N. E. 393; *Deane v. Caldwell*, 127 Mass. 242; *Atkins v. Wilcox*, 53 L. R. A. 118, 44 C. C. A. 626, 3 N. B. N. Rep. 497, 105 Fed. 595; *Fidelity Safe Deposit & T. Co. v. Armstrong*, 35 Fed. 567; *Brown v. Schleier*, 55 C. C. A. 475, 118 Fed. 981; *Re Curtis*, 109 La. 171, 9 Am. Bankr. Rep. 286, 94 Am. St. Rep. 445, 33 So. 125.

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Sanborn, Circuit Judge, delivered the opinion of the court:

The contention of counsel for the appellant is that the claim of the lessor is not for rents which were payable after the petition for adjudication in bankruptcy was filed, but for damages for a breach of the contract in the lease to pay these rents; that the adjudication in bankruptcy dissolves all contractual relations of the bankrupt at the date of the filing of the petition in bankruptcy (*Re Jefferson*, 2 Am. Bankr. Rep. 206, 93 Fed. 948; *Bray v. Cobb*, 3 Am. Bankr. Rep. 788, 100 Fed. 270; *Re Hays, F. & W. Co.* 117 Fed. 879); that the dissolution of a contractual relation is a breach of the contract; and that, for the breach of the contract to pay the rents accruing subsequent to the filing of the petition, a claim for damages may be allowed in bankruptcy (*Re Swift*, 50 C. C. A. 234, 112 Fed. 315; *Re Stern*, 54 C. C. A. 60, 116 Fed. 604; *Re Frederick L. Grant Shoe Co.* 66 C. C. A. 78, 130 Fed. 881).

It is, however, the nature of the claim, and not the name which is applied to it, that conditions its provability in bankruptcy. Watson's claim was for \$20 of the \$60 per month which the lessee had agreed to pay him for rent of the leased premises for one hundred and fifteen months after the petition in bankruptcy was filed. In reality, his claim was for the entire \$60 per month, but he had received by the surrender to him of the premises by Brown under their contract of March 2, 1903, and had credited to him, the rental value of the premises, \$40 per month, so that the rent which he claimed remained unpaid was but \$20 for each month.

At the close of the hearing the referee found that the rental value of the premises was \$47.50 per month, and that the only rent remaining unpaid was \$12.50 per month for the one hundred and fifteen months subsequent to February, 1903, and this amounted to \$1,437.50, which he allowed to the appellant under the name of damages for the breach of the contract in the lease.

These facts demonstrate the proposition that, while counsel and the referee call this allowance damages for a breach of the lease, it is in fact nothing but that part of the monthly rent which was to accrue after the petition was filed, which the referee found that the lessee had not paid by his surrender of the leased premises to the lessor in March, 1903. But rent which the bankrupt has agreed to pay, and which is to accrue subsequent to the filing of the petition in bankruptcy, does not constitute a provable claim under the bankruptcy law of 1898 (Act July 1, 1898, chap. 541, 30 Stat.

at L. 562, 563, U. S. Comp. Stat. 1901, p. 3447), because it is not "a fixed liability . . . absolutely owing at the time of the filing of the petition against him" (§ 63a), and because it is not an existing demand, but both the existence and the amount of the possible future demand are contingent upon unforeseen events, such as default of the lessee, re-entry by the lessor, and assumption by the trustee, so that it is neither an unliquidated nor a liquidated provable claim (§ 63b). *Walla Walla v. Walla Walla Water Co.* 172 U. S. 1, 19, 43 L. ed. 341, 349, 19 Sup. Ct. Rep. 77; *Re Ellis*, 2 N. B. N. Rep. 360, 98 Fed. 967, 969, 970; *Re Mahler*, 3 N. B. N. Rep. 39, 105 Fed. 428, 430; *Fidelity Safe Deposit & T. Co. v. Armstrong*, 35 Fed. 567, 569; *Re Hevenor*, 144 N. Y. 271, 274, 39 N. E. 393; *Re Commercial Bulletin Co.* 2 Woods, 220, Fed. Cas. No. 3,060; *Re Collignon*, 4 Am. Bankr. Rep. 250; *Atkins v. Wilcox*, 53 L. R. A. 118, 44 C. C. A. 626, 3 N. B. N. Rep. 497, 105 Fed. 595; *Re Curtis*, 109 La. 171, 9 Am. Bankr. Rep. 286, 292, 295, 94 Am. St. Rep. 445, 33 So. 125; *Re Heinsfurter*, 97 Fed. 198; *Beers v. Hanlin*, 3 N. B. N. Rep. 749, 99 Fed. 695; *Lamson Consol. Store Service Co. v. Bowland*, 52 C. C. A. 335, 338, 114 Fed. 639, 642; *Wilson v. Pennsylvania Trust Co.* 52 C. C. A. 374, 114 Fed. 742.

In *Deane v. Caldwell*, 127 Mass. 242, 244, Chief Justice Gray (subsequently Mr. Justice Gray of the supreme court) announced the true rule upon this subject in these words: "Before the day at which rent is covenanted to be paid, it is in no sense a debt. It is neither *debitum* nor *solvendum*; for, if the lessee is evicted before that day, it never becomes payable. *Bordman v. Osborn*, 23 Pick. 295. It is not within the provision of a bankrupt act allowing 'uncertain or contingent demands' to be proved against the estate of a bankrupt, because it is not an existing demand, the cause of action on which depends upon a contingency; but the very existence of the demand depends upon a contingency."

The lease before us admirably illustrates the principle. It provides that the lessee shall pay \$60 per month for the term of ten years "for the use and benefit accruing to him from the use and occupancy" of the premises; that, if he pays these sums as they fall due, and performs all his covenants, he may hold and enjoy the premises; but that, if any rents are due and unpaid, or if default is made in any of his covenants, or if he allows any undue waste of any of the improvements on the premises, the lessor may at once re-enter and repossess the premises. The contract contains no covenant that the

lessee will pay any rents after his default and the re-entry by the lessor. The use and occupation of the premises during the term of the lease were the consideration for the payment of the monthly rents, and the payment of the rents was the consideration for the use of the premises. If the rent for any month was not paid, or if waste was permitted, the lessor had the option to repossess himself of the premises, and to withhold from thenceforth the consideration for future instalments of rent, or to permit the lessee to continue in possession of the property, and to enforce the collection of the rents by an action or by some other proceeding. He could not, however, do both. His resumption of the premises necessarily constituted, in the absence of an express agreement to the contrary, a termination of the lease, and a release of the lessee from the payment of all the instalments of rent he had promised to pay thereafter. *Lamson Consol. Store Service Co. v. Bowland*, 52 C. C. A. 335, 338, 114 Fed. 639, 642.

Moreover, if by contract or by virtue of legal proceedings the lessor became entitled to the possession of the premises, and also to the difference between the amount which he might secure from another tenant, or the rental value of the leasehold, and the rents reserved, that amount would always be uncertain and contingent upon future events. *Re Hevenor*, 144 N. Y. 271, 274, 39 N. E. 393.

When the petition in bankruptcy was filed, no rent was due and unpaid. There was therefore no debt owing by the lessee to Watson, and the latter had no legal demand or claim against him under the lease. The future existence of any such claim or demand, and its amount, if it ever came into existence, were contingent upon (1) the future default of the lessee; (2) the exercise by the lessor of his option to resume the possession of the leased premises if such a default should occur; and (3) upon the assumption of the lease by the trustee in bankruptcy. For the latter had the option to take the leasehold estate, and to assume the payment of the agreed rents. *Ex parte Houghton*, 1 Low. Dec. 554, Fed. Cas. No. 6,725; *Ames v. Union P. R. Co.* 60 Fed. 966, 970, 971; *Re Ellis*, 2 N. B. N. Rep. 360, 98 Fed. 967, 968. As the lessor had no legal claim or demand against the lessee for the agreed rents to be paid in the future, when the petition in bankruptcy was filed; and as the future existence and the amount of such a claim were both contingent upon unforeseen future events,—Watson had no provable claim for any part of these rents. Since his claim is in fact for nothing but \$12.50 per month of the agreed rents pay-

able after the filing of the petition in bankruptcy, the application to it of the title of a claim for damages for a breach of the lease neither changes its nature, nor makes it more provable than it would have been if its real character had been described by its name.

2. An adjudication in bankruptcy does not dissolve or terminate the contractual relations of the bankrupt, notwithstanding the decisions to the contrary in *Re Jefferson*, 2 Am. Bankr. Rep. 206, 93 Fed. 948; *Bray v. Cobb*, 3 Am. Bankr. Rep. 788, 100 Fed. 270; and *Re Hays, F. & W. Co.* 117 Fed. 879. Its effect is to transfer to the trustee all the property of the bankrupt except his executory contracts, and to vest in the trustee the option to assume or to renounce these. It is the assignment of the property of the bankrupt to the trustee by operation of law. It neither releases nor absolves the debtor from any of his contracts or obligations, but, like any other assignment of property by an obligor, leaves him bound by his agreements, and subject to the liabilities he has incurred. It is the discharge of the bankrupt alone, not his adjudication, that releases him from liability for provable debts in consideration of his surrender of his property, and its distribution among the creditors who hold them. Even the discharge fails to relieve him from claims against him that are not provable in bankruptcy; and, since his obligation to pay rents which are to accrue after the filing of the petition in bankruptcy may not be the basis of a provable claim, his liability for them is neither released nor affected by his adjudication in bankruptcy, or by his discharge from his provable debts. One agrees to pay monthly rents for the place of residence of his family or for his place of business, or to render personal services for monthly compensation for a term of years; he agrees to purchase or to convey property; and he then becomes insolvent and is adjudicated a bankrupt. His obligations and liabilities are neither terminated nor released by the adjudication. He still remains legally bound to pay the rents, to render the services, and to fulfil all his other obligations, notwithstanding the fact that his insolvency may render him unable immediately to do so. Nor are those who contracted with him absolved from their obligations. If he or his trustee pays the stipulated rents for his place of residence, or for his place of business, the lessors may not deny to the payor the use of the premises according to the terms of the lease. If he renders the personal services, he who contracted to pay for them may not deny his liability to discharge this obligation. His trustee does not become

liable for his debts; but he does acquire the right to accept and assume, or to renounce, the executory agreements of the bankrupt, as he may deem most advantageous to the estate he is administering; and the parties to those contracts which he assumes are still liable to perform them. And so throughout the entire field of contractual obligations the adjudication in bankruptcy absolves from no agreement, terminates no contract, and discharges no liability. *Re Curtis*, 109 La. 171, 9 Am. Bankr. Rep. 286, 94 Am. St. Rep. 445, 33 So. 125; *Re Ellis*, 2 N. B. N. Rep. 360, 98 Fed. 967, 968; *Witthaus v. Zimmerman*, 91 App. Div. 202, 11 Am. Bankr. Rep. 314, 316, 86 N. Y. Supp. 315; *White v. Griffing*, 44 Conn. 437, 446, 447; *Re Pennewell*, 55 C. C. A. 571, 9 Am. Bankr. Rep. 490, 119 Fed. 139.

3. Not only this, but, if counsel for appellant could sustain his proposition that the adjudication of bankruptcy absolved the parties to the lease from their contract at the date of the filing of the petition in bankruptcy, or terminated the lease on that day, still the lessor would have no legal claim against the estate, because the petition was filed on February 6, 1903, the rent was paid by Brown to March 1, 1903. there had been no breach of the contract when the petition was filed, and, if both parties were released from the agreement at that time, or if the lease was then terminated, neither party could have subsequently been in default under it or have committed a breach of it, because thereafter no contract would have existed to be defaulted, and no covenant to be broken.

4. Finally the adjudication in bankruptcy did not constitute a breach of the lease, and it raised no cause of action as of the date of the filing of the petition in bankruptcy. At that date the rent had been paid until March 1, 1903,—until twenty-two days after the date of the filing. There could therefore have been no breach until March 1, 1903, when the rent for March fell due; and consequently there was no claim or demand founded on a breach of the contract at the time the petition was filed, and, if one ever accrued, it arose many days after the filing of the petition, and too late to constitute a provable claim against the estate of the bankrupt. The rule of law that, where one has disabled himself from performing a contract, it immediately ripens, and an action for its breach arises, which is illustrated by *Re Swift*, 50 C. C. A. 264, 112 Fed. 315, wherein a stockbroker had made a contract to deliver stock to a customer, and he was held to have made it impossible for him to fulfil his agreement by his adjudication in bankruptcy, which took the stock

from him, and vested it and all his property in his trustee, is not in conflict with this conclusion, because the leasehold estate of Brown—the only thing essential to the performance of his contract—never passed to his trustee, as the latter did not elect to assume it. Brown was not necessarily disabled by the adjudication from using or selling his leasehold, or from paying the rent. The mere probable financial inability of one to fulfil his contract, or to pay his debt not yet due, does not make them immediately due and actionable. The cases *Re Stern*, 54 C. C. A. 60, 116 Fed.

604, and *Re Frederick L. Grant Shoe Co.* 66 C. C. A. 78, 130 Fed. 881, cited by appellant's counsel, fail to rule the question here under consideration, because the breaches of contract in those cases occurred before the petitions in bankruptcy were filed.

The conclusion is that a claim for damages for a breach of a contract in a lease to pay instalments of rent for the use of the premises at times subsequent to the filing of the petition in bankruptcy is not provable under the bankruptcy law of 1898, and *the order of the District Court is affirmed.*

UNITED STATES CIRCUIT COURT OF APPEALS, FIRST CIRCUIT.

Town of NAHANT, *Plff. in Err.*,

v.

UNITED STATES of America, Impleaded,
etc.

(136 Fed. 273.)

1. A state statute acquiescing in an attempt by the Federal government to acquire land within the state for the use of such government does not entitle the government to employ the local rule of damages as the measure of its liability for property taken.
2. The value of sewer and water pipes owned by a municipal corporation, and laid under streets which are taken by the Federal government under its power of eminent domain for an entirely different use, must be paid to the municipality.

(March 20, 1905.)

ERROR to the District Court of the United States for the District of Massachusetts to review a judgment refusing compensation to the town of Nahant for the value of certain property alleged to have been taken by the United States under its power of eminent domain. *Reversed.*

The facts are stated in the opinion.

Argued before *Colt* and *Putnam*, Circuit Judges, and *Aldrich*, District Judge.

Messrs. James R. Dunbar and *William Hoag*, for plaintiff in error:

The United States possesses, as an inherent attribute of sovereignty, the right of eminent domain,—the right to take private property for public uses within the scope of the powers granted by the Constitution.

NOTE.—As to right of public to compensation upon interference with its interests by the exercise of the right of eminent domain, see *Seattle & M. R. Co. v. Washington*, 22 L. R. A. 217; *Heffner v. Cass & Morgan Counties*, 58 L. R. A. 353; *Zanesville v. Zanesville Teleg. & Teleph. Co.* 52 L. R. A. 150. 69 L. R. A.

This right is independent of the consent of any state, and requires no state legislation as a condition precedent to its exercise.

Kohl v. United States, 91 U. S. 367, 23 L. ed. 449; *Ft. Leavenworth R. Co. v. Lowe*, 114 U. S. 525, 29 L. ed. 264, 5 Sup. Ct. Rep. 995.

The commonwealth of Massachusetts did not, by chapter 373 of the Acts of 1902, delegate to the United States the authority to exercise the right of eminent domain of the commonwealth in this case.

Perry v. Wilson, 7 Mass. 393; *Glover v. Boston*, 14 Gray, 282; *People ex rel. Hayden v. Rochester*, 50 N. Y. 525; *Currier v. Marietta & O. R. Co.* 11 Ohio St. 228; *Butler v. Thomasville*, 74 Ga. 570; *Peavey v. Calais R. Co.* 30 Me. 498; *Burt v. Merchants' Ins. Co.* 106 Mass. 356, 8 Am. Rep. 339; *Kohl v. United States*, 91 U. S. 374, 23 L. ed. 452.

Property of the town of Nahant was taken by the United States by force of these proceedings.

Newburyport Water Co. v. Newburyport, 168 Mass. 541, 47 N. E. 533.

An easement is property within the meaning of the 5th Amendment to the Constitution of the United States.

United States v. Great Falls Mfg. Co. 112 U. S. 645, 28 L. ed. 846, 5 Sup. Ct. Rep. 306; *Great Falls Mfg. Co. v. Atty. Gen.* (*Great Falls Mfg. Co. v. Garland*) 124 U. S. 581, 31 L. ed. 527, 8 Sup. Ct. Rep. 631; *Loundes v. United States*, 105 Fed. 838; *United States v. Certain Lands*, 112 Fed. 622.

The taking away of the usefulness of a piece of property is a taking of the property itself.

Lewis, Em. Dom. 2d ed. pp. 49, 61–63; *Eaton v. Boston, C. & M. R. Co.* 51 N. H. 504, 12 Am. Rep. 147.

To the extent of its impairment in useful-

ness, the sewer system of the town has been taken.

Eaton v. Boston, C. & M. R. Co. 51 N. H. 504, 12 Am. Rep. 147; *Monongahela Nav. Co. v. United States*, 148 U. S. 343, 37 L. ed. 474, 13 Sup. Ct. Rep. 622; *Sedgw. Stat. & Const. Law*, 2d ed. pp. 462, 463; *United States v. Lynah*, 188 U. S. 445, 47 L. ed. 539, 23 Sup. Ct. Rep. 349; *United States v. Alexander*, 148 U. S. 191, 37 L. ed. 417, 13 Sup. Ct. Rep. 529; *Pumpelly v. Green Bay & M. Canal Co.* 13 Wall. 166, 20 L. ed. 557; *Old Colony & F. River R. Co. v. Plymouth County*, 14 Gray, 155; *Thompson v. Androscoggin River Improv. Co.* 54 N. H. 545; *Arimond v. Green Bay & M. Canal Co.* 31 Wis. 316; *People ex rel. Manhattan Sav. Inst. v. Otis*, 90 N. Y. 48.

The town of Nahant has such an interest in the property taken as entitled it to compensation.

United States v. Lynah, 188 U. S. 445, 47 L. ed. 539, 23 Sup. Ct. Rep. 349; *Webb v. Meyers*, 64 Hun, 11, 18 N. Y. Supp. 711; *Hand v. Brookline*, 126 Mass. 324; *Scott v. Manchester*, 1 Hurlst. & N. 59, 2 Hurlst. & N. 204; *White v. Hindley Local Bd. of Health*, L. R. 10 Q. B. 219; *Bailey v. New York*, 3 Hill, 531, 38 Am. Dec. 669, 2 Denio, 433; *Aldrich v. Tripp*, 11 R. I. 141, 23 Am. Rep. 434; *Oliver v. Worcester*, 102 Mass. 489, 3 Am. Rep. 485; *Child v. Boston*, 4 Allen, 41, 81 Am. Dec. 680; *Merrifield v. Worcester*, 110 Mass. 216, 14 Am. Rep. 592; *Murphy v. Lowell*, 124 Mass. 564; *Bates v. Westborough*, 151 Mass. 174, 7 L. R. A. 156, 23 N. E. 1070.

If the water and sewerage systems were public property which could be appropriated without compensation by the commonwealth of Massachusetts, the United States stands differently.

St. Louis v. Western U. Teleg. Co. 148 U. S. 92, 37 L. ed. 380, 13 Sup. Ct. Rep. 485, 26 Am. Law Rev. 520; *Bates v. Westborough*, 151 Mass. 174, 7 L. R. A. 156, 23 N. E. 1070.

Mr. William H. Garland, for defendant in error:

The town was not entitled to compensation for the taking of the land upon which its roads, streets, and paths were constructed.

Cheshire v. Adams & C. Reservoir Co. 119 Mass. 356; *Perley v. Chandler*, 6 Mass. 453, 4 Am. Dec. 159; *Millbury v. Blackstone Canal Co.* 8 Pick. 473; *Andover v. Sutton*, 12 Met. 182; *McHugh v. Boston*, 173 Mass. 408, 53 N. E. 905.

These proceedings were to be governed by the laws of Massachusetts; and the rights of the town to the lands in question are determined by those laws.

Re Certain Land, 119 Fed. 453; *Burt v.* 69 L. R. A.

Merchants' Ins. Co. 106 Mass. 356, 8 Am. Rep. 339.

The roads, streets, and paths referred to being devoted to purposes strictly public, and held by the town merely as an agency of the state government for the performance of the strictly public duties devolved upon it, the town would not be entitled to compensation for a taking by the commonwealth for other public purposes.

Mt. Hope Cemetery v. Boston, 158 Mass. 509, 35 Am. St. Rep. 515, 33 N. E. 695; *Re Certain Land*, 119 Fed. 456.

Sewerage and water pipes constructed upon or under public ways are personal property. The right of the town to maintain and use them is not a right of property in real estate.

New England Teleph. & Teleg. Co. v. Boston Terminal Co. 182 Mass. 397, 65 N. E. 835; *Natick Gaslight Co. v. Natick*, 175 Mass. 246, 56 N. E. 292; *Com. v. Lowell Gaslight Co.* 12 Allen, 75; *Dudley v. Jamaica Pond Aqueduct Corp.* 100 Mass. 183; *Edmonds v. Boston*, 108 Mass. 535.

Aldrich, District Judge, delivered the opinion of the court:

This is a proceeding instituted by the United States for condemnation of certain land at Nahant needed by the general government for fortifications and coast defenses, together with all roads, ways, and avenues included in the description of land, as well as all buildings and structures. The petition of the United States contains a prayer for notice to certain parties of interest expressly named, and a general prayer for notice to all parties interested in the lands described, and parts thereof, and rights therein, and for an appraisal and valuation by a jury of the land and ways and interests therein, and any buildings standing on said land, including all damages sustained by the owner or owners thereof.

Following the prayer of the petition, the district court ordered notice to the parties of interest named, and to any and all other persons, corporations, and associations who may be interested in the lands described in the petition, or any parts thereof or rights therein; and that they and each of them appear before the court, and show cause why the petition should not be granted as prayed for.

The order further directed the marshal to serve a copy of the petition upon parties of interest expressly named, and to give notice to all persons, corporations, or associations interested, by publication, and the return shows that notice was in fact given in accordance with the order. Subsequently, but seasonably, the town of Nahant, in which the property is situated, filed its ap-

plication for leave to be admitted as a party, and for leave to file its answer to the petition, that it might recover from the United States fair damages for the taking of its property.

In pursuance of its purpose to be heard and recover fair damages, the town filed its answer, in which it claimed interests in the condemned property, consisting of easements and rights of way over which it had built, at great expense, macadamized, crushed stone, and graveled streets, and under which, and in lands not streets, it had built and laid sewers and sewer pipes. The answer further sets forth that the town had built and laid water pipes, and that the taking of the land and the streets by the petitioner, and cutting off the sewers, stop the drainage of the land outside the land condemned, and would compel the town to build and maintain a new and expensive system of drainage. The answer concludes with a prayer that the jury may appraise the damages by reason of the taking of the land, its easements and improvements, including streets, sewers, and water pipes, for which compensation was demanded from the petitioner.

After service, and before trial, an agreement as to values and damages was duly entered into between the government and certain of the parties of interest, and subsequently a jury was duly impaneled, to which the cause was committed. At the trial it was admitted that no plan had been filed in the office of the secretary of state of Massachusetts, as required by the act of May 6, 1902 (*Laws 1902*, chap. 373, p. 289), and that certain taxes were assessed upon the land in question on the 1st day of May, 1902; and the town claimed as an element of damage, or as an interest to be appraised and valued, a lien for the amount of the taxes assessed upon land condemned.

To state the substance of the town's claim for compensation, it offered to prove that within the territory condemned certain streets had been located and constructed by the town; that in such streets there were water pipes belonging to the town, connecting with and forming a part of its system, and that the taking by the United States would compel the town to construct other lines for the purpose of carrying water to its inhabitants, and for the purpose of completing the town water system; and that in such streets there were certain sewers, the property of the town, and part of its sewer system, discharging through an outlet into the ocean, which were taken by the government, and that the sewers taken cared for the sewage of other portions of the town not taken; and that the taking of the sewers condemned would make it necessary to construct new sewers, and construct a new

outlet or outlets for the sewerage system of the town.

The court excluded all such evidence as irrelevant and incompetent, and ruled that the town was not entitled to damages either on account of taxes, or because of the taking of the land in which the water pipes and sewers were laid; and the town excepted. No questions were submitted to the jury as to the interests of the town, and the jury rendered verdicts condemning the land described in the petition, and awarded damages to the owners of the fee, but none to the town; and a decree of condemnation was entered, covering the land described, together with all roads, ways, and avenues included in the description of the land, with all buildings and structures on the described premises; and the decree further recites that the land taken is shown upon a plan annexed to the petition.

It results, therefore, that we are confronted with the question whether the claim and offer of the town disclosed any interest in the property taken and condemned, for which it was entitled to compensation.

The petition in this case was filed April 29, 1902, and sets forth that the proceeding was instituted by the Attorney General of the United States, upon the application of the Secretary of War, in accordance with an act of Congress approved August 1, 1888, chap. 728, § 1, 25 Stat. at L. 357, U. S. Comp. Stat. 1901, p. 2516, entitled "An Act to Authorize Condemnation of Land for Sites of Public Buildings, and for Other Purposes." In the following May there was passed in the state of Massachusetts an act entitled "An Act to Approve the Acquisition by the United States of a Tract of Land in the Town of Nahant." Acts 1902, chap. 373, p. 289. It is now contended by the United States that this proceeding for condemnation is so far authorized by the Massachusetts statute as to entitle the United States to stand upon the Massachusetts law as to the rule of damages where property taken for a second and different public use is connected with a prior public use authorized by the state, and that the rule of the local law is controlling.

We do not accept such view. The Massachusetts act was merely a recognition of the inherent power of the central government to exercise its own right of eminent domain, and a consent which amounts to a waiver of its jurisdiction under certain expressed limitations, and of all objection, if any, which the commonwealth might assert as a state upon consideration of its prior grants or delegations of quasi-public power to municipal or other corporate interests. By the terms of the Massachusetts statute, it was an act to approve of and consent to the ac-

quirement by the United States, through purchase or by condemnation, of land within its territory for purposes of national defense, reserving concurrent jurisdiction with the United States in and over the area to be acquired, only so far that all civil and criminal process issuing under authority of the commonwealth might be executed on the land so acquired. The act does not employ any express words of grant; nor does it contain any expression indicating a purpose to transfer property, municipal or otherwise, to the United States, without compensation. The manifest and only purpose of the state was to acquiesce in the idea that the general government might acquire by purchase, or in its inherent right, through condemnation, under its own constitutional limitations,—its own safeguards and proceedings,—territory within the limits of Massachusetts for purposes of national defense.

In the case of *Kohl v. United States*, 91 U. S. 367, 23 L. ed. 449, where it was contended that the circuit court had no jurisdiction over a proceeding brought by the United States for condemnation of property within a state; and that the condemnation provided for by act of Congress meant condemnation by the state government in the exercise of its power of eminent domain; and that, if the state grant of power was accepted by the United States, it must be exercised in the mode and by the tribunal the state had prescribed,—it was broadly, distinctly, and emphatically asserted that the principle of the right of eminent domain exists in the government of the United States as an inherent, necessary, and independent attribute of sovereignty; that the power of the United States in such respect is complete, and without any limitation that it shall be exercised in the manner prescribed for condemnation by a state; and that a proceeding in the United States court for condemnation for necessary public and Federal uses is one by the United States government in its own right, and by virtue of its own eminent domain. See also *United States v. Gettysburg Electric R. Co.* 160 U. S. 668, 679, 40 L. ed. 576, 580, 16 Sup. Ct. Rep. 427.

The United States, in the exercise of such inherent and paramount right of eminent domain, is under its own limitation and injunction in respect to questions relating to just compensation for property taken in its own right; and this results from the 5th Amendment to the Federal Constitution, which declares that private property shall not "be taken for public use without just compensation."

What would be just compensation for property taken by the general government 69 L. R. A.

in its exercise of the right to condemn property used for a prior Federal public purpose, under its prior grant or franchise, might not be just compensation for property taken with which it had theretofore had no connection, and to which it therefore sustains the relation of an entire stranger to the title and to the property condemned.

Again, what would be just compensation in a condemnation proceeding by a state, where property had been dedicated to a prior public use under the exercise of a franchise granted by a state, might not be just compensation where property and rights are taken by the general government, in an independent proceeding, in the exercise of its own original and inherent right of eminent domain, to take property and rights upon just compensation. This would perhaps depend upon whether the general government, through the consent or grant of the state, and under the doctrine of subrogation, has succeeded to all the rights which would inure to the state in case of its condemnation of property created in connection with an existing easement or franchise which the state had previously granted.

We do not, however, deem it necessary to inquire as to the status of the local law in respect to the rule of compensation where the state condemns property for a second public use which was created and dedicated to the prior public use in connection with a franchise previously granted by the state. If the right rests with the state of Massachusetts to condemn without compensation, for another and a different public use, property in the nature of structures created and used by municipal corporations in the exercise of a public easement or franchise like that in question, granted through the general law of a state, there is nothing in the act warranting the conclusion that the state intended to transfer any such right to the United States. It results, therefore, as we have said, that the general government is proceeding in this case in its own right of eminent domain, under the limitations of the Constitution, to secure property for a public and paramount purpose upon just compensation; the state through its statute of approval and consent, having simply acquiesced in the idea that it may so proceed.

The situation, so far as the municipality is concerned, is this: The town of Nahant, under the general laws of the state, exercised the municipal right to build streets for the accommodation of public travel, and to construct water and sewer systems for the comfort and protection of the local public. So far as lands within ways dedicated to public use and travel are concerned, it is not seriously contended in argument that the municipality had any title thereto which it

can set up for purposes of compensation. Therefore we need not deal with any possible question in that respect. It is contended, however, that property in structures, such as pipes and other material connected with sewer and water systems, and in artificial structures in connection with streets, may become the subject of municipal property, and thus stands differently.

Even if it be true, which we doubt, that a structure like the Brooklyn bridge (a public way resting at each end upon land dedicated by a municipality, under the laws of a state, to a public purpose) can be taken by the state, together with the land, for a second and different public use, without compensation; and, if it be true that the general government (a different entity or sovereign) may, under its own condemnatory proceedings, take land dedicated to a public state use, for a second though a different and Federal public use, without compensation, it would still be difficult to see how the proposition of Federal constitutional just compensation can be sustained upon that ground, and to the extent that the general government may, for its own use in connection with fortifications, warships, or other Federal defensive purposes, take the bridge (the iron, the steel, the granite, and other material in the artificial structure), which belong to the municipality, and may be worth millions of dollars, without any compensation or indemnity to the municipal entity which paid for it, and to which it belongs.

The act of Congress and the allegations in the pleadings contemplate just compensation for buildings and other structures as well as land.

The act of Congress authorizes condemnation of real estate by the United States, under judicial process, for public buildings or for other public uses. The petition directs itself against certain lands located in Nahant, particularly described by metes and bounds, and asks for condemnation thereof, "together with all roads, ways, and avenues included in the foregoing description, with all buildings and structures upon the described premises, all of which land taken is shown upon a plan annexed to this petition, entitled, 'Plan of the United States Reservation, Nahant, Massachusetts,' and to which reference is to be had for a more particular description of lands taken hereby." The petition then proceeds to ask, upon due notice to all the parties interested in the lands and parts thereof and rights therein, and after each and all parties interested have been heard, for "a faithful and impartial appraisement and valuation of said lands and ways, and interests therein, and any buildings standing on said lands, includ-

ing all damages sustained by the owner or owners thereof."

It seems clear, therefore, that all structures in and upon the territory described, and all interests therein, have been taken; and this results from the fact that the petition, in pursuance of the high exercise of the paramount Federal right of eminent domain, directs itself, without reservation or qualification, against the territory described upon a plan, and all ways, avenues, buildings, and structures which the petition alleges have been taken; and the decree, as well, directs itself against the territory, "together with all roads, ways, and avenues included in the foregoing description, with all buildings and structures upon the described premises, all of which land is shown upon a plan," etc.; and the decree proceeds to condemn, without reservation, all such interests, and with apt words to vest the fee in the United States for its use forever.

The authorities, we think, sustain the text of Lewis on Eminent Domain in respect to what constitutes a taking of property,—that, whenever lawful rights of an individual to the possession, use, or enjoyment of his land are in any degree abridged or destroyed by reason of the exercise of the power of eminent domain, his property is *pro tanto* taken. Beyond question, the authorities sustain the proposition as well that, where the right to take property is exercised as a paramount right, under the doctrine of eminent domain, and under apt proceedings, which at once and without qualification or reservation take hold of the body of the estate, and leave open for adjustment and ascertainment the question of just compensation only, such taking constitutes a taking of the entire property, within the meaning of the law.

We think the statute and the proceedings reasonably and fairly contemplate constitutional just compensation for all property interests taken or destroyed. The right to compensation is an incident of the power to take, and, as said, in *Monongahela Nav. Co. v. United States*, 148 U. S. 312, 326, 37 L. ed. 463, 468, 13 Sup. Ct. Rep. 622, the just compensation provided for by the Constitution means emphatically a full and perfect equivalent for the property taken, and, in *United States v. Gettysburg Electric R. Co.* 160 U. S. 668, 680, 40 L. ed. 576, 581, 16 Sup. Ct. Rep. 427, the full value of the property taken is to be paid.

We do not deem it necessary to engage in an extended discussion of questions relating to municipal ownership in property or to enter upon a discussion of the confused state of the authorities in respect to the question of compensation when property already used for a public purpose is taken for a broader or another distinct public use by the sover-

eignty creating the franchise upon which the first public use was predicated. It is quite sufficient to say that the older authorities as to the reserved right of the state to condemn country roads for state use without compensation are at least obsolete so far as having application to municipal property rights under the recent extraordinary growth of municipal properties in modern times, and under modern legislative enactment. There is a broad distinction between rural highways and urban streets. *Lewis, Em. Dom.* § 91c, and notes.

The question of the reserved right of the state to alter, amend, and withdraw its franchises or easements, and the effect of the exercise of such right upon property based thereon, received discussion in § 68 of *Dillon's Municipal Corporations*, 4th ed. and notes thereto; and in § 71, and elsewhere, the subject of the legislative power over public and private property of municipalities.

Quite aside, however, from the extent of the right, or the limitations upon the right, of a state, under its reserved power, to devote private and public municipal property to a second public use, the weight of modern authority is altogether in favor of the proposition that structural properties created or acquired through the exercise of municipal functions in connection with a franchise or easement granted by the state will not be taken, even by such sovereignty, for a distinct and different public use, without compensation.

Speaking generally, the authorities sustaining the doctrine of a dedication to a second public use without compensation have reference to the rights of the original landowner, who has once been paid full compensation for the land taken for public purposes. This distinction should always be borne in mind, and it is difficult to see how, in principle, such authorities apply to the situation of a municipality which has not once been paid for its property dedicated to a public use, or to a situation where a municipality, through burdens of taxation resting upon its units, has created or acquired, in its own distinct municipal right, tangible property and structures which it holds as trustee for the beneficial use of its inhabitants and the local public. There would seem to be no reason why such property should not be treated, at least for purposes of constitutional just compensation, as private municipal property. The burden of its property creations, through taxation, rests upon the units of the local municipality. Property creations and existence are necessary incidents of municipal government. There is no just reason, under such circumstances, for saying that because of the ordi-

narily accepted legal fiction that structural property attaches to the legal title to the realty, and because the municipality holds the legal right to use the land, rather than the legal title to the land, the municipal trustee of the body politic which paid for the structural property should not have just compensation from a distinct and independent entity which takes it, not as owner of the land, but under arbitrary right, and for a purpose entirely different than that for which the property was originally designed and paid for, and to which it was originally dedicated. As between parties like these, where the entity taking the property is in a legal sense a stranger to the municipal right, it is difficult to see any difference in principle between municipal property consisting of flagstones, granite curbings, and lamp-posts, or other things which would be necessary and valuable for use in connection with the street system of a municipality, and municipal property consisting of waterworks, elaborate sewer pipes, or electric lighting systems, furnishing water or light upon money rates to individual users, or free to the inhabitants of the municipality, except the burden which results from taxation.

The situation in the case we are considering does not require an analysis of the many authorities in respect to municipal ownership and municipal right of compensation where condemnation is made by a state for a second public use; and our general observations in that respect only bear upon the question whether the state of Massachusetts undertook to transfer to the United States its right, if any, to take for a second use property of the character in question without compensation. In determining the question whether the state of Massachusetts, through its legislative act of 1902, to which we have referred, undertook to transfer to the United States any supposed right to condemn, without compensation, property resting upon its franchise, it must be borne in mind that corporate, charter, and contract rights are protected by the Constitution of the United States as property (*West River Bridge Co. v. Dix*, 6 How. 507, 12 L. ed. 535),—a doctrine fully recognized by the courts of Massachusetts (*Boston Water Power Co. v. Boston & W. R. Corp.* 23 Pick. 360; *Central Bridge Corp. v. Lovell*, 4 Gray. 474), as well as by the courts of the United States (*Monongahela Nav. Co. v. United States*, 148 U. S. 312, 37 L. ed. 463, 13 Sup. Ct. Rep. 622). It may be stated as an unquestioned rule that the right to take property already devoted to public use cannot rest in doubtful construction. The right must be given in express terms or by necessary implication. *Boston Water Power Co.*

v. *Boston & W. R. Corp.* 23 Pick. 360, 398; *Springfield v. Connecticut River R. Co.* 4 Cush. 63, 71, 72.

There is nothing in the terms of the Massachusetts act which makes the United States its successor in respect to the control of the state over its municipal or other franchises, or in respect to its right to take tangible property of municipal corporations; and the whole situation is such as to make it unreasonable that rights of successionship in that respect should result by implication. In the case of *Monongahela Nav. Co. v. United States*, 148 U. S. 312, 344, 37 L. ed. 463, 474, 13 Sup. Ct. Rep. 622, 633, to which we have referred, Mr. Justice Brewer, after referring to the *Dartmouth College Case*, 4 Wheat. 518, 4 L. ed. 629, as establishing the doctrine that rights created by an act of incorporation cannot be set aside by either party to it, says: "The state has never assumed to exercise any rights reserved in the charter. . . . So far as the state is concerned, all its grants and franchises remain unchallenged and undisturbed in the possession of the navigation company. The state has never transferred, even if it were possible for it to do so, its reserved rights to the United States government; and the latter is proceeding, not as the assignee, successor in interest, or otherwise of the state, but by virtue of its own inherent supreme power. . . . Our conclusions are that the navigation company rightfully placed this lock and dam in the Monongahela river; that, with the ownership of the tangible property legally held in that place, it has a franchise to receive tolls for its use; that such franchise was as much a vested right of property as the ownership of the tangible property; that the right of the national government, under its grant of power to regulate commerce, to condemn and appropriate this lock and dam belonging to the navigation company, is subject to the limitations imposed by the 5th Amendment, that private property shall not be taken for public uses without just compensation."

True, in that case the corporation was not a municipal corporation; still, in a municipal situation like the one before us, where the town is not claiming right to compensation for the land or the easement dedicated to the public under state authority,—a phase of the situation which we do not consider,—we are unable to see why the reasoning of the *Monongahela Case* does not apply with full force to the rights of a municipality in respect to tangible property which it is entitled, under the state law, to acquire and hold, and to the natural and reasonable consequences which may result from a taking by the United States.

This proceeding is one, as already said, 69 L. R. A.

in which the United States stands upon its inherent and independent right to take property for necessary public purposes under the constitutional limitation of just compensation. *United States v. Gettysburg Electric R. Co.* 160 U. S. 668, 675, 40 L. ed. 576, 577, 16 Sup. Ct. Rep. 427; *Monongahela Nav. Co. v. United States*, 148 U. S. 312, 37 L. ed. 463, 13 Sup. Ct. Rep. 622; *Barron v. Baltimore*, 7 Pet. 243, 8 L. ed. 672.

In his work on Municipal Corporations, 4th ed. §§ 66, 67, and notes, Judge Dillon observed that municipal corporations, as ordinarily constituted, possess a double character,—the one, governmental, legislative or public; the other, in a sense, proprietary or private,—and over its civil, political, or governmental powers the authority of the legislature is, in the nature of things, supreme and without limitation, unless the limitation is found in the Constitution of the particular state. But, in its proprietary or private character, the theory is that the powers are supposed not to be conferred primarily or chiefly from considerations connected with the government of the state at large, but for the private advantage of the compact community which is incorporated as a distinct personality or corporate individual; and as to such powers, and to property acquired thereunder, the corporation is to be regarded *quoad hoc* as a private corporation. Again, at § 68, that property acquired and owned by a municipal corporation by legislative consent is not subject to an unlimited power of the legislature over it, is consonant with natural justice. The need of having property and property rights is one of the main reasons why municipal corporations are created. Under the Roman law, as declared by Savigny (*Jural Relations*, § 85), "property capacity is the essential quality of a juristical person." While under the state authorities there is some confusion as to the extent to which this doctrine is accepted, the great weight of authority, as will be seen by reference to the authorities collected in the notes to which I have referred, sustains the principle of the necessary municipal right of holding property.

Again, according to Judge Dillon's text (§ 68), "if a municipal corporation, as representing a distinct community, be regarded as a legal person, the legislature, in effect, says to it, 'You may at your own expense acquire property:'" and in *Richland County v. Lawrence County*, 12 Ill. 1, 8, Judge Trumbull, in speaking of public municipal corporations, says: "The corporation is to be regarded as a private company. A grant may be made to a public corporation for purposes of private advantage, and, although the public may also derive a common

benefit therefrom, yet the corporation stands on the same footing, as respects such grant, as would any body of persons upon whom like privileges were conferred;" and, in *Montpelier v. East Montpelier*, 29 Vt. 12, 19, 67 Am. Dec. 748, that "towns, and other public corporations may have private rights and interests vested in them under their charter; and as to those rights they are to be regarded and protected the same as if they were the rights and interests of individuals or of private corporations."

The theory of property rights of municipalities is fully recognized by the Supreme Court in *St. Louis v. Western U. Teleg. Co.* 148 U. S. 92, 37 L. ed. 380, 13 Sup. Ct. Rep. 485, as well as in *Mt. Hope Cemetery v. Boston*, 158 Mass. 509, 511, 35 Am. St. Rep. 515, 33 N. E. 695, which was a case where the double character of cities and towns was considered; and the court in the latter case, after stating the local doctrine of the power of the legislature in respect to property held in agency of the state government for strictly public purposes, declared that, "by a quite general concurrence of opinion, however, this legislative power of control is not universal, and does not extend to property acquired by a city or town for special purposes not deemed strictly and exclusively public and political, but in respect to which a city or town is deemed rather to have a right of private ownership, of which it cannot be deprived against its will, save by the right of eminent domain, with payment of compensation. This distinction we deem to be well founded; but no exact or full enumeration can be made of the kinds of property which will fall within it, because in different states similar kinds of property may be held under different laws, and with different duties and obligations, so that a kind of property might in one state be held strictly for public uses, while in another state it might not be. But the general doctrine that cities and towns may have a private ownership of property, which cannot be wholly controlled by the state government, though the uses of it may be in part for the benefit of the community as a community, and not merely as individuals, is now well established in most of the jurisdictions where the question has arisen."

As between a town and a state, the right of compensation for acquired property might depend in some cases upon the authority of the local municipality to hold property for a given purpose, and in other cases upon the question whether the town holds the property as the agent of the state, for strictly public or state purposes; but, however that may be, and without elaborating further these questions, which we deem in a sense

immaterial in a case like the one before us, where the municipality was authorized by the state law to raise money from the local municipal body to construct ways and construct water and sewer systems, all in a sense public, though primarily for the benefit of the local municipal community, and where the municipality has acquired property for such purposes, we have no doubt of its right to recover just compensation therefor, when taken under the right of eminent domain by a power other and higher than the state.

This case, as we have already said, comes to us upon offers of proof and upon a general ruling. Upon propositions so general and unsubstantial as offers of proof, we do not feel called upon to define all the rules which may govern in respect to damages, or to describe the mode of ascertaining the measure of damages required by the constitutional provision in respect to just compensation; nor could we understandingly do so, under propositions so general, if we were disposed to. We cannot enter upon a field so broad and indefinite as that opened by general offers of proof, for the purpose of determining all possible questions involved. Upon actual trial, and upon actual proofs and distinct rulings, the situation would naturally be simplified, and the questions may be presented in one aspect or another; and we cannot now anticipate what questions would become material in the actual trial, if one is had. The general view now presented may then be changed in substantial respects. The only question for us to decide, in the present aspect of the case, is whether the municipality of Nahant had an interest in the property condemned, which it was entitled to have appraised, and for which it was entitled to have compensation. Our conclusion is that it had such an interest, and our decision does not go beyond the general question presented. We may, however, make general reference, without decision, to some of the questions discussed. If we were to undertake to anticipate and determine all possible questions upon these general offers of proof, we should have to consider the view expressed by Mr. Justice Brewer in the *Monongahela Nar. Co. Case*, 148 U. S. 312, 326, 37 L. ed. 463, 468, 13 Sup. Ct. Rep. 622, 626, that the constitutional combination of the two words "just compensation" means a full and perfect equivalent for the property taken, and that the just compensation is for the property, and not to the owner, which, according to the view of the Supreme Court in that case, takes a situation like this from the rule which permits benefits to the owner to be deducted from the values in ascertain-

ing the measure of damage to which he is entitled.

We do not look upon this case as one in which counsel for the town are seriously contending for compensation for the state franchise in respect to the municipal interests within the territory condemned. It will probably be found that the great majority of cases which hold that the value of the franchise right is to be considered upon the question of compensation, like *United States v. Great Falls Mfg. Co.* 112 U. S. 645, 28 L. ed. 846, 5 Sup. Ct. Rep. 306, *Great Falls Mfg. Co. v. Atty. Gen.* (*Great Falls Mfg. Co. v. Garland*) 124 U. S. 581, 31 L. ed. 527, 8 Sup. Ct. Rep. 631, and the *Monongahela Nav. Co. Case*, 148 U. S. 343, 37 L. ed. 463, 13 Sup. Ct. Rep. 622, have reference to a franchise granted to a corporation only quasi public,—one where the right relates to a situation into which the public interest enters somewhat, but which chiefly involves an enterprise for remunerative results to the corporation.

Ordinarily structures and certain kinds of fixtures are compensated for by appraising them as a part of the realty. This is probably universally true where land is taken from the owner for public purposes. We have no doubt, however, upon principles of natural justice and of right, that a municipality should be compensated upon an appraisalment of its tangible property resting upon and under land which it does not own, but with which its property is connected in the exercise of a public franchise for public purposes; and, assuming this to be so, in estimating its value all the capabilities of the property, and all the uses to which it may be applied or to which it is adapted, are to be considered. 2 Lewis, Em. Dom. 1048; Smith, *Modern Law of Mun. Corp.* 719.

The petition prays for an impartial appraisalment of property taken, including "all damages sustained by the owner or owners thereof." Still, in view of the general character of the claim of the town, for indemnity for the interruption to its water and sewer systems which results from taking a part thereof, we do not feel called upon to determine whether, in arriving at just compensation, or, in other words, whether, in making the municipality whole by returning an equivalent for what has been taken, just compensation for property actually taken is to be ascertained by reference to its capabilities, and uses in connection with the part not taken, or (Lewis, Em. Dom. §§ 471, 471a) by ascertaining the difference between the value of the whole property before the taking and the value of the remainder after the taking, or by ascertaining the value of the part taken, to-

gether with the damage resulting to the parts of the system outside of the territory taken, by reason of the interruption or severance.

We do not think the claim or the offer of proof sufficiently definite to justify us in assuming to decide which rule should be applied. It is said in Lewis on Eminent Domain (§ 464) that, "when part is taken, just compensation includes damages to the remainder. Upon this point there is entire unanimity of opinion. 'The constitutional provision cannot be carried out, in its letter and spirit, by anything short of a just compensation for all the direct damages to the owner.'" To these propositions there are gathered many authorities in the notes contained in the second edition of that work. Dillon says: "Regard must be had to the condition as to the shape, use, and convenience in which the residue of the property will be left" (2 Dill. Mun. Corp. § 624), while Mr. Justice Peckham, speaking for the Supreme Court, leaves the question in this way: "As to the effect of the taking upon the land remaining, that is more a question of the amount of compensation. If the part taken by the government is essential to enable the railroad corporation to perform its functions, or if the value of the remaining property is impaired, such facts might enter into the question of the amount of the compensation to be awarded." *United States v. Gettysburg Electric R. Co.* 160 U. S. 668, 685, 40 L. ed. 576, 582, 16 Sup. Ct. Rep. 427, 431. See also Cooley, *Const. Lim.* 6th ed. 697, 700, and notes. *United States v. Alexander*, 148 U. S. 186, 37 L. ed. 415, 13 Sup. Ct. Rep. 529; *United States v. Truesdell*, 148 U. S. 196, 37 L. ed. 419, 13 Sup. Ct. Rep. 532; *Great Falls Mfg. Co. v. Atty. Gen.* (*Great Falls Mfg. Co. v. Garland*) 124 U. S. 581, 31 L. ed. 527, 8 Sup. Ct. Rep. 631; *Pumpelly v. Green Bay & M. Canal Co.* 13 Wall. 166, 177, 178, 20 L. ed. 557, 560; *Laflin v. Chicago, W. & N. R. Co.* 33 Fed. 415; 18 Am. Dig. Century ed. col. 1277, § 365, and numerous cases there cited.

We do not decide upon which view this cause should be submitted to the jury. Perhaps either would be correct. Any view which would give the town just compensation for its property taken would answer the requirement of the Constitution. It is possible that a verdict based upon the value of the structures and materials and other tangible properties of the town actually taken, together with a special verdict for the damage resulting to parts of property not taken, might solve the situation.

As we hold that the Federal proceeding takes hold of the situation *ex proprio*

vigore, and without regard to the state statute or the will of the state (*Monongahela Nav. Co. v. United States*, 148 U. S. 312, 341, 37 L. ed. 463, 473, 13 Sup. Ct. Rep. 622), we have no occasion to consider the question based upon the failure of the government to file a copy of the plan of the premises taken as required by § 4 of the Massachusetts act of May 6, 1902; and, as we hold that the property was taken by the act of the United States in its own right

under its high prerogative of sovereignty and by virtue of its own proceeding, which antedated the assessment of the taxes in question, there is no occasion to consider that aspect of the case.

The decree of the District Court is so far opened as to permit further proceedings not inconsistent with the opinion of this court passed down this day, to the end that the town of Nahant may have just compensation for its property taken.

TENNESSEE SUPREME COURT.

J. T. WHEELER, Admr., etc., of Hizar Beaty, Deceased, Impleaded with Lieberman, Loveman, & O'Brien *et al.*, Appt.,

v.

James N. CLARK *et al.*

(.....Tenn.....)

1. The rule that one in adverse possession under color of title of a tract of land is entitled to maintain replevin for logs cut thereon by one claiming to be the true owner, regardless of the true location of the ultimate title to the land, applies where the spot from which the logs were cut is annexed to the actual possession of a portion of the tract because within the boundaries of the paper title.
2. The deeds under which plaintiff in replevin claims possession of property from which the chattels were taken may be looked at for the purpose of defining

plaintiff's possession, although the question of the ultimate title to the land cannot be gone into.

3. An entry, under a champertous deed, upon land of which another is in possession, does not confer upon the one making it the right, when sued in replevin for timber taken from the property, to force the former occupant to prove his title.
4. Actual possession by inclosure of a portion of land claimed under a paper title draws to it constructive possession of all land within the boundaries called for by the title papers.
5. A tract of land is sufficiently described in a deed by referring to it by the number of its government patent, in which it is definitely described.
6. That the title to property for which replevin is brought is shown to be in one of the plaintiffs is sufficient to sustain the action; and defendant cannot take ad-

NOTE.—*Right to maintain replevin by or against one in adverse possession of land for things severed.*

- I. The general rule.
 - a. In general, 732.
 - b. Reason of the rule, 732.
- II. Nature of the adverse possession.
 - a. In general, 734.
 - b. Incidental trial of title, 735.
- III. Replevin of *fructus industriales*, 737.

I. The general rule.

a. In general.

Generally speaking, the rule undoubtedly is that replevin, or an action of that nature, is not maintainable against one in the adverse possession of land, for things severed therefrom.

Thus, the owner of the freehold cannot maintain an action of detinue for things severed, if, at the time of the severance, he had not actual possession of the land which was then held and occupied adversely to him. *Cooper v. Watson*, 73 Ala. 252.

So, it is admitted in *Leatherwood v. Sullivan*, 81 Ala. 464, 1 So. 718, and *Adler v. Prestwood*, 122 Ala. 374, 24 So. 999, that, as a general rule, when the defendant in an action of detinue for chattels severed from land is in possession of the land from which the chattels were severed, holding adversely to the claimant (69 L. R. A.

and disputing his title, the action is not maintainable.

And so, the owner of land out of possession is not entitled, after he has established his right to the possession, to recover the fruits of the land from one who purchased them from an occupant who at the time was in the adverse possession of it. *Johnston v. Fish*, 105 Cal. 420, 45 Am. St. Rep. 55, 38 Pac. 979.

"When one who is in the adverse possession gathers a crop in the course of husbandry, or severs a tree or other thing from the land, the thing severed becomes a chattel; but it does not become the property of the owner of the land, for his title is divested,—he is out of possession, and has no right to the immediate possession of the thing. . . . The owner of the land cannot sue for the thing severed in trover or detinue as a chattel." *Brothers v. Hurdle*, 32 N. C. (10 Ired. L.) 490, 51 Am. Dec. 400, *obiter*.

Crops grown and harvested by one in the adverse possession of land may not be replevied by another, who also claimed the land by reason of an entry made under the timber-culture laws. *Bathbone v. Boyd*, 30 Kan. 485, 2 Pac. 664.

b. Reason of the rule.

The reason upon which this rule is broadly placed is that title to land cannot be tried in a transitory action.

vantage of the fact that other plaintiffs are not shown to have a right to the possession of any interest therein.

7. That one suing to recover logs cut from real estate is shown to have decedeed away a portion of the land, and that the grant is not shown not to have included the logs, are immaterial, where the grantee is joined as plaintiff in the action.
8. That logs for which replevin is brought were not all cut from plaintiff's land is immaterial, where the one from whose land they were cut transferred all his right to plaintiff before the bringing of the action.

(Wilkes, J., dissents.)

(February 18, 1905.)

A PPEAL by the administrator of Hizar Beaty, deceased, from a judgment of the

Circuit Court for Fentress County in favor of plaintiffs in an action brought to recover certain logs alleged to have been wrongfully removed from plaintiffs' property. *Affirmed.*

The facts are stated in the opinion.

Mr. John F. McNutt, for appellant:

Before plaintiffs are entitled to the judgment for the possession of the logs replevied in the case, they must show that they were the true and lawful owners of the lands from which said logs were cut and removed, or that they were in the actual and exclusive possession of said lands.

Collier v. Yearwood, 5 Baxt. 581.

Plaintiffs cannot recover where the property belongs to a third party.

McFerrin v. Perry, 1 Sneed, 314; *Robb*

An action of replevin does not lie for the purpose of litigating and determining the title to real estate between adverse claimants. *Baker v. Campbell*, 32 Mo. App. 529, *obiter*.

So, the owner of land may not bring replevin for chattels severed when the land is in the adverse possession of the defendant, or of a third person. The law does not permit him to assert his title to the land against the person in adverse possession in that manner. *Anderson v. Hapler*, 34 Ill. 436, 85 Am. Dec. 318.

And so, when the person severing timber from land is in the adverse possession thereof, the owner may not maintain detinue therefor, since title and right of possession of lands cannot be determined in such an action. *Street v. Nelson*, 80 Ala. 231.

An action in replevin is not maintainable by one not in the actual, exclusive possession of a quarry, for slates taken therefrom, whatever his title may be, against one who is in the possession under a claim of right. This decision is based upon the ground that title cannot be decided in a transitory action because that might lead to the trial of title of a coal mine in England in an action of replevin for coal dug out of the mine and carried to Pennsylvania; and title to the soil in a foreign nation might thus be tried in a transitory action. *Brown v. Caldwell*, 10 Serg. & R. 114, 13 Am. Dec. 660. This decision, however, is abrogated by a statute which now exists in Pennsylvania, providing as follows: "In all actions of replevin now pending, or hereafter brought, to recover timber, lumber, coal, or other property severed from realty, the plaintiff shall be entitled to recover, notwithstanding the fact that the title to the land from which said property was severed may be in dispute: Provided, said plaintiff shows title in himself at the time of the severance." Act May 15, 1871, P. L. 268, § 1.

The plaintiff out of possession cannot sue for property severed from the freehold when the defendant is in possession of the premises from which the property was severed, holding them adversely, in good faith, under the claim and color of title; in other words, the personal action cannot be made the means of litigating and determining the title to the real property as between conflicting claimants. *Halleck v. Mixer*, 16 Cal. 574.

And so, where defendant is in the actual possession of real estate, in good faith claiming title thereto, a party, upon the claim that he

is the true owner of the real estate, may not, by claim and delivery, secure possession of a portion of a house severed by defendant from the land, and sold. The title to the land cannot be litigated in that kind of an action. *Hines v. Good*, 128 Cal. 38, 79 Am. St. Rep. 22, 60 Pac. 527.

In order to maintain an action of replevin for things severed from the realty, the plaintiff must have had the actual or constructive possession of the land; and, as the title to land cannot be tried *ex directo*, in replevin, if the series of acts, in which the severance and taking away has occurred, are sufficient to create an adverse possession in the defendant, replevin cannot be maintained. *Washburn v. Cutter*, 17 Minn. 361, Gil. 335.

The plaintiff may not introduce his title papers to show that he was the owner of land, in an action of replevin to recover grain harvested therefrom, when the defendant had been in possession of the land for several years. *Caldwell v. Custard*, 7 Kan. 303.

In an action of replevin brought by one in the actual possession of land under claim of right, for oats taken therefrom by parties attempting to take possession of part of the land, testimony to show that the plaintiff's possession of the land was not in good faith, but that she was merely acting for her father in obtaining title from the government because he could not enter the land, was inadmissible. "The controversy in the case was not as to the title of the land, but simply as to the possession thereof, and as to the ownership of the oats." *Barnhart v. Ford*, 37 Kan. 520, 15 Pac. 542.

A replevin action may not be made the means of litigating and determining the title to the realty as between the conflicting claimants; and therefore, in an action brought by one claiming to be the true owner of the premises, against another in the actual possession thereof and claiming title adversely to the plaintiff by reason of a tax deed, who had removed a house from the premises, an adjudication of the invalidity of the tax deed, and consequent rendition of judgment in favor of the plaintiff, was error. *Rees v. Higgins*, 9 Kan. App. 832, 61 Pac. 500.

The same principle holds good when a plaintiff in the adverse possession of lands brings an action of replevin for things severed during his occupancy.

Thus, in an action of replevin for crops,

v. Cherry, 98 Tenn. 72, 38 S. W. 412; 24 Am. & Eng. Enc. Law, 2d ed. p. 486.

The plaintiffs must prove either general or special property in themselves, or they cannot recover.

Parham v. Riley, 4 Coldw. 5.

The original owner of lands sold to pay taxes cannot maintain replevin for the timber cut by the purchaser between the times of sale and of redemption.

Cromelien v. Brink, 29 Pa. 522.

The trial judge erred in declining to pass on the title.

Hart v. Vinsant, 6 Heisk. 616.

Messrs. L. T. Smith, J. T. Wheeler, and A. M. Roberts also for defendants.

Messrs. Conatser & Case, for appellees: Plaintiffs below were not required to

identify the logs cut from the land with absolute certainty after they had been mixed with logs from other land by defendants below.

Eldred v. Oconto Co. 33 Wis. 133.

Defendants had no possession of the land off which the logs were cut.

A champertous deed is no protection whatever for any purpose. It could not be offered as an outstanding title. It is void for all purposes.

Williams v. Hogan, Meigs, 189; *Fowler v. Nixon*, 7 Heisk. 728; *Gheen v. Osborne*, 11 Heisk. 70.

Description by reference to entry number was sufficient.

Smith v. Greaves, 15 Lea, 459; *Solomon v. Thatcher*, 2 Shannon, Cas. 37.

brought by, a plaintiff in the actual adverse possession of the land, the defendant cannot defend upon his alleged better title to the land. *Lehman v. Kellerman*, 65 Pa. 489.

II. Nature of the adverse possession.

a. In general.

The adverse possession, however, to be effectual in giving a right to the possession and disposition of the severed chattels, must be more than a mere unsubstantiated claim. It must be entered into and continued in good faith, and under at least claim, and perhaps color, of title.

Thus, an action to recover wood cut from land is maintainable by the true owner against the parties who cut the wood, who were in the adverse possession of the land at the time, but were so in possession without title, or color of title. *Kimball v. Lohmas*, 31 Cal. 154. The court in this case seems to regard the common-law rule to be that replevin cannot be maintained for property severed from the freehold while in the adverse possession of the defendant, no matter what may be the character of his possession in other respects,—whether founded upon title, or taken by bow and spear. In commenting adversely upon this rule, the court says: "Upon authority, it is not easy to say precisely what it is, or where it came from. The cases by no means agree, and, when they attempt a reason, they are equally wide apart. Considered by the light of principle, there seems to be very little principle, if any, involved. The wood in question, having been cut from the land of the plaintiff, is as much his property now as before it was cut. By the severance from the freehold it was changed from real to personal property, but its title was unaffected."

... If, then, it is his property, why is he not entitled to its possession? And, if entitled to the possession, why is he not entitled to an action for it?"

So, to defeat an action of replevin for trees cut, on the ground of disseisin of the plaintiff, there must be an actual, adverse occupation of the land, held in good faith under claim of title; and therefore, it appearing that the occupation was temporary only, and by persons camped on it for the purpose of felling trees to be rafted out, there was no permanent or continuous occupation of the land, and replevin

by the true owner of the trees is maintainable. *Phillips v. Gastrell*, 61 Miss. 413.

It is settled that an action in replevin will not lie in favor of the legal owner of land for crops planted and harvested thereon by a person in the actual and exclusive possession of the land in good faith as a pre-emption claimant, holding the same adversely to all other persons. *Smith v. Cunningham*, 67 Cal. 263, 7 Pac. 679, *obiter*.

An action to recover grains sown and harvested by the defendant upon lands to which he claimed title, and of which he had the actual, adverse, and exclusive possession, cannot be maintained. *Martin v. Thompson*, 62 Cal. 618, Followed without opinion in *Martin v. Durand*, 62 Cal. 623.

And an action of replevin is not maintainable against defendants, who raised and harvested the wheat in controversy from land in which they were in the actual possession, claiming title thereto under an invalid conveyance from plaintiff, i. e., under color of title. *Emerson v. Whitaker*, 83 Cal. 147, 23 Pac. 285.

The court conceded, *obiter*, in *Johnson v. Elwood*, 53 N. Y. 431, that, if a plaintiff who was attempting to maintain an action of replevin for chattels severed from realty upon the ground of constructive possession under a tax deed which proved to be a nullity, had been in actual possession of the land under such a deed, it might have served as the foundation of title by adverse possession, which would have enabled the plaintiff to protect himself against mere trespassers and intruders.

An action of replevin is not maintainable for rails and posts made from trees cut from land, when the defendant at the time of the taking was in possession of the land under an actual claim of title. *Snyder v. Vaux*, 2 Rawle, 423, 21 Am. Dec. 466.

And so an action of claim and delivery, to recover logs severed from the land while the defendant was in possession thereof under a claim of title, is not maintainable. *Harrison v. Hoff*, 102 N. C. 126, 9 S. E. 638.

An action in replevin cannot be maintained against one who has purchased hay taken from a farm, from a party in possession of the farm claiming it as his own against the world, and holding it adversely,—the action being brought before the plaintiff recovered possession of the farm. *Stockwell v. Phelps*, 34 N. Y. 363, 9 Am. Dec. 710.

Only the party having the eldest entry is permitted to give it in evidence.

Wilson v. Kilcannon, 1 Overt. 202; *Hendrick v. Dallum*, 1 Overt. 427; *Anderson v. Cannon*, Cooke (Tenn.) 27; *Conn v. Haislip*, 1 Swan, 31.

Messrs. Evans & Snodgrass also for appellee Clark.

Neil, J., delivered the opinion of the court:

This action was brought in the circuit court of Fentress county, in replevin, by defendants in error, to recover of plaintiffs in error 45 logs. The case was tried before Hon. D. L. Lansden, chancellor, sitting as circuit judge, without the intervention of a jury. He rendered a judgment in favor

of Clark and others against Lieberman, Loveman, & O'Brien and the estate of Hizar Beaty (J. T. Wheeler, administrator), and the latter alone appealed. There was evidently a purpose on the part of Hizar Beaty, in taking the logs, to compel defendants in error to try the title to the land on which the logs grew, through the agency of the replevin suit; but His Honor found as a fact that the defendants in error were in possession of the land on which the logs grew at the time they were cut by the said Hizar Beaty, and he declined to consider the question whether the defendants in error had the superior title. He passed upon certain title papers of the plaintiffs in error, holding them void on the ground of champerty, for the purpose of

After the entry and occupation of defendant upon land under a claim of title, an action in replevin for crops severed is not maintainable against him by the dislodgee out of possession. *De Mott v. Hagerman*, 8 Cow. 220, 18 Am. Dec. 443.

A plaintiff not in the possession of land cannot maintain replevin against one in possession in good faith under a claim of right, although under a contract utterly illegal and void, for crops planted and harvested by him. *Groome v. Almstead*, 101 Cal. 425, 35 Pac. 1021.

It seems to be the opinion of the court in *Brewer v. Fleming*, 51 Pa. 102, that replevin will not lie against one in the actual possession of land under a claim of title, for timber, slate, or other products severed by him from the freehold. But this doctrine is abrogated in Pennsylvania by the statute set out in I., *supra*.

The purchaser of an equity of redemption in land, who makes an open and peaceable entry under a sheriff's deed, thereby becomes seized and possessed of the land conveyed to him, including the crops thereon; and may maintain an action of replevin against the former owners, who had continued to occupy two dwelling houses upon the premises, for hay taken by them from the land. *Nichols v. Dewey*, 4 Allen, 386.

One who entered upon a tract of land under a conveyance in fee, claiming title to it, and exercising acts of dominion over the whole, may maintain replevin for boards made from trees cut from a part of the land, in the nature of woodland, by a trespasser, and although that part was not inclosed, and no improvements had been made thereon, and no dominion exercised over it, except to use it for purposes of fuel and timber. *Davis v. Easley*, 13 Ill. 193.

A trespasser who goes upon lands of another without claim or color of title cannot acquire a right or title to crops or timber by severing and removing the same from the freehold; yet, if the owner has notice that the trespasser is upon the premises, exercising acts of ownership, and acquiesces therein; or if, upon a notice by the owner to the intruder to desist, the demand is refused, and he remains upon the premises, and continues to exercise acts of dominion,—such possession becomes actual and adverse to that of the owner, to the extent only, however, of the land actually occupied. The trespasser, therefore, cannot maintain an action of detinue against the legal owner for corn planted and 69 L. R. A.

harvested by the latter upon other portions of the tract of land than the part actually occupied by him. *Stewart v. Tucker*, 106 Ala. 321, 17 So. 385.

An owner of timber land, although not in actual possession thereof, may maintain replevin for timber cut therefrom against one who temporarily occupied the land while engaged in lumbering operations under the belief that the part occupied by him was within his lines. *Young v. Herdic*, 55 Pa. 172.

And so an action of replevin will lie by the owner of land, although not in actual possession thereof, against one who wrongfully enters upon it under a void deed, and cuts down and carries off timber and bark, when the latter had notice of the legal title of plaintiff; since his possession, which was merely temporary for the purpose of cutting the timber and bark, was not an adverse claim made in good faith. *Youmans v. Francisco*, 15 N. Y. Week. Dig. 312.

One in possession of land, claiming under a pre-emption right under the act of Congress June 1, 1840, cannot maintain replevin to recover rails made from timber upon the land, before his right to a pre-emption was proved and patent issued. *Bower v. Higbee*, 9 Mo. 259.

Where neither of the parties in possession of the land set up color or claim of title, but each was diligently seeking to acquire the title of the United States to the same parcel of public lands, in the honest belief that, under the laws of the United States, he was entitled to the pre-emption, and would ultimately acquire the legal title, an action of replevin will not lie in favor of one against the other for hay cut from the land. *Page v. Fowler*, 28 Cal. 605. This holding was restated as the court's opinion upon a subsequent appearance of the case, reported in 37 Cal. 100.

b. Incidental trial of title.

It being thus necessary that the adverse possession be in good faith, under claim, and perhaps color, of title, and more than a mere unsubstantiated claim, it is obvious that, notwithstanding the rule that title is not triable in a transitory action, the nature of the parties' claims must be to some extent inquired into in order to determine whether the adverse holding is sufficient to give the claimant the right to the possession and disposition of the chattels.

This doctrine and practice appear nowhere

determining the question of conflicting possession.

The plaintiff in error appealed from the judgment of his honor, and has filed numerous grounds of error. These assignments cover a wide scope, ranging over the whole field of title, and, besides, raising numerous questions of evidence. In the view we take of the case, it will be necessary to notice only a few of the assignments.

There is some evidence in the record to support the finding of His Honor that the defendants in error were in possession of the land from which the logs were cut by Hizar Beaty at the time they were cut. So on this appeal that question must be determined in their favor. The land referred to was covered by grant No. 3,329, issued on the 22d of April, 1834, to Milton King. There are in the record two deeds purporting to convey the same land to Bruno Gernt, one of the defendants in error; a deed from A. Litton, Jane E. Litton, and Alice W. Litton, of date September 13, 1889; and a deed from Claiborne Beaty, of date March

5, 1890. There is also in the record a lease, of date August 3, 1896, made by Bruno Gernt, Sidney Beckwith, W. L. Jenks, W. W. Jones, and James N. Clark (defendants in error), to one Abe Franklin, covering this same land. There is also testimony in the record to the effect that, while Abe Franklin was holding under this lease, residing in a house built upon the land, the said Hizar Beaty entered upon the land and cut the logs. Upon the strength of this testimony, His Honor held that the defendants in error were entitled to recover in replevin, regardless of the question concerning the ultimate title to the land, since the special property conferred by possession is sufficient to support the action of replevin against a trespasser. We think His Honor's view was correct. The rule referred to is necessary to the preservation of the peace of society. If it should not be maintained, it would soon result that men, everywhere, in cases of disputed title to personal property, would seize the property by the strong hand, at the outset, for the purpose

more clearly than in *WHEELER v. CLARK*, although there are other earlier decisions to the same effect.

So, the title to land may certainly be looked into to determine the rights of the parties, and incidentally tried in a transitory action, when necessary to establish the title to personal property severed from realty. Thus, in an action of replevin for hay claimed by plaintiff by reason of his ownership of the land, which he had inclosed and otherwise improved, against a defendant who broke down a portion of the fence, entered upon the land, and took possession, presumably under a claim of pre-emption, the latter is a naked trespasser, making an unwarranted entry upon the inclosure of another, and the granting of a nonsuit to him is error. *Laurendeau v. Fugelli*, 1 Wash. 559, 21 Pac. 29.

In an action of replevin for rails cut and split by the plaintiff on uninclosed land claimed by him, and afterwards hauled away and appropriated by defendant, who also claimed title to the land, it was held relevant to prove title to the land for the purpose of showing who had the right to the rails. The court uses the following language: "The question before the jury in this case was, In whom was the title or right of possession of the rails? This did not depend, necessarily, upon the question as to who had the title to the land. But, situated as the trees were out of which the rails were made, the land being uninclosed, and therefore not in the actual possession of either party, it became a legitimate and necessary inquiry to ascertain upon whose land they stand, and not for the purpose of trying the question of title to the land, but as a means of determining who had the right to the possession of the rails when made." *Hart v. Vinsant*, 6 Helsk. 610.

Where a party claiming title to land by reason of tax titles brings an action of replevin for the possession of logs severed from the land, against one claiming title thereto, the validity of his title may be inquired into by the court, not to determine who has the legal title to the

land, but to determine who is the owner thereof, and entitled to the possession of the personal property. The court looks to the substance; and, when it can see that the action is one to determine the right to the possession of personal property, and not to try conflicting titles to land, it will proceed with the investigation, and permit the respective parties to make out their case by the best testimony in their power. *Busch v. Nester*, 70 Mich. 525, 38 N. W. 458.

As declared by the court in *Harlan v. Harlan*, 15 Pa. 507, 53 Am. Dec. 612: "The court looks to the substance; and, where it appears that in truth it is a trial of title, then it is properly ruled that replevin is not the proper action, but that it must be tried in another form."

Had a plaintiff proved that he derived his title from a state government patent; or had he proved that he was in actual possession of land when logs were cut therefrom,—he would have thereby made *prima facie* proof of ownership, and, to defeat an action in replevin, the burden would have been upon the defendants to show that the legal title was in some other plaintiff; but, had he been in the actual possession and occupancy of the land when the logs were cut therefrom, he could have maintained an action in replevin without making any proof of a paper title, unless the defendants proved an adverse title thereto of a higher character than a mere possessory one. *Hungerford v. Bedford*, 29 Wis. 345.

So, if a plaintiff was in the actual possession and occupancy of land when the trespass was committed thereon, he may maintain replevin without making any proof of a paper title, unless the defendant proved an adverse title thereto of a higher character than a mere possessory one. *McNarra v. Chicago & N. W. R. Co.* 41 Wis. 69, *obiter*.

It was held in *Elliott v. Powell*, 10 Watts. 453, 36 Am. Dec. 200, that, in an action of replevin brought by one in the possession of land for a crop severed therefrom, evidence was

of forcing upon the adversary party the necessity of taking the initiative in a burdensome suit, and assuming the onus of proof as to title.

It is insisted that, if the chancellor was at liberty to decline to go into the final question of title to the land on which the logs grew, it was inconsistent and improper in him to look to the deeds above referred to for the purpose of defining possession. We do not think so. The use of deeds, and even title bonds, for this purpose is quite common. The question proposed for consideration was not one of title, but only of possession,—a distinct, independent, and legal inquiry under our system of real property law. To meet this special phase of the case made by the defendants in error, the plaintiffs in error offered in evidence in the court below a deed purporting to have been made by the Union Land, Coal, & Coke Company to the Cumberland Coal & Coke Company, of date September 24, 1899, covering the same land, and testimony tending to show that Hizar Beaty cut the logs

under the authority of the latter company. The deed was objected to by the defendants in error on the ground of champerty, because the testimony showed that they (defendants in error) were in possession of the land, by a tenant residing thereon, when the deed in question was made. This objection was sustained by the chancellor, and the deed excluded. To this action error is assigned here by the plaintiffs in error. There can be no doubt, under our statute, that such a deed is void. *Green v. Cumberland Coal & Coke Co.* 110 Tenn. 35, 72 S. W. 459. But plaintiffs in error reply to this that even a void deed may be "color of title," under our decisions, and a possession thereunder, if held long enough, may, under the statute of limitations, ripen into a good title, which is, of course, true. From this it is urged that the entry upon the land under the champertous deed in question was lawful, and neutralized the prior possession under the two Gernt deeds referred to. We think the conclusion is based upon a false assumption. Possession under

admissible on the part of the defendant, showing that he was the real owner and as such entered into possession, and harvested the crop, and had since remained in possession; and that the plaintiff was merely a trespasser. The court says: "It is a mistake to suppose that the title to real estate may not be incidentally tried in a transitory action. Cases may be put where the greatest injustice would result if this could not be done." But this decision is criticized in *Lehman v. Kellerman*, 65 Pa. 489, *supra*, 1, b, where the court says that, taken in the full extent of the principle stated in the opinion, the holding would conflict with subsequent, as well as previous, decisions. The court further points out, however, that, although the plaintiff was in the actual possession and sowed the grain, it does not appear that he did so under an adverse title; and that the opinion evidently proceeds upon the ground that there was no contested title, and that the defendant had an immediate right of entry.

III. *Replevin of fructus industriales.*

In a few decisions a different reason appears for refusing to allow replevin against an adverse possessor of land for disposing of crops, than the denial of trial of title in a transitory action.

Thus, in holding that an action to recover the possession of a quantity of prairie hay made from grass cut by one without right, although under a claim of right, he having purchased the right to make the hay of one who claimed to have authority to sell it, is not maintainable, the court says: "It is true the hay in stack is the grass which belonged to plaintiff, cut and cured, and preserved for use; but the labor of defendant, rendered in good faith under a claim of right, gave to the hay substantially all its value. . . . Therefore, the plaintiff should not be permitted to enjoy the fruits of defendant's labor without paying therefor." *Lewis v. Courtright*, 77 Iowa, 190, 41 N. W. 615.
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So, an action of replevin will not lie on the part of the true owner of land for crops raised and harvested on the land by parties holding the possession thereof adversely to him. The court says: "In such case it is well settled that the annual crops *fructus industriales* cannot be recovered by an action of replevin." *Pennybecker v. McDougal*, 46 Cal. 661.

He who is in possession of, and cultivates, a piece of land, and harvests a crop grown thereon, and severs the same from the soil, cannot be dispossessed of said crop by the owner of the land, in an action of replevin. "This we consider the well-settled law of this state." *McAllister v. Lawler*, 32 Mo. App. 91.

Crops were held not intended to be included by the words "other property" in the act of 1871, providing that, "in all actions of replevin now pending or hereafter brought to recover timber, lumber, coal, or other property severed from realty, the plaintiff shall be entitled to recover, notwithstanding the fact that the title to the land from which said property was severed may be in dispute;" and, therefore, it was held that replevin will not lie on the part of one claiming title to land, for crops harvested by another, who is in actual, adverse possession of the land under a claim of title. The court admits that the act of 1871 has changed the rule that replevin will not lie by one out of possession to recover against one in possession and claiming title, for chattels which had become such by severance from the land, so far as the property mentioned therein and other property of like character, such as slate, marble, iron ore, zinc ore, etc., are concerned; but, growing crops being produced by the labor of the adverse possessor, it would be a great hardship to subject him to a succession of actions for his various crops when harvested, and to the necessity of trying complicated and vexatious questions of title to land, in the determination of the ownership of his fruits, vegetables, and crops. *Renick v. Boyd*, 99 Pa. 555, 44 Am. Rep. 124.

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a false deed cannot, in the very nature of things, be rightful. In fact and in law it is wrongful against the person having the true title, and the true right of possession attendant upon that title, during every day it lasts, until the full term of seven years has been completed. When that time arrives, the possession having been open, notorious, adverse, and undisturbed, and the deed having been registered during the full term of seven years, a distinct right is conferred upon the hitherto wrongful possessor by positive law,—our statute of 1819, based upon a well-known public policy, which need not be more particularly referred to. Shannon's Code, § 4456. When this term of seven years has been thus completed under color of title, various questions may and do arise, in estimating the value of that possession, looking back over its course. Among these is the question of the neutralization of one possession by another. It is held that in the case of the interlap of grants, rival possessions within the interlap will neutralize each other, and the case must be determined upon the strength of title.

These doctrines find their most ordinary application in cases arising under the statute of limitations, albeit they are sometimes controlling in questions purely of possession. It is not true, however, that, if one be in actual possession of a portion of a tract of land, by a house or other inclosure built thereon, occupied by a tenant under a deed defining boundaries, under which state of facts the possession is extended by construction of law to the whole boundary covered by the deed (*Mansfield v. Northcut*, 112 Tenn. 536, 80 S. W. 437), another may enter upon the same land under a forged or a champertous deed, and force the former to bring ejectment against him, or proceed, after entering, to cut timber, and, when sued by the former in replevin for the timber itself, or when sued for the value, compel such prior possessor to try the title to the land on which the timber grew. Certainly, if such suit be brought within three years (Shannon's Code, § 5096) for possession against such interloper, the action would be one in forcible entry and detainer, and not ejectment; and in such an action the question of title would not arise, but only the question of prior possession. The same would necessarily be true of a suit brought within three years to recover for timber cut, whether in a direct action for the timber itself, as in the present case, or for the value of it. Whether this rule would be different after the expiration of three years, we need not consider, since the present ac-

tion was brought within less than three months after the seizure of the logs. However, there can be no doubt that adverse possession of personal property for three years would vest title therein (Shannon's Code, § 4470; *Morris v. Lowe*, 97 Tenn. 243, 36 S. W. 1098) so as to bar an action for the property itself. But it is, beyond question, true that prior possession itself would furnish a sufficient basis of right to support an action against a trespasser for either real or personal property. Prior possession, in and of itself, confers a right as against all trespassers, or persons seizing property without due process of law; and the law will protect that right against such persons by restoring, through an appropriate possessory action, that possession, when it is violated in the manner indicated. Any other course of decision would soon fill the state with vexatious and wasteful litigation, if not with violence and bloodshed. Under the opposite theory, how easy it would be to disturb any man's title! And how great the reward for disrupting the peace of society! Any man coveting the land of another could cause a third party to make him a deed purporting to convey an estate in fee, and then enter upon the land and proceed to hold it, or even merely to cut timber; and, to enable the prior possessor to obtain redress, he must submit to a raking fire on his title, from turret to foundation stone. If such investigation reveal one spot of fatal weakness, his arms of both attack and defense are shattered in his hands, and the interloper is left in possession of the property; and this not because he has the better right, but because he was shrewd enough to discover the weakness of his victim's position, and bold enough to place himself in an attitude where that victim would be compelled to attack him under an irretrievable disadvantage, and to encounter inevitable defeat. The law does not encourage the spreading of such nets. The authorities support the principles above announced.

In *Cartwright v. Smith*, 104 Tenn. 689, 58 S. W. 331, it is said: "The gist of the action [replevin] is that the defendant is in possession of the property, and that plaintiff is entitled to the possession. Judge Caruthers, in treating the sections of the Code regulating actions of replevin, has said *viz.* 'Upon a fair construction of the whole of this act, and by it judging of the intention of the legislature, we are constrained to decide that it will lie in all cases where the plaintiff has a present right to the possession of any personal property in the possession of the defendant. In all such cases the property is unlawfully detained

from the plaintiff by the defendant, and therefore falls within the plain language and meaning of the act." In accord: *Shaddon v. Knott*, 2 Swan, 358, 363, 58 Am. Dec. 63; *Wilson v. McQueen*, 1 Head, 17, 18; *Brammell v. Hart*, 12 Heisk. 366; *Shields v. Dodge*, 14 Lea, 356. And compare *Crawford v. Bynum*, 7 Yerg. 381; *Criner v. Pike*, 2 Head, 398; *Carson v. Prater*, 6 Coldw. 565; *Southern R. Co. v. Hall*, 107 Tenn. 512, 64 S. W. 481. "Where property which has been annexed to the freehold is severed therefrom, even by a wrongdoer, it becomes personal property, so as to become recoverable by an action of replevin." 24 Am. & Eng. Enc. Law, 2d ed. p. 481, and cases cited; 28 Am. & Eng. Enc. Law, 2d ed. p. 543. "Where the title to property which has become personally by reason of its severance from the soil or freehold depends upon the ownership of the real estate, it has been held that the true owner, if out of possession, could not in replevin recover the property, where its severance from the freehold was made by a person holding adversely and in good faith under claim and color of title, as the action of replevin could not be made the means of litigating and determining the title to real estate as between conflicting claimants." 24 Am. & Eng. Enc. Law, 2d ed. p. 486.

In *Cobby on Replevin*, 1890 ed., it is said: "Under the authorities, it is allowable in a replevin action to examine into the title of the real estate . . . just far enough to determine whether or not there are adverse claimants to the real estate. If there are, the validity of their claims cannot be tried in the replevin action; but, if there are not adverse claimants to the realty, the title may be shown in the replevin action, for the purpose above stated." §§ 353, 374-376, 382.

In *Cooper v. Watson*, 73 Ala. 252, 255, it is said: "The doctrine seems well settled, upon principle and authority, that, if the owner of the land be not in the actual possession,—if he can show title to things severed from it only by showing title to the land,—a personal action for the taking, conversion, or detention of such things will not lie. If he have the possession at the time of the severance, the rule is different. But if his possession is divested,—if his right lie in entry,—and the adverse possessor gathers a crop in the course of husbandry, or severs a tree or other thing from the land, the things severed are converted into chattels. But they do not become the property of the owner of the land. He is out of possession, and has no right to the immediate possession of such things; nor can he bring any action to recover them until 69 L. R. A.

he regains possession." "To hold the law otherwise," as said in *Smith's Leading Cases*, quoted in the preceding case, "would be to bring the title to the land in dispute in a transitory action, although the plaintiffs had not adopted proper means for reducing his title to possession. For, if the general right to land, unaccompanied by possession, were viewed as giving first a general right of property in whatever may be severed from the freehold, and then a consequent constructive possession, the only question in an action of trover or replevin brought against an actual possessor would be as to the party in whom the title to the realty lay."

The point may be enforced by a few excerpts from other authorities:

In *Anderson v. Hapler*, 34 Ill. 436, 439, 85 Am. Dec. 318, it is said: "Our statute gives the remedy where the goods or chattels have been wrongfully distrained or otherwise wrongfully taken, or shall be wrongfully detained. The possession of land was always a sufficient title thereto as against a stranger. The rightful owner could not forcibly enter and eject a disseisor, nor question his rights, excepting in a real or possessory action for the recovery of the land. The possessor of land might bring replevin for chattels severed from the freehold, and, as the ownership of lands drew to it the constructive possession, the owner might bring replevin for chattels thus severed where there was no adverse possession. But the owner could not bring replevin for chattels severed from land in the adverse possession of the defendant or of a third person. The law does not permit him to assert his title to the land against the person in adverse possession in that manner;" citing *Morris*, *Replevin*, 57, 58; 1 *Smith*, *Lead. Cas.* 485; 1 *Chitty*, Pl. 163; *Eaton v. Southby*, *Willes*, 131; *Snyder v. Vaux*, 2 *Rawle*, 427, 21 Am. Dec. 466; *Vausse v. Russel*, 2 *McCord*, L. 329; *Mather v. Trinity Church*, 3 *Serg. & R.* 509, 8 Am. Dec. 663; *Baker v. Howell*, 6 *Serg. & R.* 476; *Brown v. Caldwell*, 10 *Serg. & R.* 114, 13 Am. Dec. 660; *Powell v. Smith*, 2 *Watts*, 126; *De Mott v. Hagerman*, 8 *Cow.* 220, 18 Am. Dec. 443; *Davis v. Easley*, 13 *Ill.* 192.

In *Stockwell v. Phelps*, 34 N. Y. 363, 364, 90 Am. Dec. 710, it is said: "Replevin, or an action in the nature of replevin, in the *cepit*, can only be brought when trespass could be maintained, and that will only lie for an injury to land when the plaintiff is in possession (*Rich v. Baker*, 3 *Denio*, 79; *De Mott v. Hagerman*, 8 *Cow.* 220, 18 Am. Dec. 443); and . . . [one] being in the actual possession of the premises, claiming them as his own, is regarded

as the owner, as to all the world, until after a judicial decision."

In *Brown v. Caldwell*, 10 Serg. & R. 114, 13 Am. Dec. 660, it is said: "Replevin is not the proper form of action to try title to land *ex directo*, though incidentally title to such action may sometimes be called in question. In Pennsylvania this action has been allowed a great sweep, and to embrace every question of property. But it is property in goods, and not in lands. It is to try the title to personal property, and not real estate. Replevin will not lie for a tract of land. Title cannot be decided in an action merely personal and transitory, no matter whether replevin, trover, or assumpsit. Nor can these actions be maintained by one not in the actual, exclusive possession, whatever his title may be, against one who is in the possession, claiming right. Here the possession is not vacant. The owner of the title is in the constructive, actual possession.

In *Page v. Fowler*, 28 Cal. 605, 610, it is said, quoting from *Halleck v. Mixer*, 16 Cal. 579: "The true rule is this: The plaintiff out of possession cannot sue for property severed from the freehold when the defendant is in possession of the premises from which the property was severed, holding them adversely, in good faith, under claim and color of title. In other words, the personal action cannot be made the means of litigating and determining the title to the real property as between conflicting claimants."

In *Rees v. Higgins*, 9 Kan. App. 832, 834, 61 Pac. 500, it is held that it is "not proper . . . to make the replevin action the means of litigating and determining the title to the real property as between conflicting claimants."

The reason underlying all these cases is that the primary consideration in a replevin action is the right of possession, and that, as to things severed from the realty, the possession of the land at the time determines the right of possession to such things, such person being in the adverse possession of the land, and claiming under color of title; that the court will determine the matter upon the right of possession, and not upon the title to the land; and finally, that in such an action the court will not permit the title of the land to be determined.

There is one exception to be noted. This is: Where neither party has actual possession of any portion of the land at the time the timber is cut, the right to the possession of such timber must be determined by the title to the land, since the law in that case would attach constructive possession of the 69 L. R. A.

land to the title. *Hart v. Vinsant*, 6 Heisk. 616. But even in such a case evidence of title is permitted, "not for the purpose of trying the question of title to the land," but for the purpose of determining the question of possession. *Id.* 618, 619.

Here it is necessary that we should pause for a moment, and note the meaning attached to the terms "actual possession" and "constructive possession" in the authorities.

Of course, it would be idle to attempt a review of the cases within the limits of a judicial opinion, so great is their number. But they are collected in 1 Am. & Eng. Enc. Law, 2d ed. pp. 822-830; 13 Am. & Eng. Enc. Law, 2d ed. p. 745; 28 Am. & Eng. Enc. Law, 2d ed. pp. 238, 239; 1 Cyc. Law & Proc. pp. 983, 1125, 1126. An examination of these authorities, text and notes, will disclose the following: There is some diversity in the use of the terms above referred to, but a substantial agreement concerning the true test of adverse possession in cases such as we have before us, wherein it appears there is actual possession of a portion of tract of land by one claiming under color of title defining boundaries. In the first authority cited in the last paragraph it is said: "It is well established that possession which is necessary to ripen into title must be actual, and to begin such possession, there must be an entry which will amount to an ouster of the true owner. It must be actual, either of all or part of the land claimed, as the same may be held with color of title or without; because constructive possession follows the title, and there cannot be two possessions of the same land at the same time, and the owner, being in possession by virtue of his title, remains until he is disseised by another entering and holding for himself." 1 Am. & Eng. Enc. Law, 2d ed. p. 822. "Mere naked possession without color of title is adverse only to the extent of the actual possession or inclosure. But an entry into possession under a conveyance from a person having color of title is presumed to be made according to the description in the deed, and his occupancy is construed as possession of the entire lot, where there is no actual adverse possession of the parts not actually occupied by him." *Id.* p. 824. "A man cannot by mere physical means retain land in his exclusive grasp. Possession may be more manifest as to a part than as to the rest. Therefore it is an established rule of law that the actual possession of a part is the possession of the entire tract or boundary covered by the occupant's title or claim of title. . . . What is the extent of his possession is to be determined by the limits of his title or color of title. An intruder without color of title

is of necessity confined to his mere inclosure." Id. p. 825, notes, quoted from *Core v. Faupel*, 24 W. Va. 245. "The actual fencing and inclosing of the tract are not, unless expressly required by statute, essential to constitute adverse possession, but such acts are very decisive in determining possession and claim of ownership." Id. p. 828. "Fences are a means by which possession of land may be taken and held. They are not, however, the only means. There may be an actual possession without fences or inclosures of any kind, if it appears from other facts and circumstances that the plaintiff was exercising exclusive dominion and control over the land." 13 Am. & Eng. Enc. Law, 2d ed. p. 749. "When one is in actual possession of a portion of a given tract of land he will be held, in law, to be in possession of the remainder, if he holds under a deed or other color of title and there is no antagonistic or adverse possession." 13 Am. & Eng. Enc. Law, 2d ed. p. 750. "Actual possession, or possession in fact, exists where the thing is in the immediate occupancy of the party, or his agent or tenant." 28 Am. & Eng. Enc. Law, 2d ed. p. 238. "Constructive possession, or possession in law, as it is sometimes called, is that possession which the law annexes to the legal title or ownership of property where there is a right to the immediate actual possession of such property, but no actual possession." Id. 239. In the notes to the page last cited we find the following: "Constructive possession is 'a possession in law, without possession in fact.' *Hodges v. Eddy*, 38 Vt. 327. . . . Properly speaking, constructive possession is that possession which the law annexes to the title. *M'Colman v. Wilkes*, 3 Strobb. L. 471, 51 Am. Dec. 637. Possession which, as an inference of law, arises presumptively from the legal title, is a mere constructive possession, and is founded on the existence of title in some form. *Jeffrey v. Owen*, 41 N. J. L. 260. . . . Constructive possession is that which exists in contemplation of law, without actual personal enjoyment or occupation. *Newcome v. Crews*, 98 Ky. 339, 32 S. W. 947; *Jeffrey v. Owen*, 41 N. J. L. 260; *Brown v. Volkening*, 64 N. Y. 80; *Foust v. Territory*, 8 Okla. 541, 58 Pac. 728. Constructive possession is such a possession as the law carries to the owner by virtue of his title only, there being no actual occupation of any part of the land by anybody. *Mitchell v. Bridgers*, 113 N. C. 63, 18 S. E. 91; *Graham v. Houston*, 15 N. C. (4 Dev. L.) 232. Constructive possession may exist without an actual *pedis possessio*, where there is a present right, and the possession is either vacant, or is consistent with the

right of the owner to an immediate and actual possession by himself. *Sullivan v. Sullivan*, 66 N. Y. 37."

In 1 Cyc. Law & Proc. pp. 982, 983, it is said: "That an adverse claim to land may ripen into a perfect title by virtue of the statutes of limitations, it is primarily essential that the possession relied upon be actual." On page 1125 it is said: "The general rule is well settled that where a party enters, under color of title, into the actual occupancy of a part of the premises described in the instrument giving color, his possession is not considered as confined to that part of the premises in his actual occupancy, but he acquires possession of all the lands embraced in the instrument under which he claims." In a note on page 983 it is said: "Actual possession may consist either in an occupancy in fact of the whole tract claimed, or of an occupancy of part thereof in the name of the whole, where there is sufficient evidence of the bounds of the whole that is claimed as one entirety, and the circumstances are such that the law extends the possession of the part that is occupied to these bounds. This latter may be termed a 'virtual possession,' in order to distinguish it from the other kind of actual possession, which is called 'substantial' or *pedis possessio*. But whatever terms may be used to give precision to the subject, the attributes which pertain to an actual possession belong to it, whether it be substantial or virtual. *M'Colman v. Wilkes*, 3 Strobb. L. 465, 51 Am. Dec. 637."

In our own case of *Hebard v. Scott*, 95 Tenn. 467, 32 S. W. 390, it was held that "the occupation of part of a tract of land, claiming the whole, under a paper title defining its boundaries, is effective possession of the whole tract under the statutes of limitation." To the same effect are *Winters v. Hainer*, 107 Tenn. 337, 64 S. W. 44; *Turnage v. Kenton*, 102 Tenn. 328, 52 S. W. 174; *Hunter v. Bills*, 3 Tenn. Cas. 97, 101; *Elliott v. Cumberland Coal & Coke Co.* 109 Tenn. 745, 71 S. W. 749. We have one or two cases in our Reports which, upon casual reading, would seem to indicate that there must be an inclosure of the whole tract claimed, even when the party claims under color of title; but, upon careful reading of these cases in connection with the cases cited in them (*Pullen v. Hopkins*, 1 Lea, 741; *Hicks v. Fredericks*, 9 Lea, 491), it is clear that what is meant is simply that there must be some sort of inclosure upon some part of the land, as a house, a fenced field, or other "improvement," as visible evidence of possession, where the land is capable of such use, and not that the whole tract of land must be inclosed.

The latest cases we have upon the subject of adverse possession are *Green v. Cumberland Coal & Coke Co.* 110 Tenn. 35, 72 S. W. 459, and *Mansfield v. Northcut*, 112 Tenn. 536, 80 S. W. 437,—both cited *supra*.

In the first of these cases it is said: "Where there is no part of the land in actual possession, the constructive possession is with the party holding the superior legal title; but, where a portion of the land is in actual adverse possession, the party so holding has constructive possession of all the premises outside of his inclosure to the limits of his claim or assurance of title; and such constructive possession is superior to that which results merely from the ownership of the legal title, and is sufficient to put in operation the statutes of limitation to the entire tract."

In the second case it is said: "The Northcuts had actual possession of a small house upon the land occupied by Mrs. Mansfield as their tenant, claiming to the extent of the boundaries called for in their title papers. The remainder of the tract was uninclosed. A claimant of the land under a hostile title to that of defendants in error built a cabin upon a different part of the premises, and induced Mrs. Mansfield to move into it and attorn to him, and this action [forcible entry and detainer] was brought to dispossess her. Defendants in error, under these facts, had possession of the entire tract,—actual possession of the house occupied by their tenant, and constructive possession of the remainder. Constructive possession of this nature, connected as it is with actual possession of a part of the premises is of a higher character than that which follows the legal title. It will perfect a defective title, under the statute of limitations, and raise a presumption of grant, when held for sufficient periods of time. . . . We think that constructive possession of this character is sufficient to enable a claimant so holding to maintain this action."

It is perceived that the species of "constructive possession" enforced in these two cases in no wise differs from the "effective possession" mentioned in *Hebard v. Scott*, and the "virtual possession" mentioned in *McColman v. Wilkes*, 3 Strobb. L. 465, 51 Am. Dec. 637, and that the attributes which pertain to an actual possession belong to it. It is further apparent that the learned justice who prepared the opinion in the cases quoted from carefully distinguished the kind of constructive possession—"effective possession" or "virtual possession"—enforced in those cases from the general constructive possession which the law attaches to the title where there is no ac-

tual possession in the owner of the title, and no one in adverse possession. It is also perceived that the learned justice differentiated this "effective possession" or "virtual possession" from technical "actual possession" merely for the sake of scientific precision or logical accuracy of thought, and that he not only did not assign to it a different office and effect from that belonging to actual possession, but blended the two and gave them the same effect; that is, treated both as constituting, in effective operation, a single possession. In so treating them, the opinions referred to not only held the court in line with its former adjudications above referred to with approval, but preserved its harmony with the overwhelming weight of authority in this country upon the special phase of the question herein considered, as shown by the excerpts which we have made from the text-books quoted above, and as exhibited by the vast number of cases cited in the notes on the pages referred to.

The substance of the whole matter, as applied to the present controversy, is that, the defendants in error being in actual possession of a part of the tract on which the timber grew, by their tenant living in a house built upon the tract, holding under color of title, and claiming the land as their own at the time the timber was felled and the logs taken away, their possession extended to the limits or boundaries contained in their title papers, which covered the space where the trees grew. This possession was the "effective possession" or "virtual possession" described above, and was an "adverse possession," in the sense in which that term is used in the law. Being thus in adverse possession of the land, they were likewise in adverse possession of the timber which grew upon it, and, when it was felled and the logs hauled away, these logs were taken from their possession; and, within the authorities cited, and under the principles stated, they were entitled to pursue the logs by the appropriate possessory action (replevin); and, to sustain the action, they did not need to go further than prove their status as above outlined, and the taking, without deraining title or going into a controversy with the person taking the logs concerning the true title to the land. Any other view would place the court in the novel position of holding that one in adverse possession of land, claiming under color of title, may recover the land itself from a trespasser by a possessory action, but must bring ejectment for timber cut from it, or (the same thing, in substance) must sustain his possessory action for the timber (replevin) by the character

of testimony required only in ejectment cases.

So, recurring to the special point previously mentioned, we conclude that the deed of the Cumberland Coal & Coke Company, even if admitted in evidence, could not protect Hizar Beaty's estate against recovery in the present action.

It is insisted by the plaintiffs in error that his exception to the two Gernt deeds above referred to should have been sustained. We do not think so. The exceptions were, in substance, that those two deeds did not describe any land. This is a mistake. They refer to the grant by its number, and it describes the land. *Id certum est quod certum reddi potest.*

It is insisted that the defendants in error do not show a right to the possession of any interest in the logs sued for, and that there can be no recovery in replevin in such a case. To this it need only be replied that the whole possessory right is shown to be in Bruno Gernt. It is immaterial to the plaintiffs in error if he join others with him in the suit, and share his recovery with them.

It is said that, after the date of his deeds above referred to, Bruno Gernt executed a deed to Sydney Beckwith to an undivided 450-acres interest in the land covered by grant No. 3,329 and that it does not appear but that the logs in question, or some of them, were cut from said Beckwith's land. This is an immaterial matter to the plaintiffs in error since Beckwith joined in the suit below.

It is said that part of the logs in question were cut from the land of Marion Stephens, and part from the land claimed by the defendants in error, and that it is impossible to distinguish them. This is immaterial, also, since it appears that Marion Stephens transferred his right in the logs, whatever it might be, to the defendants in error prior to the bringing of the suit below.

The foregoing sufficiently disposes of the real matters in controversy, and we need not refer to or consider the other errors assigned.

It results that the judgment of the court below must be affirmed.

Wilkes, J., dissenting:

I do not concur with the majority opinion. There is no principle better established than that in an action of replevin the plaintiff must show either a general or special property or ownership in himself.

In *Parham v. Riley*, 4 Coldw. 5, it is said: "The purpose of the action of replevin is to recover in *specie* the personal chattel which has been taken and detained from the owner's possession. Under the plea of 'not guilty.' It is competent for the defendant

. . . to show that the title to the property replevied is not in the plaintiff, but in himself or a third person, and thereby defeat the action. The plaintiff cannot succeed unless he prove either a general or special property in himself. . . . [Hence], property acquired by robbery does not vest such title in the trespasser as will authorize him to maintain the action."

Under the plea of not guilty, in an action of replevin, "the material inquiry is as to the property of the plaintiff, which he must be prepared to prove. If this issue is found against him, he cannot succeed." 2 Greenl. Ev. 563.

"The plaintiff cannot succeed, then, unless he is prepared to prove either a general or special property in himself, and will be defeated if the proof shows the right to the property and possession is in a stranger, . . . It is enough for this case to say that the present defendant has a right to show that the plaintiffs have no title, or that the legal right to the property is outstanding in . . . anyone else; and, if he succeeds in doing so, the plaintiffs must be defeated." *McFerrin v. Perry*, 1 Sneed, 316.

In the case at bar the plaintiff is relieved by the majority from showing property or title in himself, and his right to recover is made to depend upon constructive possession, although actual possession would not suffice unless the right to that possession is shown by the proof. See also *Collier v. Yearwood*, 5 Baxt. 581.

To the same effect is *Hart v. Vinsant*, 6 Heisk. 618. In that case it is said: "Situated as the trees were out of which the rails were made,—the land being uninclosed, and therefore not in the actual possession of either party,—it became a legitimate and necessary inquiry to ascertain upon whose land they stand, not for the purpose of trying the question of title to the land, but as a means of determining who had the right to the possession of the rails when made."

In *Clement v. Wright*, 40 Pa. 250, it is said: In the absence of any actual adverse possession of wild timber land, the law casts the possession on the owner; and proof of title was therefore admissible, not for the purpose of trying the title, but to prove possession in the rightful owners, which possession defendant had acquired by purchase. To the extent that it was legitimate and necessary to inquire into the ownership or right of possession of the rails, it was incumbent on both parties to adduce the best evidence of title. It was also erroneous to exclude the title papers of defendant.

The action of replevin is based upon the trespass in the taking; and in such actions of trespass the plaintiff must show an actual

possession, or a valid title in himself to the premises in dispute. *Snoddy v. Kreutch*, 3 Head, 303; *Large v. Dennis*, 5 Sneed, 597.

The title required in cases of replevin is the same as in actions of trover. Cobbey, Replevin, § 89. When a plaintiff is in actual possession, he need not derain his title, as against a naked trespasser. *Large v. Dennis*, 5 Sneed, 597.

But constructive possession can never be determined to be in any other than the legal owner of the premises. Therefore the plaintiff in this action, where brought for a casual trespass to wild and unoccupied lands, must show title to the premises. *Polk v. Henderson*, 9 Yerg. 310; *Douling v. Hickmon*, 4 Hayw. (Tenn.) 170; *West v. Lanier*, 9 Humph. 771; *Bailey v. Massey*, 2 Swan, 168.

As we understand the opinion of the majority, any person having constructive possession, but not actual occupancy, of premises, may bring an action of replevin for timber cut. If so, then, in case of an interlap or any other conflict of title, in which both parties have possession of part and title papers for the remainder, either party may bring replevin against the adverse claimant, without showing title and ownership, because each has constructive possession of the same grade and dignity. In addition, it is a solecism to speak of constructive possession which is not based upon ownership and title, for, in order to show constructive possession, title and ownership must appear as its basis. The correct doctrine, as I understand it, is that a party in actual possession or occupancy of land, as when it is inclosed, etc., may maintain replevin against a naked trespasser who does not claim title. But where there are two parties claiming title to land, and neither in occupancy, neither may maintain replevin for timber cut on the disputed premises, and certainly not without showing "ownership," which in the case of real estate is synonymous with "title," and title cannot be tried in an action of replevin. As is said in Cobbey on Replevin, § 376. 'In replevin for logs cut and removed by defendants from the land to which plaintiff claims title, proof that the plaintiff was in actual possession and occupancy of the land at the time of such cutting and removal is sufficient to enable him to maintain the action, without proof of a paper title, unless the defendants prove an adverse title thereto of a higher character than a mere possessory title. But where the land was unoccupied when the logs were taken, plaintiff must show that he is the real owner, and trace his title to the government. Where a trespasser settled on timber land for the purpose of cutting the

timber thereon, such settlement does not constitute him an adverse claimant, and the true owner may bring replevin for the logs and the timber so cut." To the same effect see also, 24 Am. & Eng. Enc. Law, 2d ed. p. 486, § 8; *Hungerford v. Redford*, 29 Wis. 345; *McNarra v. Chicago & N. W. R. Co.* 41 Wis. 69; *Wadleigh v. Marathon County Bank*, 58 Wis. 546, 17 N. W. 314.

The majority opinion refers to Cobbey on Replevin, §§ 353, 374-376, 382; and § 353 is copied, which explicitly and directly supports this dissent, by stating, in substance, that, where there are adverse claimants to land, replevin will not lie for timber cut by one of them. Section 376 we have already copied. The gist of that section is that, when the land is unoccupied when the logs are taken, the plaintiff must show that he is the real owner, and trace his title to the government. So in § 354 it is said: "Where the land is wild, uninclosed, the plaintiff must show a good legal title, as constructive possession follows the legal title." *Johnson v. Elwood*, 53 N. Y. 431. To the same effect is *Hart v. Vinsant*, 6 Heisk. 616.

In *Hungerford v. Redford*, 29 Wis. 345, it is said: "Action to recover the possession of a quantity of pine logs, alleged to have been cut by the defendants on a certain tract of land belonging to the plaintiff, and by them removed therefrom. The complaint is in the usual form. The answer is a general denial, and an averment that the land upon which the logs were cut and from which they were removed belongs to the defendants. The plaintiff recovered judgment in the circuit court, from which the defendants have appealed. 1. It appears by the evidence that the land from which the logs were taken was unoccupied; and it was therefore necessary that the plaintiff should prove that he was the owner thereof before he could recover the logs. The owner of the land is the owner of the logs, and entitled to the possession of the same. To prove his title to the land, the plaintiff gave in evidence a conveyance thereof executed by Eli P. May and wife to Wm. B. Ogden, dated January 21, 1857; also conveyances of the same land executed by Ogden to Flagg, by Flagg to Rumsey, and by Rumsey to the plaintiff. The latter of these conveyances is dated August 17, 1868. This is all of the testimony relating to plaintiff's title to the land, and it is clearly insufficient. It fails entirely to show that May or any other grantor in either of the above-mentioned conveyances had any title to the land, and hence fails to show that the plaintiff has title thereto. A merely colorable title in the plaintiff is not alone sufficient to entitle him to judgment in an action like this,

where, as in this case, the land is unoccupied. Had he been in the actual possession and occupancy of the land when the logs were cut, he could have maintained this action without making any proof whatever of a paper title, unless the defendants proved an adverse title thereto of a higher character than a mere possessory one. But the plaintiff was not in actual possession of the land when the logs were cut, which was in winter of 1868, 1869, and he shows no title in himself to the land, except one which is merely colorable. If the plaintiff is not the real owner of the land, and the defendants shall be compelled to pay the judgment which he recovered against them in the circuit court, what rule of law will prevent such owner from bringing an action against them for the same logs, and recovering therein? No such rule has been contended for in this case, and we are not aware that there is any such rule. The fact that a recovery by the holder of a merely colorable title is no bar to a recovery by the real owner demonstrates that none but the real owner can recover."

In *McNarra v. Chicago & N. W. R. Co.* 41 Wis. 74, it is said: "The title necessary to be proved in order to maintain the action is the same as in an action of trespass *quare clausum fregit* or in replevin for timber cut and removed by a trespasser from the lands of the plaintiff. In either case, if the lands upon which the trespass was committed were vacant and unoccupied, the plaintiff must prove his title thereto, or he cannot recover. But if he was in the actual possession and occupancy of the land when the trespass was committed, he may maintain trespass or replevin, according to the exigencies of the case, without making any proof of a paper title, unless the defendant prove an adverse title thereto of a higher character than a mere possessory one. *Hungerford v. Redford*, 29 Wis. 345. In this case the plaintiff showed himself in actual possession of the land at the time of the injury, and the defendant did not show or attempt to show any outstanding adverse title thereto. Hence the plaintiff's possession was sufficient to sustain the action, and he was not required to establish a higher or better title."

In the present case there is a claim of title by both parties. Neither is in actual possession or occupancy. Both are in constructive possession. According to the majority, each would have a right to replevy from the other, and no inquiry of ownership or title is allowable.

One may have a slightly higher grade of constructive possession; but this could only be determined by a comparison of titles, 69 L. R. A.

which is not allowed. Both have constructive possession, and, under the opinion of the majority, each may maintain replevin; but neither is required to show ownership or title on which constructive possession is based.

This is a new doctrine, not supported by reason or authority, and I most respectfully dissent from such holding. In dissenting, I controvert none of the authorities cited by the majority, but, so far as they are applicable, they support the view expressed in this dissent. The majority hold that title cannot be inquired into, and at the same time proceed to inquire into the title to see whether the plaintiff has constructive possession. Not only so, but they pass upon defendant's title, and pronounce it champertous. As to the difference between actual and constructive possession, and the different grades of constructive possession the mass of authorities cited by the majority is wholly unnecessary. The entire subject is fully, ably, and exhaustively discussed in *Green v. Cumberland Coal & Coke Co.* 110 Tenn. 35, 72 S. W. 459; but I think much of the reasoning of the majority opinion in this case is in conflict with the holding in the *Cumberland Coal & Coke Case*.

The case of *Mansfield v. Northcutt*, 112 Tenn. 536, 80 S. W. 437, holds that constructive possession is sufficient to sustain the action of forcible entry and detainer. But the action of forcible entry and detainer is maintained upon grounds different from an action of replevin. The only question in an action of forcible entry and detainer is one of possession. Title or ownership is not necessary to be shown. Only two questions are inquired into, viz: (1) Who was in possession? (2) How was that possession lost? *Davidson v. Phillips*, 9 Yerg. 95, 30 Am. Dec. 393. A trespasser who has no title whatever may recover from the true owner if his possession is disturbed. *Ibid.* And the statute expressly provides that in such actions the estate or merits of the title shall not be inquired into. *Shannon's Code*, § 5103. But in replevin, ownership and right to possession must be shown, and not mere actual possession alone. *McFerrin v. Perry*, 1 Sneed, 317, and other cases cited, *supra*.

But I will pursue the matter no further; simply contenting myself with the statement that I am of the opinion the cases cited by the majority opinion do not lead to the result reached, but to the contrary. I cite in support of this dissent the following authorities relied on by the majority: 24 Am. & Eng. Enc. Law, 2d ed. p. 486; Cobbey, Replevin, §§ 353, 376, and other sections; *Cooper v. Watson*, 73 Ala. 252, 255;

Anderson v. Hapler, 34 Ill. 436, 439, 85 Am. Dec. 318, and cases cited; *Stockwell v. Phelps*, 34 N. Y. 363, 90 Am. Dec. 710; *Page v. Fowler*, 28 Cal. 605, 610; *Rees v. Higgins*, 9 Kan. App. 832, 834, 61 Pac. 500; *Hart v. Vinsant*, 6 Heisk. 616, directly in point.

LOUISVILLE & NASHVILLE RAILROAD
COMPANY, *Plff. in Err.*,

v.

E. C. DILLARD.

(.....Tenn.....)

1. The conductor of a passenger train cannot be regarded as in a separate department of service from a brakeman of a freight train, so as to render the railroad company liable for injury to the latter by his negligence.
2. After a master has exercised due care in the selection of servants, the danger arising from the negligence of a fellow servant is one which is voluntarily assumed by a person going into the service of the master; it being a risk for which satisfactory compensation is presumed to have been rendered by the larger wages he can earn in such service than in other employments.

(March 18, 1905.)

ERROR to the Circuit Court for Sumner County to review a judgment in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by negligence for which defendant was responsible. *Reversed.*

The facts are stated in the opinion.

Messrs. Seay & Seay for plaintiff in error.

Messrs. B. F. Proctor and J. D. G. Morton for defendant in error.

NEIL, J., delivered the opinion of the court:

This action was brought in the circuit court of Sumner county to recover damages for an injury inflicted upon the foot of the defendant in error in a collision that occurred in November, 1902, at Hendersonville, on the line of the plaintiff in error, between a freight train and a passenger train. There were verdict and judgment in the court below and the railway company, after motion for a new trial had been overruled, appealed and assigned errors.

The defendant in error was a brakeman on the freight train. The declaration con-

tained counts on the negligence of the train despatcher, the negligence of the conductor of the freight train, and the negligence of the conductor of the passenger train. To the last-mentioned count—the third—there was a demurrer filed, raising the question that the conductor on the passenger train stood in the relation of fellow servant to the train crew of the freight train, and hence to the defendant in error, the brakeman on that train; and therefore the company would not be liable to him for an injury caused by the negligence of such passenger conductor. This demurrer was overruled by the circuit-court judge, and his action on this matter forms the subject of the first assignment of error, which we shall now proceed to consider.

The first assignment of error raises the question whether the conductor on the passenger train was the fellow servant of the brakeman on the freight train, or whether such conductor stood in the relation of vice principal to the brakeman.

In our latest case upon the subject (*Ohio River & O. R. Co. v. Edwards*, 111 Tenn. 31, 76 S. W. 897) it is said: "The mere superiority in dignity, grade, or compensation, in favor of one servant of a common principal over other servants, is not a mark by which to distinguish whether or not the former is a vice principal. . . . The most general test is that, in order to be a vice principal, a servant must so far stand in the place of his master as to be charged in the particular matter with the performance of a duty towards the inferior which, under the law, the master owes to such servant,—as furnishing tools (*Guthrie v. Louisville & N. R. Co.* 11 Lea, 372, 47 Am. Rep. 286), or machinery and appliances (*Louisville & N. R. Co. v. Lahr*, 86 Tenn. 335, 341, 6 S. W. 663), or giving orders with respect to work to be done by the subordinate (*Nashville O. & St. L. R. Co. v. Handman*, 13 Lea, 423, 429). A test frequently stated in our cases is the authority to give orders, as a vice principal, to the subordinate servant, in directing him when, where, and how to work. . . . Some illustrations of the foregoing are seen in the following cases: *Louisville & N. R. Co. v. Bowler*, 9 Heisk. 866; *Louisville & N. R. Co. v. Northington*, 91 Tenn. 56, 16 L. R. A. 268, 17 S. W. 880; *Chattanooga Electric R. Co. v. Lawson*, 101 Tenn. 408, 409, 47 S. W. 489. In these cases a section boss was held to stand

NOTE.—As to when conductor is deemed to be a coservant of other railroad employees, including his relation to members of crews of other trains, see also *note* to *Jackson v. Norfolk & W. R. Co.* 46 L. R. A. 337.

For a case in this series holding that conductor of one train is not a fellow servant of a L. R. A.

brakeman on another train, see *Daniel v. Chesapeake & O. R. Co.* 16 L. R. A. 383.

On the question whether railroad servants working on different trains are fellow servants generally, see cases in *note* to *Sofield v. Guggenheim Smelting Co.* 50 L. R. A. 431.

as a vice principal to the section hands under him because he had power to order them with respect to their work, and also because it was his duty to see that they had proper tools with which to work. In *East Tennessee & W. N. C. R. Co. v. Collins*, 85 Tenn. 227, 1 S. W. 883, and *Louisville & N. R. Co. v. Martin*, 87 Tenn. 398, 3 L. R. A. 282, 10 S. W. 772, it was held that the engineer was the vice principal of the brakeman on a train, when, in the absence of the conductor, he had power to give the brakeman orders in respect to his work, but otherwise not; and in *East Tennessee, V. & G. R. Co. v. Wright*, 100 Tenn. 56, 42 S. W. 1065, it was held that the conductor stands as vice principal to all of the train force, because they are all under his orders." To the same effect, *Illinois C. R. Co. v. Spence*, 93 Tenn. 173, 42 Am. St. Rep. 907, 23 S. W. 211.

The conductor of the passenger train in question, however, had no power to give orders to the brakeman on the freight train. This ground for adjudging the relation of vice principal and of servant thereunder did not, therefore, exist. Was the conductor of the passenger train charged with any of the personal duties of the master towards the brakeman on the freight train? Was he charged with the duty of furnishing tools and appliances or a safe place to work? There is nothing to show that he was charged with such duties. Was the passenger conductor in charge of, or engaged in, a separate department of the master's business?

In this state the departmental doctrine is recognized in railway cases. The grounds on which it rests are thus stated in *Coal Creek Min. Co. v. Davis*, 90 Tenn. 711, 719, 720, 18 S. W. 387, 389: "The doctrine rests upon the theory that the vast extent of the business of railway companies has led to the division of their business into separate and distinct departments; that, by reason of this division, a servant in one branch or department has no sort of association or connection with one in another department; that this absence of association gives the servant no opportunity of observing the character of a servant in another department of labor, and no opportunity to guard against the negligence of such servant. The want of consociation is the idea underlying this limitation. This rule has not been extended by us beyond railroad corporations, and we are not disposed to extend it further than to the class of employments to which it has been heretofore limited."

Under this doctrine, it has been held that a track repairer was in a different department from, and hence not the fellow servant of, the crew of a train running upon the track (*Haynes v. East Tennessee & G. R.*

Co. 3 Coldw. 222); for the same reason, that a section foreman was not the fellow servant of the train crew (*Nashville & C. R. Co. v. Carroll*, 6 Heisk. 347, 361); that a watchman was not the fellow servant of an engineer (*Louisville & N. R. Co. v. Robertson*, 9 Heisk. 276); a telegraph operator at a way station not the fellow servant of the conductor of a train (*East Tennessee, V. & G. R. Co. v. De Armond*, 86 Tenn. 73, 6 Am. St. Rep. 816, 5 S. W. 600); a car inspector not the fellow servant of the crew of a switch engine (*Taylor v. Louisville & N. R. Co.* 93 Tenn. 307, 27 S. W. 663); a depot agent not the fellow servant of the conductor of a train (*Louisville & N. R. Co. v. Jackson*, 106 Tenn. 438, 61 S. W. 771); a bridge crew not the fellow servant of the crew of a freight train (*Freeman v. Illinois C. R. Co.* 107 Tenn. 340, 64 S. W. 1); and an engineer not the fellow servant of a telegraph operator (*Illinois C. R. Co. v. Bentz*, 108 Tenn. 670, 58 L. R. A. 690, 91 Am. St. Rep. 763, 69 S. W. 317).

We have no case holding that separate trains constitute separate and distinct departments of railway service; nor do we think they can be so treated on principle. The reason underlying the departmental doctrine resides in, as already stated, the need of consociation to enable coemployees to judge of the caution, diligence, and efficiency of each other, in order that they may properly protect themselves against negligence. In distinct departments of the service they are regarded as constantly working apart from each other, without the opportunity of mutual observation and criticism. This reason, however, cannot be held to apply to the crews of different trains running upon the tracks of the same company. It does not appear that such crews are permanently attached to any special trains. Moreover, even if not associated upon the same train, the crews of each train, in passing and repassing and in mingling with each other in the handling of traffic in the course of their work, necessarily have an opportunity of judging to some extent how the various trains are managed by the people who man them. At best, the amelioration of the dangers incident to a hazardous business cannot be very great for the servants of a common master, even when they work in the same department, where the number of such coemployees is great, as very often happens in the railway business, and in other kinds of business.

If the conductor of the passenger train in question had no control over the brakeman on the freight train, or was not charged with any duty of the master towards him, as in the furnishing of tools and appliances or a safe place to work, or was not in a different

department of the master's service (and we have seen that he had no such powers and bore no such relation), which are the only exceptions our cases recognize as taking co-employees out of the class of fellow servants, then the said conductor and brakeman were fellow servants, and the master was not liable for the injuries inflicted upon one by the negligence of the other. This conclusion seems inevitable, on principle.

The weight of authority likewise supports this conclusion. *Baltimore & O. R. Co. v. Andrews*, 17 L. R. A. 191, 1 C. C. A. 636, 6 U. S. App. 75, 50 Fed. 728; *Kerlin v. Chicago, P. & St. L. R. Co.* 50 Fed. 186-188; *St. Louis, I. M. & S. R. Co. v. Needham*, 25 L. R. A. 837, 11 C. C. A. 56, 27 U. S. App. 227, 63 Fed. 107, 112; *Northern P. R. Co. v. Mase*, 11 C. C. A. 63, 27 U. S. App. 238, 63 Fed. 114; *McMaster v. Illinois C. R. Co.* 65 Miss. 264, 268, 7 Am. St. Rep. 654, 657, 4 So. 59; *Pittsburg Ft. W. & C. R. Co. v. Devinney*, 17 Ohio St. 197. There are other cases holding a contrary view. *Mad-den v. Chesapeake & O. R. Co.* 28 W. Va. 617, 618, 57 Am. Rep. 695-697; *Daniel v. Chesapeake & O. R. Co.* 36 W. Va. 397, 411, 413, 417, 419, 16 L. R. A. 383, 387, 389, 390, 32 Am. St. Rep. 870, 882, 885, 888, 889, 15 S. E. 162; *Louisville & N. R. Co. v. Edmund*, 23 Ky. L. Rep. 1049, 64 S. W. 727. The Kentucky case is based, in substance, on the ground that separate trains constitute separate departments or that they are equivalent thereto, because the crews of such separate trains are "so disconnected as not to give the one a right or opportunity for controlling, admonishing, or even observing the manner of the collaborators doing his work." We have already held this distinction inadmissible, in a former part of this opinion. The substance of the West Virginia cases (both collision cases), as we understand them, is that it is the personal duty of the master to keep the way clear, and that each conductor in charge of a train should be regarded as representing the master for that purpose. We think this view is fully met by the reasoning of Sanborn, J., in *St. Louis, I. M. & S. R. Co. v. Needham*, 25 L. R. A. 837, 11 C. C. A. 56, 27 U. S. App. 227, 63 Fed. 107, 112. In that case it appeared there was a rule of the company which provided "that conductors of all trains, when approaching meeting points where they are to take the siding, must go to the forward part of trains, and attend to the switch in person. On train leaving the siding, they must set up switch for the main track in person. Conductors must not assign this duty to anyone, but must attend to it in person in every instance." The decedent was a fireman on a passenger train running south from Little Rock, Arkansas, 69 L. R. A.

December 16, 1889. About two hours before this passenger train arrived at Alexander, a station 10 miles south of Little Rock, the conductor of a construction train of the railroad company caused the switch of the spur track at that place to be opened, ran his train upon that track and then ran it north to Little Rock, and left the switch open, when it was his duty to close it. The passenger train ran into the open switch, and Mr. Needham was killed. In answer to the contention that it was the personal duty of the master to make and keep the way safe, the court, among other things, said: "The line of demarcation between the absolute duty of the master and the duty of the servants is the line that separates the work of construction, preparation, and preservation from the work of operation. Is the act in question work required to construct, to prepare, to place in a safe location, or to keep in repair the machinery furnished by the employer? If so, it is his personal duty to exercise ordinary care to perform it. Is the act in question required to properly and safely operate the machinery furnished, or to prevent the safe place in which it was furnished from becoming dangerous through its negligent operation? If so, it is the duty of the servants to perform that act, and they, and not the master, assume the risk of negligence in its performance. The roadbed, ties, tracks, stations, rolling stock, and all the appurtenances of a well-equipped railroad together constitute a great machine for transportation. It is the duty of the railroad company to use ordinary care to furnish a sound and reasonably safe machine, to use due diligence to keep it in proper repair, and to use ordinary care to employ reasonably competent servants to operate it; but, when this duty is performed, the duty rests upon the servants to operate it carefully. In the case before us there is no evidence that the conductor who negligently left the switch open was not selected with reasonable care. There is no claim that there was any defect in the switch that hindered or prevented the conductor from closing it. The company furnished a switch sufficient to move the rails, and used due care in selecting the servant to operate it. Before this servant commenced to operate it, the switch was closed, so that the passenger train on which the decedent was killed might have passed in safety. It became the duty of the conductor, in the operation of the railroad, to open this switch, and to run his train through it upon the spur track. He did so. It then became his duty to take his train off the spur track and to close the switch. He took his train off and

proceeded south, but carelessly left the switch open. His negligence was not in the construction, preparation, or repair of the railroad, but in its operation. The railroad was safe before he made it unsafe by his negligence in operating it, and he was discharging none of the personal duties of the master, but one of the duties of the servant, when he became guilty of the fatal negligence. Any other holding would annihilate the now settled rule of liability for the negligence of fellow servants. It will not do to say that the timely movement and fastening of a switch in the ordinary operation of a railroad is requisite to provide a safe place for the next train to be operated in, and hence is one of the personal duties of the master. Under such a rule, it would become the absolute duty of the master to so operate all switches, all turntables, the levers of all engines, all brakes, all cars, and every appurtenance of the railroad, that every place upon it should at all times be safe, and no negligence of any employee could ever cause an injury to another servant for which the master might not be held liable. At the instant of the injury every place in which an injury is inflicted is unsafe. The test of liability is not the safety of the place nor of the machinery at the instant of injury, but the character of the duty, the negligent performance of which caused the injury. Was it a duty of construction, preparation, or repair, or was it a duty of operation of the machine? In our opinion, the duty of opening and closing a switch in the ordinary operation of a railroad is not one of the personal duties of the master, but a duty of operation,—a duty of the servant,—for negligence in the discharge of which another servant of the same master, engaged in operating a train over the same railroad, cannot recover."

And it was well said by Brewer, J., in *Howard v. Denver & R. G. R. Co.* 26 Fed. 837, 842,—a collision case: "It will not do to say that, because Ryan's engine was in the way, and collided with decedent's train, the track was not clear, and therefore the master had failed in his duty of providing a safe place for the employee to work in and upon. The negligent use by one employee of perfectly safe machinery will seldom be adjudged a breach of the master's duty of providing a safe place for other employees. Such a construction would make any negligent misplacement of a switch, any negligent collision of trains, even any negligent dropping of tools about a factory, a breach of the duty of providing a safe place. The true idea is that the place and the instruments must in themselves be safe, for this

is what the master's duty fairly compels, and not that the master must see that no negligent handling by an employee of the machinery shall create danger. Neither can it be said that Ryan and decedent were engaged in a different class of work. Both were employed in the movement of trains,—the same kind of service. True, they were on different trains, and at the time of the accident had no opportunity of noticing the conduct of each other until too late to prevent the collision. But, being engaged in the same kind of service, and on the same division, they must naturally have often been thrown into contact and had ample opportunities for mutual supervision. To subdivide beyond the class of service, into the place of work, would carry the exception beyond well-recognized limits. It would make the trainmen on one train not fellow servants with those on another; the carpenters and machinists in one room strangers in service to those of another; one gang of section men not coemployees with another,—and all because at the time their places of work happened to be different."

To admit the qualification into the law of master and servant sought to be introduced in this case, making the conductor of one train the vice principal of employees upon another train, thereby declaring each train to constitute a separate department of the service, would practically break down the whole law of fellow servants as previously understood in this state. The law as it exists in this state is not unfair either to the master or the servant. While, on the one hand, it seems, on a casual view, that it is a hardship upon the servant to deny him relief for an injury inflicted upon him by the negligence of a fellow servant in whose selection he had no voice, yet it seems equally hard to make the master liable to one of his servants for the negligence of another servant when he (the master) has exercised due care in selecting such servant. What more could he do? It is impossible that he should supervise and control every act of his servants. Yet if he is made liable to each of his servants for every act of all of his servants in the course of the employment,—and there may be, and there often are, thousands of them,—the law then places upon him a duty which everyone knows that no one can discharge. The true and just view is that expressed in our cases,—that, after the master has exercised due care in the selection of his servants, the danger arising from the negligence of a fellow servant is a danger which one going into the service voluntarily assumes; and it is a risk for which it is presumed he is

satisfactorily compensated by the larger wages he can earn in the service than in other employments. In this state we have already narrowed the field covered by the law of fellow servants by withdrawing from it cases wherein one servant of the master is set over other servants, with power to command them in their work, and by the introduction of the departmental doctrine as construed and applied in our previous cases, and have added cases arising under these to the master's generally recognized duty of furnishing safe tools and appliances, a safe place to work, and the selection of reasonably competent servants. We deem it inexpedient to make any further extension than may follow from a natural and reasonable development of the principles already adjudged. We do not think the case now put before us lies within the path of that development.

We are of opinion, therefore, that the circuit judge committed error in not sustaining the demurrer to the third count of the declaration, and the first assignment is sustained.

Other assignments of error are disposed of in a memorandum opinion filed with the record, and need not be further referred to here.

Reverse and remand.

City of MEMPHIS *et al.*, Appts.,
v.

Margaret HASTINGS.

(118 Tenn. 142.)

1. The legislature may authorize a municipal corporation to condemn for park purposes and boulevard land near to, but outside of, its corporate limits.
2. The condemnation of land for a boulevard connecting public parks is not unlawful on the ground that it is for mere convenience or pleasure, not for necessity.
3. An amendment to a city charter authorizing the condemnation of land outside the city limits for park purposes is not invalid for not providing compensation to the owner of the land taken, where it provides that the proceedings for the exercise of the power of condemnation shall be the same as that now provided by law for the taking of private property for public use, and the charter of the city incorporates within itself the general condemnation statutes of the state.
4. A provision in a statute authorizing the condemnation of land for boulevards to connect parks is covered by

NOTE.—For a collection of authorities upon the right to take property for the comfort and pleasure of the public, see *Knowlton v. Williams*, 47 L. R. A. 314.
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a title stating the object of the statute to be to authorize the acquisition, improvement, and maintenance of parks.

5. The creation of a park commission and a board of park commissioners is within the purview of a title authorizing the acquisition, maintenance, and improvement of parks.
6. An amendatory act, whose caption merely recites the title of the original act, without enlarging its scope, is constitutional and valid, providing its purview is germane to the title of the original act.

(July 6, 1904.)

APPEAL by petitioners from a judgment of the Circuit Court for Shelby County dismissing a petition for the condemnation of land for the construction of a park boulevard. *Reversed.*

The facts are stated in the opinion.

Mr. L. B. McFarland, with **Mr. J. W. Canada**, for appellants:

The legislature may empower a city to spend money on improvements on roads outside of the city limits, and levy a tax therefor.

Hagood v. Hutton, 33 Mo. 244.

And to enforce police ordinances.

Van Hook v. Selma, 70 Ala. 361, 45 Am. Rep. 85; *Emeric v. Indianapolis*, 118 Ind. 279, 20 N. E. 795.

And to condemn property beyond its limits.

Houghton v. Huron Copper Min. Co. 57 Mich. 547, 24 N. W. 820; *Warner v. Gunnison*, 2 Colo. App. 430, 31 Pac. 238; *Lester v. Jackson*, 69 Miss. 887, 11 So. 114; *Chambers v. St. Louis*, 29 Mo. 543; *Newman v. Ashe*, 9 Baxt. 380; *Hagood v. Hutton*, 33 Mo. 244; *Thompson v. Moran*, 44 Mich. 605, 7 N. W. 180; *Warner v. Gunnison*, 2 Colo. App. 430, 31 Pac. 238.

Where there is a general law in existence, giving to municipalities or other bodies the right of condemnation, and providing for compensation to the landowners whose property is taken, special acts passed thereafter, extending or enlarging the right of condemnation, are not fatal if they fail to provide for compensation.

Jennings v. LeRoy, 63 Cal. 397; *Warner v. Hennepin County*, 9 Minn. 139, Gil. 130; *Cherry v. Keyport*, 52 N. J. L. 544, 20 Atl. 970; *Clarke v. Blackmar*, 47 N. Y. 150; *Re New York Elev. R. Co.* 70 N. Y. 327, Affirming order, 7 Hun, 239; *Sveikhard v. Michels*, 81 Hun. 325, 29 N. Y. Supp. 777, 30 N. Y. Supp. 1135, 8 Misc. 568, 29 N. Y. Supp. 777; *Re Sharet's Road*, 8 Pa. 89; *Smedley v. Ervin*, 51 Pa. 445; *Wister v. Philadelphia*, 6 Legal Gaz. 51, 31 Phila. Leg. Int. 53; *Tuttle v. Knox County*, 89 Tenn. 157, 14 S. W. 486.

Park ways are incidental and ancillary to

parks, and an essential part of the improvement of parks and a park system.

Re New York, 34 Hun, 444, Affirmed in 99 N. Y. 569, 2 N. E. 642; *People ex rel. Seaver v. Green*, 52 How. Pr. 440; *Re Prospect Park & C. I. R. Co.* 67 N. Y. 371; *Luehrman v. Taxing District*, 2 Lea, 430; *Brandon v. State*, 16 Ind. 197; *Ex parte Griffin*, 88 Tenn. 548, 13 S. W. 75; *Cannon v. Mathes*, 8 Heisk. 523; *Sutherland*, Stat. Constr. § 93; *State v. Yardley*, 95 Tenn. 555, 34 L. R. A. 656, 32 S. W. 481; *Illinois C. R. Co. v. Crider*, 91 Tenn. 494, 19 S. W. 618.

Land taken by a city for purposes of parks, park ways, or for places of recreation and amusement for the public, and advantageous to the public for recreation and health, is taken for public use; and the power of eminent domain extends thereto.

United States v. Cooper, 9 Mackey, 104; *Shoemaker v. United States*, 147 U. S. 282, 37 L. ed. 170, 13 Sup. Ct. Rep. 361; *United States v. Gettysburg Electric R. Co.* 160 U. S. 668, 40 L. ed. 576, 16 Sup. Ct. Rep. 427; *Rowan v. Portland*, 8 B. Mon. 232; *County Court v. Griswold*, 58 Mo. 175; *Re Central Park*, 63 Barb. 282; 1 Lewis, Em. Dom. § 176, p. 443; *West Chicago Park v. Western U. Teleg. Co.* 103 Ill. 33; *Higginson v. Nahant*, 11 Allen, 530; *Re Bushwick Ave.* 48 Barb. 9; *Re Niagara Falls & Whirlpool R. Co.* 108 N. Y. 375, 15 N. E. 429; *Brooklyn Park v. Armstrong*, 45 N. Y. 234, 6 Am. Rep. 70; *Re New York*, 99 N. Y. 569, 2 N. E. 642; 10 Am. & Eng. Enc. Law, 2d ed. pp. 1084, 1085; *People ex rel. Wilson v. Salomon*, 51 Ill. 37; *Foster v. Park Omra*, 133 Mass. 321; *State Park v. Henry*, 38 Minn. 266, 36 N. W. 874; *Re Central Park*, 50 N. Y. 493; *Re Washington Park*, 52 N. Y. 137; *Root's Case*, 77 Pa. 276.

Messrs. Randolph & Randolph for appellee.

McAlister, J., delivered the opinion of the court:

This record presents a petition exhibited in the circuit court of Shelby county, asking the condemnation of a certain strip of land, 900 feet long and 50 feet wide, belonging to the defendant, for the purpose of extending a boulevard along the west side of Trezevant avenue. It is alleged therein that, under and by virtue of chapter 142, p. 250, of the Acts of 1899, the city of Memphis is empowered to purchase by private negotiation, or acquire by condemnation, a park way for the purpose of connecting the city with any parks that might be established, or for the purpose of connecting the parks with each other. It is further alleged that, for the purpose of carrying out 69 L. R. A.

the powers conferred by said act, the city was authorized to establish by ordinance a park commission, composed of three members, and that Robert Galloway, L. B. McFarland, and J. R. Godwin had been legally elected, and now constitute said park commission. It is further alleged that on the 5th of November, 1903, an ordinance was passed authorizing and directing the park commissioners to obtain, establish, and construct a system of park ways in and around the city of Memphis; that, under and by virtue of this ordinance, the park commission did, on the 9th day of January, 1904, establish said park way so as to begin at Overton park, and run thence south along and with Trezevant avenue to a point 700 feet south of the right of way of the Southern Railway Company, thence west to Cooper avenue, thence south along Cooper avenue to Lamar Boulevard, and thence in a westerly and southwesterly direction to Kerr avenue, and along and with Kerr avenue to Riverside Park and the Mississippi river; said park way to be 200 feet in width as far south as Union avenue, and for the balance of the distance to average 150 feet in width. It is then alleged that, in order to construct this park way or boulevard, a certain portion of the property of defendant is required, and that the object of this petition is to acquire the same by condemnation proceedings.

The prayer of the petition is that the city of Memphis be decreed an easement or right of way to the strip of land described, and that the court issue its writ of inquiry of damages to the sheriff, commanding him to summon a jury, to be named by the court, to inquire into and assess the damages of the defendant by reason of the taking of the strip of land described.

The defendant resisted the condemnation of said land, and in her answer relied upon the following grounds, viz: (1) Because the city of Memphis is attempting to condemn property for public uses situated outside of its corporate limits, and that any act authorizing the exercise of the power to condemn land lying wholly without its corporate limits is unconstitutional and void. (2) That the said chapter 142, p. 250, of the Acts of 1899, is in violation of article 1, § 21, of the Constitution of Tennessee, and is also in violation of the 14th Amendment of the Constitution of the United States, because it does not provide for just compensation to be paid to the owner of the property sought to be condemned, and that the mode and manner of ascertaining such compensation, and enforcing the same, is not fixed and established in said act. (3) That it violates article 2, § 17, of the Constitution of Ten-

nessee, because the body of the act provides for subject-matters outside of the title, and not in any sense germane to the subject suggested by it.

The cause was heard at the March term, 1904, by the Honorable J. P. Young, who was of opinion that the act of 1899 was unconstitutional, because the subjects of the act are not embraced in the title; and further, that said act makes no provision for compensating the owners of property so condemned for a park boulevard; and further, that such a boulevard connecting the parks is a public convenience, and not a public necessity. The court thereupon dismissed the petition. The city appealed, and has assigned errors.

Chapter 142, pp. 250-252, Acts 1899, § 1, provides as follows: "The parks, or lands to be used for park purposes, may be purchased either by private negotiation or by condemnation, as hereinbefore provided, as may be determined by the legislative council. If the parks, or land for park purposes, be purchased by private negotiation, the negotiation shall be conducted by such member or members of the legislative council as shall be designated by said council; but no purchase shall be effected until the same has the approval of the majority of the legislative council. And said parks, or land for park purposes, may be purchased either within or without the limits of such taxing districts or cities, but not more than 10 miles from the nearest point on the limits of such taxing districts or cities, as such limits may be at the time of such purchase."

Section 2: "Any such taxing district or city may condemn parks or land for park purposes under the power of eminent domain, and such taxing districts and cities are hereby expressly given the power to condemn, for park purposes, the yards, switches, tracks, the depot and property of any character, of any railroad company, and also the property of any manufacturing establishment, and also the property of any other person or corporation either within or without the limits of said taxing district or city, but not over 10 miles beyond the nearest point in said limits as such limits may be at the time of such condemnation; and the proceedings for the exercise of this power of condemnation shall be the same as that now provided by law for the taking of private property for public uses."

Section 3: "That, in order to raise the means necessary to purchase or condemn parks, or land for park purposes, such taxing districts or cities are hereby authorized and empowered to issue their coupon bonds to any amount not exceeding \$250, 69 L. R. A.

000, bearing a rate of interest not exceeding 5 per cent maturing at such time, callable in such manner as the legislative council may determine, and payable in lawful money of the United States of America," etc.

Section 4: "That such taxing district or city is authorized and empowered to levy a special park tax only so long as said bonds shall remain outstanding," etc.

Section 5: That such taxing district or city shall have the power to purchase by private negotiation, or acquire by condemnation, a park or park ways, either running from said taxing district or city to any such park, or running between and connecting such parks; and such taxing district or city may purchase or condemn such park ways either within or without the limits of such taxing district or city, but in no case more than 10 miles beyond the nearest point of the limits of such taxing district or city as the same may be at the date of such purchase or condemnation; and the proceeds of the bonds aforesaid may be used for improving or maintaining such park ways."

Section 6 provides for the creation of a park commission by the legislative council of such taxing district, to be composed of three members, who shall be elected by said legislative council.

Section 7 provides that the legislative council of such taxing district or city shall have full and ample power to establish, by ordinance, rules and regulations to govern said park commission, and to govern the employment and discharge of such employees, and to fix the official bonds and the compensation of such park commissioners and employees.

The first objection to this act is that it undertakes to permit the municipal authorities to condemn land for parks and for the building of park ways situated beyond the municipal limits; and it is insisted that the legislature has no power to delegate such authority.

An examination of the act of 1899 will show that it is an amendment to chapter 11, p. 15, of the Acts of 1879, constituting the city of Memphis a taxing district, and providing a local government for the same.

Section 20 of chapter 11, p. 28, of the Acts of 1879, provides: "That private property within the taxing district may be taken for public use in the manner now provided by law for the application of private property to public use."

It is insisted that, under the original charter just recited, conferring upon the city of Memphis the right of eminent domain, the exercise of that power was expressly limited to property lying within

the corporate limits. But it is manifest that the act of 1899 has enlarged the exercise of the right of eminent domain by the corporate authorities of the city of Memphis so as to permit property situated beyond the corporate limits to be appropriated and condemned for the purpose of establishing parks, and connecting them by boulevards with the city and with each other.

It is insisted, moreover, on behalf of appellee, that there is a distinction between a grant of authority from the legislature to a municipal corporation to exercise the right of eminent domain in the condemnation of property situated beyond the corporate limits for the establishment of a park, and the grant of such authority for the building of a boulevard connecting such parks. The position is that, while a park may be a matter of public necessity to the inhabitants of a crowded city, as a means of furnishing them healthful recreation, yet no such necessity exists for the condemnation of land for the building of a boulevard merely to connect such parks.

The record discloses that the boulevard in question is to be about 3 miles long, entirely without the city limits, and at its narrowest point 150 feet wide, and at its greatest 200 feet. It is shown that the route to be followed by the park way is over country roads that are now in existence, and the land of defendant is sought for the purpose of widening the roads as they now exist. It is said the entire length of the proposed park way now forms one continuous public road extending between the two parks; and, while it is admitted that a wide road connecting them is a matter of great public convenience, it is not a matter of public necessity, and hence is not subject to be taken in the exercise of the city's right of eminent domain.

In *Newman v. Ashe*, 9 Baxt. 380, it was held that, while the charter of the city of Knoxville did not in express terms confer the power to purchase and hold real estate outside of the corporate limits for the purpose of constructing waterworks, it did so by necessary implication. The power to construct waterworks—a legitimate corporate purpose—is expressly given, and the authority is given to the mayor and aldermen to protect from injury, by adequate penalties, the pipes, hydrants, or fixtures, buildings, or improvements, belonging to, or in any way pertaining to, said waterworks, whether within or without the limits of said corporation.

In *Thompson v. Moran*, 44 Mich. 605, 7 N. W. 180, an act of the legislature giving the city the right to purchase, improve, and control Belle Isle park was sustained, notwithstanding the fact that it was situated beyond the corporate limits of Detroit.

Warner v. Gunnison, 2 Colo. App. 430, 31 Pac. 238; Dill. Mun. Corp. 3d ed. §§ 146, 597 *et seq.*; *Houghton v. Huron Copper Min. Co.* 57 Mich. 547, 24 N. W. 820; *Lesster v. Jackson*, 69 Miss. 887, 11 So. 114; *Chambers v. St. Louis*, 29 Mo. 543; *Hagood v. Hutton*, 33 Mo. 244.

It will be observed that, under the act of 1899, the city is authorized to exercise the right of eminent domain in condemnation of property either for parks, or park purposes, or park ways, within a limit of 10 miles from the nearest point of said taxing district or city. It was argued at the bar that it would be a great stretch of power on the part of the legislature to permit the municipal corporation to acquire land for public purposes in remote portions of the state; but, as already seen, the power conferred by the act of 1899 upon the municipality of Memphis must be exercised on land situated adjacent or contiguous to the corporate limits, and within a distance of 10 miles from its nearest point.

Moreover, it appears from the record that the boulevard sought to be condemned is at all points within 1 mile of the corporate limits of the city of Memphis.

The next objection is that the condemnation of the land of the defendant is not a public necessity, but merely a public convenience; and, for that reason, the act of the legislature, so far as it attempts to authorize such appropriation, is unconstitutional and void. Mr. Lewis, in his work on Eminent Domain (vol. 1, § 175), says: "Pleasure and recreation are not only essential to health, but tend to the improvement of character. No better instance of a public use can be given than that of a public square or park in the midst of, or convenient to, a dense population. Private property may be taken for the purpose of securing such means of recreation and health. A park is a public use, though not located in a city or town, but only in the vicinity of it. Land may be taken on each side of a highway to be kept open for courtyards and ornament. Highways may be laid out for the purpose of affording access to a position which commands a fine view, or for accommodating pleasure driving. The taking of a large tract in the Adirondacks for a state park was held to be for a public use. So, limiting the height of buildings around a public park or square."

It will be observed, the author states that a park is a public use, though not located in a city or town, but only in the vicinity of it; and, further, that land may be taken for driveways, or for accommodating pleasure

driving. In the case of *West Chicago Park v. Western U. Teleg. Co.* 103 Ill. 33, it was held that land might be condemned for building a boulevard running from the south end of Douglas park to the Illinois & Michigan Canal.

"A public park is a public use." *United States v. Cooper*, 9 Mackey, 104.

"Land taken in a city for public parks and squares advantageous to the public for recreation, health, or business is taken for a public use, and the power of eminent domain extends thereto." *Shoemaker v. United States*, 147 U. S. 282, 37 L. ed. 170, 13 Sup. Ct. Rep. 361.

"The purpose of preserving and marking on the site of the battle of Gettysburg the positions occupied by the different military organizations at that battle is a public use or purpose for which Congress may authorize the condemnation of the necessary land." *United States v. Gettysburg Electric R. Co.* 160 U. S. 668, 40 L. ed. 576, 16 Sup. Ct. Rep. 427.

"The right of the public at large to acquire easements over the lands of individuals is not confined to public highways, but extends to many other easements and uses." such as public parks and grounds. *Rowan v. Portland*, 8 B. Mon. 232.

The legislature, in 1874, authorized the appropriation of land for a public park for the benefit of the inhabitants of St. Louis county located outside the city. Held to be a public use, although chiefly beneficial to the citizens. *County Court v. Griswold*, 58 Mo. 175.

Land taken in a city for public parks and squares by authority of law, whether advantageous to the public for recreation, health, or business, is taken for a public use; and it is no valid ground of objection to the confirmation of a report of commissioners for opening a new park that the lands embraced in such park are not all contiguous, and that there are intervening blocks and spaces not taken, where such intervening spaces are not so large as to interfere with the integrity or continuity of the plan, or the equalizing of the assessments.

They contribute to the health and enjoyment of the people, and are laid out with drives and ways for public use. The proceedings in the case of *Higginson v. Nahant*, 11 Allen, 530, and *Mt. Washington Road Co.'s Petition*, 35 N. H. 134, were justified on the ground that they were public highways in the ordinary sense, although primarily intended as pleasure drives. *Re New York*, 99 N. Y. 569, 2 N. E. 642.

"Land taken in a city for a public park whether advantageous to the public for recreation, health, or business, is taken for a public use. And the land may be condemned 69 L. R. A.

under the power of eminent domain, not only for public parks in cities, but it may be condemned in a county for the inhabitants of the county." 10 Am. & Eng. Enc. Law, 2d ed. pp. 1084, 1085; *Re Central Park*, 63 Barb. 282; *People ex rel. Wilson v. Salomon*, 51 Ill. 37; *Foster v. Park Comrs.* 133 Mass. 321; *State Park v. Henry*, 38 Minn. 266, 36 N. W. 874; *Brooklyn Park v. Armstrong*, 45 N. Y. 234, 6 Am. Rep. 70; *Re Central Park*, 50 N. Y. 493; *Re Washington Park*, 52 N. Y. 137; *Root's Case*, 77 Pa. 276; *County Court v. Griswold*, 58 Mo. 175.

It is next objected that the act of 1899 makes no provision for compensation to the owner of land condemned for parks or park purposes. In *Watauga Water Co. v. Scott*, 111 Tenn. 321, 76 S. W. 839, it was said by this court, viz.: "It is a fundamental principle of the law of eminent domain and the taking of property for public use that it can only be done by making just compensation to the person whose property is taken for its reasonable value, and any legislation which confers the right of eminent domain can only be valid upon condition that such compensation is provided for, and the mode and manner of ascertaining and enforcing the same is fixed and established."

Article 1, § 21, of the Constitution, provides, viz.: Private property shall not be taken or applied to public use without just compensation being made therefor.

It is insisted that this indispensable requirement to the exercise of eminent domain for any purpose has not been observed by this act. It is said, however, that the act of 1899 is only an amendment to chapter 11, p. 23, Acts 1879, the original charter of Memphis, which does provide, viz.: "That the private property within the taxing district may be taken for public use in the manner now provided by law for the application of private property to public use."

It will be remarked that, while the right to take property for public use under the act of 1879 is confined to property situated within the taxing district, the amendatory act of 1899 extends the right to be exercised over property located beyond the limits of the taxing district, and within 10 miles of its nearest point. It is in this respect only that the original act is amended. It will be noticed that the original act of 1879 does not in terms provide for compensation to the landowner, yet it says it may be taken for public use in the manner now provided by law, etc.

Now it is insisted that § 20, chap. 11, p. 28, of the Acts of 1879, just quoted, incorporates into the taxing-district charter the general law upon the subject of eminent domain, and, among other provisions, the obligation of just compensation to the owner.

Again it is provided by § 2 of chapter 142, p. 250, Acts 1899, viz.: "Sec. 2. Be it further enacted, That any such taxing district or city may condemn parks, or land for park purposes, under the power of eminent domain; and such taxing districts or cities are hereby expressly given the power to condemn, for park purposes, the yards, switches, tracks, the depot and property of every character, of any railroad company, and also the property of any manufacturing establishment, and also the property of any other person or corporation, either within or without the limits of said taxing district or city, but not over 10 miles beyond the nearest point in said limits, as such limits may be at the time of said condemnation; and the proceedings for the exercise of this power of condemnation shall be the same as that now provided by law for the taking of private property for public uses."

It will be observed that, by virtue of this amendment, land for parks, or park purposes, outside of the city limits, may be condemned, "under the power of eminent domain;" and "the proceedings for the exercise of this power of condemnation shall be the same as that now provided by law for the taking of private property for public use."

We are clearly of opinion that the amendatory act of 1899 became incorporated with the act of 1879 chartering the city of Memphis, and that the general statutes of the state providing for the condemnation of private property for public uses were thereby imported into the original charter as fully as though they had been specifically designated by chapter and section of the Code. The general law providing for the taking of private property for internal improvements is set out in §§ 1844 *et seq.*, Shannon's Code. These sections provide as follows:

"Sec. 1844. Any person or corporation authorized by law to construct any railroad, turnpike, canal, toll bridge, road, causeway, or other work of internal improvement, to which the like privilege is conceded, may take the real estate of individuals, not exceeding the amount prescribed by law or by the charter under which the person or corporation acts in the manner and upon the terms herein provided.

"Sec. 1845. The party seeking to appropriate such land shall file a petition in the circuit court of the county in which the land lies, setting forth, in substance, (1) the parcel of land a portion of which is wanted and the extent wanted; (2) the name of the owner of such land, or, if unknown, stating the fact; (3) the object for which the land is wanted; (4) a prayer that a suitable

portion of land may be decreed to the petitioner, and set apart by metes and bounds.

"Sec. 1846. Notice of this petition shall be given to the owner of the land, or, if a nonresident of the county, to his agent, at least five days before its presentation."

"Sec. 1849. After the requisite notice has been given, if no sufficient cause to the contrary is shown, the court shall issue a writ of inquiry of damages to the sheriff commanding him to summon a jury to inquire and assess the damages."

"Sec. 1856. The jury will then proceed to examine the ground, and may hear testimony, but no argument of counsel; and set apart by metes and bounds a sufficient quantity of land for the purposes intended, and assess the damages occasioned to the owner thereby.

"Sec. 1857. In estimating the damages the jury shall give the value of the land without deduction; but incidental benefits which may result to the owner by reason of the proposed improvement may be taken into consideration in estimating the incidental damages."

"Sec. 1859. If no objection is made to the report, it is confirmed by the court, and the land decreed to the petitioner upon payment to the defendants, or to the clerk for their use, [the amount] of the damages assessed, with costs."

"Sec. 1865. No person or company shall, however, enter upon such land for the purpose of actually occupying the right of way until the damages assessed by the jury of inquest and the costs have been actually paid; or, if an appeal has been taken, until the bond has been given to abide by the final judgment, as before provided.

"Sec. 1866. If, however, such person or company has actually taken possession of such land, occupying it for the purposes of internal improvement, the owner of such land may petition for a jury of inquest, in which case the same proceedings may be had, as near as may be, as hereinbefore provided, or he may sue for damages, in the ordinary way, in which case the jury shall lay off the land by metes and bounds, and assess the damages as upon the trial of an appeal from the return of a jury of inquest."

These sections of Shannon's Code substantially embrace the proceedings that are required to be taken for the condemnation of private property for any public use, which provisions, it will be observed, afford the landowner an ample remedy to receive just compensation for the land taken.

As already stated, in the opinion of the court, these sections of the Code, by the references to them found in the original charter of 1879, as well as in the amenda-

tory act of 1899, have become an integral part of the charter of the city of Memphis.

It is next insisted that the body of the act of 1899 contains subjects which are not embraced in, or germane to, its title. The caption of the act is: "An Act to Amend an Act Entitled an Act to Establish Taxing Districts in This State, and to Provide a Means of Local Government for the Same, being Chapter 2 of the Acts of 1879 and the Acts Amendatory Thereof, so as to Authorize and Empower the Taxing Districts and Cities Organized under Said Act to Acquire, Improve, and Maintain Parks for the Benefit of the Public. Acts 1899, p. 250, chap. 142.

It is said, in the first place, that nothing is stated in the title in respect to acquiring, improving, and maintaining roadways or boulevards; but the title limits the right to acquiring, improving, and maintaining parks for the benefit of the public.

It is insisted that the body of the act authorizing the acquisition or condemnation of land for park ways or boulevards extending through the country merely for the purpose of connecting two parks with each other is not germane to the title.

This criticism upon the act cannot be maintained. It would be too narrow a construction of the act to exclude from its scope the building of boulevards or driveways necessary to connect two parks situated in remote parts of the city. Moreover, the legislature has not defined the shape or extent of the parks to be laid out under the provisions of this act, but has left that matter exclusively to the taste and discretion of the park commissioners and the legislative council. These authorities, in the exercise of their judgment, instead of laying out one park within the corporate limits of the city, have provided for the opening of two parks,—one situated northeast of the city, and known as "Overton park," and the other located southwest of the city, and designated as "Riverside park." For the convenience of the public, it was necessary that these two parks should be connected by a driveway, which, as now designed by the park commissioners, has become a part of the parks themselves. It is wholly immaterial how irregular and eccentric the shape of the parks thus constructed may appear, since that matter is confided exclusively to the judgment of the park commissioners. Everything that pertains to the building, extending, or connecting the parks authorized to be built under the provisions of the amendatory act of 1899 is necessary, and by implication within the general purview of the act.

In *Re New York*, 34 Hun, 444, the court 69 L. R. A.

said: "The park ways designated and described in the act are designed for avenues uniting four of the parks. As they have been described, they are peculiarly appropriate for that purpose, and may well be regarded as incidents to, or extensions of, the areas of the parks themselves. The one, uniting what has been designated as the Van Cortlandt and Bronx parks, is intended to consist of about 80 acres of land devoted to a park way 600 feet in width and nearly 1 mile in length. Another, similarly to unite the Bronx and Pelham parks, includes an appropriation of about 91 acres of land, exclusive of an existing boulevard. The width of this park way will be 400 feet, and its length about $2\frac{1}{2}$ miles. The third is of minor importance, and is designed to serve as a similar avenue between what is called the Crotona and the Bronx parks." *People ex rel. Seaver v. Green*, 52 How. Pr. 440.

The court of appeals of New York, in *Re New York*, 99 N. Y. 576, 2 N. E. 642, in dealing with a similar subject, said as follows: "The title . . . is, 'An Act Laying out Public Places and Parks and Park Ways in the 23rd and 24th Wards of the City of New York and in the Adjacent District of Westchester County, and Authorizing the Taking of Lands for the Same' (Laws of 1884, chap. 522, p. 625), and is claimed to violate § 16, art. 3, of the Constitution, requiring that a private or local bill shall embrace but one subject, which shall be expressed in the title. Section 6 of the park act authorizes the use of a portion of Van Cortlandt park for the purpose of a rifle range and military parade ground, and § 12 extends over the whole of the newly acquired territory the jurisdiction of the department of public parks, which by the city charter of 1873 was made the dominant authority for their maintenance and protection. It is insisted that two new and separate subjects were thus injected into the body of the act, without hint or reference in the title. The criticism is quite too rigid and narrow. It would lead up to a condemnation which few titles would escape, until they became cumbersome and awkward digests of the details of their enactments. What are here denominated new subjects are fairly and reasonably elements and details of the laying out of new parks and the acquisition of lands therefor, and so embraced in the one general subject of the bill."

It is also objected that the body of the act authorizing the creation of a park commission and the election of commissioners presents another subject that is not embraced within the title of chapter 142, p. 250, Acts 1899.

This objection is also untenable, since the

creation of a park commission and a board of park commissioners is clearly within the purview of an act which authorizes the city of Memphis to acquire, improve, and maintain parks for the benefit of the public. A park commission is a useful and almost indispensable instrumentality for the maintenance and supervision of a system of public parks. Other criticisms of a similar nature are made on this act, but none are well taken, since, in our opinion, they are all settled by the rule laid down in *Hynan v. State*, 87 Tenn. 109, 1 L. R. A. 497, 9 S. W. 372. The rule therein announced is that an amendatory act whose caption merely recites the title of the orig-

inal act, without enlarging its scope, is constitutional and valid, provided its purview is germane to the title of the original act.

All of the subjects which are claimed by counsel for defendant in error to be outside of the title of the amendatory act are clearly within its purview, since they all relate to the one subject-matter embraced in the title, *vis.*, the acquisition, improvement, and maintenance of parks for the benefit of the public. It results that the judgment below was erroneous, and is reversed, the demurrer overruled, and the cause remanded.

UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT.

George E. KINZEL, Admr., etc., of Joseph H. Kinzel, Deceased, *Plff. in Err.*,
v.

ATLANTA, KNOXVILLE, & NORTHERN RAILWAY COMPANY.

(137 Fed. 489.)

A railroad engineer who obeys, although reluctantly, an order to take his train through a mountainous region on its regular trip at a time of heavy rains, when land slides are anticipated, assumes the risk of such slides, and cannot hold the company responsible in case his train is carried from the track by a slide which comes upon it so suddenly that there is no time to escape, and the danger of which was not observed by a track inspector, who had passed the spot just before the train reached there; since it must be regarded as pure accident.

(May 11, 1905.)

ERROR to the Circuit Court of the United States for the Eastern District of Tennessee to review a judgment in favor of defendant in an action to recover damages for the alleged negligent killing of plaintiff's intestate. *Affirmed.*

The facts are stated in the opinion.

Argued before *Severens* and *Richards*, Circuit Judges, and *Cochran*, District Judge. *Messrs. V. A. Huffaker and Pickle & Turner*, for plaintiff in error:

There was no express contract of assumption of risks by the intestate at any time.

NOTE.—For a case in this series holding that the negligence of the conductor of a freight train in going forward with the engine to examine culverts after a storm under the order of the road master is a question for the jury, see *Terre Haute & I. R. Co. v. Fowler*, 48 L. R. A. 531.

As to servant's right of action generally for injuries received in obeying direct command, see also *Dalemand v. Saalfeldt*, 48 L. R. A. 753, and *note*; *Finn v. Cassidy*, 53 L. R. A. 877; and *Illinois Southern R. Co. v. Marshall*, 66 L. R. A. 297.

49 L. R. A.

The risks that are assumed by the servant, as an implied condition or incident of his contract of employment, are "ordinary risks" of the service. "Ordinary risks" are those obviously incident to the work.

Winkler v. St. Louis Basket & Box Co. 137 Mo. 394, 38 S. W. 921; *Hannigan v. Lehigh & H. River R. Co.* 157 N. Y. 244, 51 N. E. 992; *Consolidated Coal Co. v. Haenni*, 146 Ill. 614, 35 N. E. 162; *Doyle v. St. Paul, M. & M. R. Co.* 42 Minn. 79, 43 N. W. 787; *Davis v. Baltimore & O. R. Co.* 152 Pa. 314, 25 Atl. 498; *Texas & P. R. Co. v. Arochibald*, 170 U. S. 665, 42 L. ed. 1188, 18 Sup. Ct. Rep. 777; *Worlds v. Georgia R. Co.* 99 Ga. 283, 25 S. E. 646; *Jenney Electric Light & P. Co. v. Murphy*, 115 Ind. 566, 18 N. E. 30; *Chocataw O. & G. R. Co. v. McDade*, 50 C. C. A. 591, 112 Fed. 891, *Affirmed* in 191 U. S. 68, 48 L. ed. 101, 24 Sup. Ct. Rep. 24.

Employees do not assume the risks of the negligence of the company.

Chocataw, O. & G. R. Co. v. McDade, 50 C. C. A. 591, 112 Fed. 891, 191 U. S. 67, 48 L. ed. 100, 24 Sup. Ct. Rep. 24.

The risk to which deceased was subjected, and which caused his death, was one traceable directly and alone to defendant's negligence.

It is the duty of the employer to furnish and maintain safe places for his employees to work, which, in the case of railroads, means safe roadbed and track.

Hugh v. Texas & P. R. Co. 100 U. S. 213, 25 L. ed. 612; *Union P. R. Co. v. Daniels* (*Union P. R. Co. v. Snyder*), 152 U. S. 684, 38 L. ed. 597, 14 Sup. Ct. Rep. 756; *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368, 37 L. ed. 772, 13 Sup. Ct. Rep. 914; *Chocataw, O. & G. R. Co. v. McDade*, 191 U. S. 67, 48 L. ed. 100, 24 Sup. Ct. Rep. 24; *Northern P. R. Co. v. Babcock*, 154 U. S. 190, 38 L. ed. 958, 14 Sup. Ct. Rep. 978.

Union P. R. Co. v. O'Brien, 161 U. S. 451, 40 L. ed. 766, 16 Sup. Ct. Rep. 618; *Texas & P. R. Co. v. Archibald*, 170 U. S. 670, 42 L. ed. 1191, 18 Sup. Ct. Rep. 777.

The master's care and diligence as regards safety of place to work, etc., must be such as "the exigency reasonably demands."

Union P. R. Co. v. O'Brien, 161 U. S. 451, 40 L. ed. 766, 16 Sup. Ct. Rep. 618; *Hough v. Texas & P. R. Co.* 100 U. S. 213, 25 L. ed. 612; *Georgia P. R. Co. v. Dooly*, 12 L. R. A. 342, note, 86 Ga. 294, 12 S. E. 923.

The employee may unquestionably assume that the employer has performed his duty, in this regard, and proceed in the service, relying upon such performance of duty by the employer without question or investigation.

Texas & P. R. Co. v. Archibald, 170 U. S. 665, 42 L. ed. 1188, 18 Sup. Ct. Rep. 777; *Union P. R. Co. v. O'Brien*, 161 U. S. 451, 40 L. ed. 766, 16 Sup. Ct. Rep. 618, 49 Fed. 538; *James B. Clow & Sons v. Boltz*, 34 C. C. A. 550, 92 Fed. 572; *New York N. H. & H. R. Co. v. O'Leary*, 35 C. C. A. 562, 93 Fed. 737; *Valley R. Co. v. Keegan*, 31 C. C. A. 255, 58 U. S. App. 377, 87 Fed. 849; *Rockport Granite Co. v. Bjornholm*, 53 C. C. A. 429, 115 Fed. 947.

This duty of the master to protect his servant against injury by keeping him in a safe place to work, and out of an unsafe one, is a positive, active duty of the master that he cannot delegate to anyone, even to a fellow servant, so as to defeat his own liability for its breach.

Union P. R. Co. v. Daniels (*Union P. R. Co. v. Snyder*), 152 U. S. 684, 38 L. ed. 597, 14 Sup. Ct. Rep. 756; *Neeley v. Southwestern Cotton Seed Oil Co.* 13 Okla. 356, 64 L. R. A. 145, 75 Pac. 537; *Chicago & N. W. R. Co. v. Swett*, 92 Am. Dec. 206, and note, 45 Ill. 197.

It is no answer to his failure to maintain safety of place that the master made the place safe originally, and has kept a sufficient force to inspect and repair it, where there was failure to repair before the servant was sent into the unsafe place.

Union P. R. Co. v. Daniels (*Union P. R. Co. v. Snyder*), 152 U. S. 684, 38 L. ed. 597, 14 Sup. Ct. Rep. 756; *Texas & P. R. Co. v. Archibald*, 170 U. S. 665, 42 L. ed. 1188, 18 Sup. Ct. Rep. 777, Affirmed and Applied in *Choctaw, O. & G. R. Co. v. McDade*, 191 U. S. 67, 48 L. ed. 100, 24 Sup. Ct. Rep. 24; *Georgia P. R. Co. v. Dooly*, 12 L. R. A. 343, note, 86 Ga. 294, 12 S. E. 923; *Union P. R. Co. v. Fort*, 17 Wall, 553, 21 L. ed. 739.

The servant will be repelled on the ground of contributory negligence, in cases of this character, only where he has full

knowledge of the existence of the defects, and full appreciation of their dangerous character, and has recklessly and with such knowledge encountered the same.

Choctaw, O. & G. R. Co. v. McDade, 191 U. S. 68, 48 L. ed. 100, 24 Sup. Ct. Rep. 24; *Texas & P. R. Co. v. Archibald*, 170 U. S. 665, 42 L. ed. 1188, 18 Sup. Ct. Rep. 777; *Houston E. & W. T. R. Co. v. De Walt*, 96 Tex. 121, 97 Am. St. Rep. 893, 70 S. W. 531; *Stephens v. Hannibal & St. J. R. Co.* 96 Mo. 207, 9 Am. St. Rep. 336, 9 S. W. 589; *Ittner Brick Co. v. Killian* (Neb.) 93 N. W. 951; *Delaware River Iron-Ship Bldg. & E. Works v. Nuttall*, 119 Pa. 149, 13 Atl. 65; *Williams v. Clark*, 204 Pa. 416, 54 Atl. 315; *Harrison v. Denver & R. G. W. R. Co.* 7 Utah, 523, 27 Pac. 728; *McArc v. Tourtellotte*, 167 Mass. 69, 48 L. R. A. 542, 44 N. E. 1071; *Chicago & N. W. R. Co. v. Bayfield*, 37 Mich. 205; *Harder & H. Coal Min. Co. v. Schmidt*, 43 C. C. A. 532, 104 Fed. 282; *Goldthorpe v. Clark-Nickerson Lumber Co.* 31 Wash. 467, 71 Pac. 1091; *English v. Chicago, M. & St. P. R. Co.* 24 Fed. 906; *O'Maley v. South Boston Gaslight Co.* 158 Mass. 135, 47 L. R. A. 164, 32 N. E. 1119; *East Tennessee, V. & G. R. Co. v. Duffield*, 12 Lea, 63, 47 Am. Dec. 319.

Messrs. Smith, Hammond, & Smith and Cornick, Wright, & Frantz for defendant in error.

Richards, Circuit Judge, delivered the opinion of the court:

This was a suit for the wrongful death of the plaintiff's intestate, Joseph Kinzel, who was a locomotive engineer in the employ of the defendant company, and lost his life in the wreck of his engine, caused by a landslide in the mountains of Tennessee. The court below twice directed a verdict for the defendant on the ground that Kinzel's death was the result of a pure accident, for which the railway company was not to blame, and the risk of which he had assumed. This action is here for review.

The material facts are conceded. Kinzel had been a locomotive engineer for seven years, and for three years had run a freight train south from Knoxville through the mountains into Georgia. Two or 3 miles south of the station of Wetmore the mountainous region began, and continued for about 22 miles. For the most of this distance the railroad ran along the side of the mountains, at the foot of which flows the Hiawassee river. The steepest part of the line began at Appalachia, about 20 miles south of Wetmore, and extended several miles south to Farner, which is near the summit. Beyond Farner is Blue Ridge,

Georgia. Naturally the portion of the line most liable to landslides was that between Appalachia and Fanner. The portion between Wetmore and Appalachia was regarded as comparatively safe. The accident occurred about 6 or 7 miles south of Wetmore, about 11 o'clock on the night of February 27, 1902. That day Kinzel was engaged as usual, in running freight train No. 13 from Knoxville to Blue Ridge. He left Knoxville at 12:30 P. M., and arrived at Wetmore at 5:30 P. M., about two hours late. He was drawing a train of twelve cars, loaded with coal and coke. It had been raining for two or three days, and slides and washouts were anticipated in the mountains. Because of this, trains Nos. 11, 12, and 14, of that date, between Blue Ridge and Knoxville, were annulled. This left but one train going north (No. 2, a passenger train) and one train (No. 13, Kinzel's freight) running south. The passenger train, No. 2, was delayed by small slides in the mountains, and did not reach Wetmore until after 9 o'clock. In the meantime Kinzel, acting under a special order, went back to Grady with his engine, and brought four camp cars, with track tools and men, to Wetmore, for the purpose of taking them along with his train up into the mountains to repair the track next day. Passenger train No. 2, when it arrived at Wetmore, reported that it had struck several small slides, that a large one fell in behind it, and that it did not think No. 13 could get through that night. Before the arrival of No. 2 at Wetmore, Kinzel asked the operator to tell the train despatcher that he did not want to go through that night, because it was not safe, and that he could not go through anyhow. The reply came back that he would have to proceed with his train, and cautioned him to run slowly and carefully, and look out for slides. About 9:30 he pulled out south, having cut off two of his loaded cars, and attached the four camp cars which were needed for the next day's work in the mountains. The primary object of sending Kinzel's train from Wetmore south that night was to get the extra track gang from Grady to the mountain line, in order to open the road for the next day's business. The secondary purpose was to advance the freight as far as Appalachia. There was no idea of any serious trouble between Wetmore and Appalachia. The trouble was usually between Appalachia and Fanner. Kinzel proceeded south, observing the caution to run slowly. The track was being patrolled by an extra gang of track walkers. About 6 or 7 miles south of Wetmore, where the road ran along the foot of the mountain about 20 feet above the river, and when Kinzel was in sight of the light of 69 L. R. A.

the section foreman, who had a few minutes before passed along where he was then running, suddenly and without warning a slide occurred under or directly in front of the engine, which carried the track and engine down into the river. The section foreman was within 300 or 400 yards of the engine, watching it, when the slide carried it down. Kinzel, though terribly hurt, was still alive when taken out of the wreck. He told the foreman that he saw his light, and thought everything was all right, but the slide came in on him, giving him no chance to avoid it.

There was no testimony tending to show that the defendant was to blame for the slide which caused the accident. There was in *Union P. R. Co. v. O'Brien*, 161 U. S. 451, 40 L. ed. 766, 16 Sup. Ct. Rep. 618. For aught that appeared, the roadbed was properly constructed, and the track that night was exceptionally well patrolled. It was not in *Fisher v. Oregon Short Line & U. N. R. Co.* 22 Or. 533, 16 L. R. A. 519, 30 Pac. 425. The section foreman passed along on his round of inspection but a few minutes before the slide took place, and there was nothing to indicate trouble ahead. The track and its surroundings appeared to be all right.

The plaintiff's case therefore rests solely on the claim that the defendant was at fault in sending Kinzel into the mountains that night. It is insisted he was ordered into a place of unusual danger, despite his protest and against his will, and was thus exposed to perils known to the company, but of which he was ignorant, with the result described. In other words, it is insisted he was the victim of a negligent order which subjected him to risks outside his regular employment. If this claim found support in the testimony, there might have been a case for the jury. But there was no order given him, in the sense claimed. Kinzel was not engaged in extraordinary work under a special order. He was on his regular run. It is true, he was being exposed to an additional risk by reason of the weather. A railroad in a mountainous region is liable to slides and washouts in rainy weather. This is a matter of common knowledge. Kinzel knew this when he took the job. And of course he assumed the risk. It was one of the risks of his employment. *Union P. R. Co. v. O'Brien*, 161 U. S. 451, 456, 40 L. ed. 766, 770, 16 Sup. Ct. Rep. 618, 1 C. A. 354, 4 U. S. App. 221, 49 Fed. 538. Rains will come in mountains as well as elsewhere, but trains must be run, and roads kept open for traffic, notwithstanding the increased risk to operatives.

Moreover, the record contains plenty of proof that Kinzel was advised on the day of the accident of the increased risk of the

situation. He reached Wetmore two hours late. He was ordered to wait there for the passenger train coming north, which did not arrive until 9 o'clock. In the meantime he was sent to Grady for the extra track gang. This advised him there was trouble in the mountains. Because he anticipated trouble ahead—feared there might be slides on the track—he asked to be allowed to stay at Wetmore overnight. The exigencies of the situation would not permit the granting of the request. It was necessary to get the extra gang through to Appalachia that night, so as to put the track between there and Farner in condition for the next day's business. So he was told to proceed, but to run slowly and carefully and look out for slides. This again was notice and warning that there was danger of slides ahead. It is to be observed, however, that the order was not a special one. It did not require exceptional work,—work outside his line of duty. It only required him to do the work he had undertaken to do when he accepted the job. When he pulled out of Wetmore that night, although he did so reluctantly, he nevertheless assumed the risk. He did only what every engineer must do under like circumstances. 1 Labatt, Mast. & S. § 438, and cases cited; *Linch v. Sagamore Mfg. Co.* 143 Mass. 206, 210, 9 N. E. 728; *Toomey v. Eureka Iron & Steel Works*, 89 Mich. 249, 50 N. W. 850; *Chesapeake & O. R. Co. v. Hennessey*, 38 C. C. A. 307, and note, p. 314, 96 Fed. 713.

Kinzel's reluctance to go on that night was due to the fact that he feared that in the darkness he might run into obstructions. The declaration averred there were

obstructions known to the company, of which he was not advised, that caused the accident. If the proof had in any degree supported this averment,—if it had tended to show that there were dangerous obstructions on the track which were known to the company, and that, in spite of his protest the company had ordered him on without advising him of their presence, and without taking proper steps to protect him against them,—another case would be presented. But the accident was not due to an obstruction into which Kinzel ran because of the darkness. Every reasonable precaution was taken by the company to protect him against obstructions. He was warned to run slowly and look out for slides, and the track was carefully patrolled. Everything was done that could be done. The slide which caused the accident was not known to the company when it directed Kinzel to proceed south. It had not then occurred, and could not have been anticipated. The track was clear when Kinzel reached the place of the accident, and the light of the trackman who had preceded him but a few minutes was in sight. The slide came on so suddenly that Kinzel could not avoid it. He did not run into the slide because of the darkness, but the slide virtually ran into him. In an instant the track was swept from under him. The result would have been the same if, under similar circumstances, the slide had occurred during the daytime. We agree with the court below that it was a case of pure accident, for which the company cannot be held liable.

The judgment is affirmed.

TENNESSEE SUPREME COURT.

W. D. BRANNON

v.

Elizabeth CURTIS.

(98 Tenn. 153.)

1. The rental value of the premises during the possession of the vendee must be deducted from his recovery for breach of a covenant of seisin, which is made by an outstanding contingent remainder, where his deed gave him at least a life estate, and the life tenancy has continued so as to preclude the remainder-men from demanding rents for any part of the time.
2. Restoration of possession is an indispensable ingredient of a decree in equity in favor of a vendee for breach of a

covenant of seisin made by an outstanding contingent remainder, where his deed gave him at least a life estate, and he has had the benefit of possession.

3. A recovery for improvements to the extent that they may have permanently enhanced the rental or usable value of the life estate may be allowed to the vendee, with his purchase money, interest thereon, and taxes paid, on breach of a covenant of seisin made by an outstanding contingent remainder, when his recovery in equity is conditioned on his restoration of possession to the vendor, and his accounting for his use of the premises.

(February 6, 1897.)

NOTE.—See the following case of Gerbert v. Sons of Abraham, and note.

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CROSS-APPEALS from a decree of the Court of Chancery Appeals modifying a decree of the Chancery Court for Davidson

County which set aside, under a bill of review, a decree which had been passed for the rescission of a contract to purchase real estate; the plaintiff appealing from so much of the decree as denied him a recovery for improvements, and defendant appealing from so much as refused to compel plaintiff to restore what he had received under the contract. *Modified.*

The facts are stated in the opinion.

Mr. John B. Daniel, for plaintiff, Brannon:

The very fact that Brannon came into court and asked and obtained a rescission was in law a restoration, and had that effect.

Kincaid v. Brittain, 5 Sneed, 124, Rawle, Covenants for Title, pp. 100-105; *Park v. Cheek*, 4 Coldw. 28; *Recohs v. Younglove*, 8 Baxt. 387.

Where suit is brought upon breach of any of the covenants and judgment obtained, and that judgment satisfied, it will have the effect to preclude the vendee from asserting any rights to the property conveyed to him out of the conveyance to which the action arose.

2 Sutherland, Damages, 265; *Tucker v. Clarke*, 2 Sandf. Ch. 96; *Noonan v. Ilsley*, 21 Wis. 146; *Porter v. Hill*, 9 Mass. 36. 6 Am. Dec. 22; *Stinson v. Sumner*, 9 Mass. 150, 6 Am. Dec. 49; *Blanchard v. Ellis*, 1 Gray, 202, 61 Am. Dec. 417; *Parker v. Brown*, 15 N. H. 188.

The covenant of seisin is broken as soon as made, if in fact the vendor did not have a good title.

Kincaid v. Brittain, 5 Sneed, 120; *Park v. Cheek*, 4 Coldw. 20.

Ordinarily the measure of damages is the purchase money and interest. The courts modify the rule to suit the facts of any particular case, to the end that the equity of the case may be met. The general statement of the rule has not any reference to improvements which the vendee placed upon the property to the extent that such improvements have permanently enhanced the value of the property.

2 Sutherland, Damages, 285; *Morrison v. Underwood*, 20 N. H. 369; *Hartford & S. Ore Co. v. Miller*, 41 Conn. 112, Rawle, Covenants for Title, 236; *Staats v. Ten Eyck*, 3 Caines, 111, 2 Am. Dec. 254.

In this case the damage incurred is the direct result of a breach of the contract, and a result which must have been contemplated by the party entering into the covenant.

Mayne, Damages, 2d ed. 147; *Dart*, Vendors, 4th ed. 726.

The decree is as absolutely binding and conclusive on Mrs. Curtis as if she had been personally served with the process, and had defended.

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Under no circumstances can any defense be made after twelve months, when attachment has been properly issued and levied.

Mulloy v. White, 3 Tenn. Ch. 9; *Claybrook v. Wade*, 7 Coldw. 562; *Bledsoe v. Wright*, 2 Baxt. 471.

Mr. A. S. Colyar for defendant.

Caldwell, J., delivered the opinion of the court:

This is a bill of review. In the year 1885 the complainant, Mrs. Elizabeth Curtis, sold and conveyed to the defendant, W. D. Brannon, a small building lot in the city of Nashville at the price of \$900. The deed executed contained a covenant of seisin in fee, and the vendee went into actual possession. He improved the lot, and is still in possession. In a litigation between other parties about a tract of land including this lot, the court, at its December term, 1892, in construing a certain device, adjudged that one Overton, whose deed constituted a link in the title of Mrs. Curtis to this lot, did not in fact own the fee, but that his ownership was subject to a contingent remainder in favor of any child or children he might leave surviving at his death. On account of that adjudication, and the consequent impairment of his title, Brannon thereafter, while still in possession of the lot, and before the falling in of the life estate, filed his bill against Mrs. Curtis in the chancery court of Davidson county, alleging her nonresidence, and the breach of her covenant of seisin, and seeking a recovery against her for the \$900 paid for the lot, with interest, for \$560 for improvements by him placed upon the land, and for \$60 taxes paid thereon. The bill was taken for confessed against Mrs. Curtis, and thereafter a final decree was rendered against her. This decree allowed Brannon a full recovery for all he claimed, and directed a sale of the property attached, without requiring him to surrender possession, or to account for mesne profits. In January 1896, after the sale of the property attached, and before confirmation, Mrs. Curtis filed the present bill to review the final decree against her, under Brannon's bill, for errors of law alleged to be apparent upon its face, and for newly discovered evidence. Brannon's demurrer to this bill was overruled by the chancellor, who adjudged that the decree impeached was erroneous in law upon its face in three particulars: First, because it allowed the vendee a full recovery of purchase money and interest thereon, without abatement for rents and profits; secondly, because it allowed such recovery without restoring the possession to the vendor; and, thirdly, because it allowed a recovery for improvements without proper

cause shown. And thereupon the chancellor further adjudged that the said decree be reviewed, reversed, and set aside, for the reasons stated, and that a reference be had to ascertain the value of the rents and profits of the lot since the vendee went into possession. The court of chancery appeals affirmed the decree under the bill of review in so far as it denied Brannon a recovery for improvements, but reversed it, and restored the decree under the original bill, in other respects. Both parties have appealed, and in this court complain of such parts of the decree of the court of chancery appeals as are adverse to them, respectively.

1. A covenant of seisin is an assurance to the vendee that the vendor has the very estate, in quantity and quality, which he purports to convey. It is a personal covenant *in præsenti*, and, if not true, is breached the instant it is made, and an immediate right of action accrues to the vendee for its breach, without and before eviction. These well-settled propositions are announced in the following cases,—partly in some and partly in others,—and as many more cases to the same effect could readily be cited: *Kincaid v. Brittain*, 5 Sneed, 119; *Recohs v. Younglove*, 8 Baxt. 387; *Park v. Cheek*, 4 Coldw. 28; *Robinson v. Coulter*, 90 Tenn. 707, 25 Am. St. Rep. 708, 18 S. W. 250; *Baird v. Goodrich*, 5 Heisk. 23; *Pollard v. Dwight*, 4 Cranch, 421, 2 L. ed. 666; *Le Roy v. Beard*, 8 How. 451, 12 L. ed. 1151; *Peters v. Boicman*, 98 U. S. 58, 25 L. ed. 91; *Logan v. Moulder*, 1 Ark. 313, 33 Am. Dec. 338; *Baker v. Hunt*, 40 Ill. 264, 89 Am. Dec. 346; *Clement v. Bank of Rutland (Clement v. National Bank)* 61 Vt. 298, 4 L. R. A. 425, 17 Atl. 717; *Gilbert v. Bulkley*, 5 Conn. 262, 13 Am. Dec. 57; *Dale v. Shively*, 8 Kan. 276; *Real v. Hollister*, 20 Neb. 112, 29 N. W. 189; *Murphy v. Price*, 48 Mo. 247; *Bickford v. Page*, 2 Mass. 455; *Wilson v. Cochran*, 46 Pa. 229; *Abbott v. Allen*, 14 Johns. 252; *Fitzhugh v. Croghan*, 2 J. J. Marsh. 429, 19 Am. Dec. 139; *Price v. Deal*, 90 N. C. 290; *Brandt v. Foster*, 5 Iowa, 287; *Morse v. Garner*, 47 Am. Dec. 570, and note (1 Strobh. L. 514); *Backus v. McCoy*, 3 Ohio, 211, 17 Am. Dec. 585; *Laurence v. Montgomery*, 37 Cal. 183. See also 2 Sutherland, Damages, 2d ed. § 592; Rawle, Covenants for Title, 5th ed. § 58; 4 Kent, Com. *471; 2 Devlin, Deeds, § 942.

2. If the breach be total, or such that the vendee may so treat it, the measure of damages is, ordinarily, the amount of consideration paid, with interest thereon. *Kincaid v. Brittain*, 5 Sneed, 119; *Park v. Cheek*, 4 Coldw. 27; *Recohs v. Younglove*, 8 Baxt. 387; *Logan v. Moulder*, 1 Ark. 313, 33 Am. Dec. 344; *Bibb v. Freeman*, 59 Ala. 612; 69 L. R. A.

Backus v. McCoy, 3 Ohio, 211, 17 Am. Dec. 585; *Herndon v. Harrison*, 34 Miss. 486, 69 Am. Dec. 399; *Swofford v. Whipple*, 3 G. Greene, 261, 54 Am. Dec. 498; *Gilbert v. Bulkley*, 5 Conn. 262, 13 Am. Dec. 57; *Meeklem v. Blake*, 99 Am. Dec. 73, note (22 Wis. 495); 4 Kent, Com. *475; 2 Sutherland, Damages, § 593; Rawle, Covenants for Title, § 158; 3 Sedgw. Damages, 8th ed. § 966; 2 Devlin, Deeds, § 894.

3. The recovery of the consideration and interest is subject, however, to abatement for rents during the vendee's possession, when it appears that he cannot be made liable therefor to the owner of the paramount title. A vendee, having enjoyed the advantages of possession at the expense of his vendor, is bound, especially in a court of equity, to account for those advantages when he demands repayment of the purchase money with interest. He cannot, in such a case, hold benefits, and at the same time recover as if he had not received them. Some of the authorities treat liability for rents as the reason for allowing interest on the consideration paid. Kent says: "The interest is to countervail the claim for mesne profits, to which the grantee is liable." 4 Kent, Com. *475. Sutherland says: "Possession without title may compensate for the interest on the purchase money, if there be no liability, which will be enforced to the real owner." 2 Sutherland, Damages, § 598. In *Flint v. Steadman* it was ruled that the vendee, who had been in possession in such manner as not to be accountable for the use of the premises, could recover only the purchase money without interest. 36 Vt. 210. We see no good reason for limiting the vendee's liability for rents to the interest on the purchase money if they have in fact been of greater value. He should account for all the benefits he has derived from the possession, and, if not responsible therefor to some other person, his vendor should have an abatement to that extent. "The whole consideration money and interest cannot be the criterion of damages, except in those cases where the purchaser derives no benefit from the conveyance." 2 Sutherland, Damages, § 597. "But if some title passes, though so far short of that covenanted for that the grantee is clearly not bound to retain it for a proportional part of the purchase money, on tendering a reconveyance and surrendering possession recovery may be had of the entire consideration[money] and interest, together with taxes paid, less the value of rents received." Id. § 599. This last proposition is based upon the decision in *Frazer v. Peoria County*, 74 Ill. 282, which goes further than the text, and holds that the

grantee must answer not only for "rents received," but also for those that "could have been received from the property." *Id.* 292. It is said in another case that, if the vendee takes any benefit, directly, or indirectly, from the deed, he must be charged with that benefit in the assessment of his damages. *Hartford & S. Ore. Co. v. Miller*, 41 Conn. 113. This court, in *Park v. Cheek*, which was an action at law for a breach of a covenant of seisin, said: "The defendant will have the right, where the plaintiff seeks . . . to recover the purchase money and interest, to set off the rents and profits of the land, and such damages as may be sustained by reason of the plaintiff removing and appropriating any permanent improvements the defendant may have erected on the premises." 4 Coldw. 28.

4. Having been in rightful possession under a deed passing a good and perfect title to at least a life estate in the land conveyed, and the life tenant being still alive, so as to preclude the remainder-men from demanding rents for any part of the time, the vendee in the present case was liable to his vendor for the rental value of the premises from the inception of his possession to the date of the decree, and it was an error of law not to reduce the vendee's recovery to that extent.

5. The original decree was further erroneous in that it allowed the vendee a full recovery for the breach of the covenant of seisin as in case of a total failure in title, or of rescission without at the same time requiring him to surrender possession of the land. It may be true, as suggested by some of the authorities, that such a recovery will, by operation of law, revert the vendor with such title as he had originally (*Kincaid v. Brittain*, 5 Sneed, 124; *Robinson v. Coulter*, 90 Tenn. 709, 25 Am. St. Rep. 708, 18 S. W. 250; *Recohs v. Younglove*, 8 Baxt. 388; Rawle, Covenants for Title, § 184), and it may likewise be true, as suggested by the learned court of chancery appeals and by the same authorities, that such a recovery even at law, would authorize an action by the vendor to regain possession; but that is not enough in a court of equity. In that forum the vendee will not be allowed a full recovery, except upon the surrender of possession. Restoration of such possession as the vendee has is an indispensable ingredient of the decree. It is one of the things essential to the right of full recovery, and without it the conscience of the court is not moved in his favor. In all matters of rescission, and in all relief akin to rescission, a court of equity will invariably put the parties as nearly *in statu quo* as possible. *Hill v. Harriman*, 95 Tenn. 305, 32 S. W. 69 L. R. A.

202; *Conner v. Henderson*, 15 Mass. 319, 8 Am. Dec. 103; *Adams*, Eq. 191; 2 Kent, Com. * * 475, 476, 480; *Blackburn v. Smith*, 2 Exch. 783; 2 Warvelle, Vendors, § 29; *Shively v. Semi-Tropic Land & W. Co.* 99 Cal. 259, 33 Pac. 848; *Farmers' Bank v. Groves*, 12 How. 51, 13 L. ed. 889; *Gay v. Alter*, 102 U. S. 79, 26 L. ed. 48; *Brown v. Witter*, 10 Ohio, 142; *Coffee v. Ruffin*, 4 Coldw. 516; *Pharr v. Bachelor*, 3 Ala. 245; 21 Am. & Eng. Enc. Law, pp. 84-87, and citations; *Coolidge v. Brigham*, 1 Met. 547; *Kansas City Land Co. v. Hill*, 87 Tenn. 589, 5 L. R. A. 45, 11 S. W. 797; *Johnson v. Jackson*, 27 Miss. 498, 61 Am. Dec. 522; *Lake Shore & M. S. R. Co. v. Richards*, 30 L. R. A. 33, and notes, 44, 45 (162 Ill. 59, 38 N. E. 773).

Never, when adequate relief can be granted to both parties, will it be given to one and withheld from the other. Had Brannon sued at law, the measure of damages would have been the difference between the value of the life estate acquired and the fee contracted for. *Recohs v. Younglove*, 8 Baxt. 385; 2 Devlin, Deeds, § 901. It is only in a court of equity, and upon the ground of rescission, that he can have the larger recovery. Being in that forum, and seeking relief upon that ground, he must, by the same decree, surrender the possession, and account for meane profits as well. Asking equity, he must do equity. It has been said, and upon good reason, that a vendee in like situation with Brannon should reconvey or tender a reconveyance before asking a recovery for the breach of a covenant of seisin. *Frazer v. Peoria County*, 74 Ill. 291; 2 Sutherland, Damages, § 599. Rawle remarks that "it would, perhaps, be a matter of prudence for the purchaser to offer such a reconveyance before or at the time of the trial, although it would be no bar to his action that he had not done so." Rawle, Covenants for Title, § 185. In *Mecklem v. Blake* the court ruled that a grantee desiring to rescind and recover purchase money and interest must tender a reconveyance, and offer to restore possession. 22 Wis. 495, 99 Am. Dec. 68.

6. At an early period in American jurisprudence it was decided that a vendee suing for a total breach of the covenant of seisin could not augment his recovery by showing a rise in value, whether the enhancement arose from extrinsic causes, as in *Staats v. Ten Eyck*, 3 Caines, 111f, 2 Am. Dec. 254, or from improvements placed upon the land by him, as in *Bender v. Fromberger*, 4 Dall. 442, 1 L. ed. 901, and *Pitcher v. Livingston*, 4 Johns. 1, 4 Am. Dec. 229; and such is the general rule prevailing at this day. 4 Kent, Com. *475; Rawle, Covenants for Title, §

158; 3 Sedgw. Damages, §§ 958, 961; 2 Sutherland, Damages, § 593; 2 Devlin, Deeds, § 894; and cases cited by the text writers, and in note to *Mecklem v. Blake*, 99 Am. Dec. 73. Perhaps the most important reason underlying this rule is the fact that the vendor ordinarily receives no benefit whatever from the enhanced value of the land. He does not, in the usual case, actually regain the land, but it goes to the owner of the paramount title, with all its enhancement.

7. But the present case is not the usual one, and the reason for the rule is not entirely applicable. It applies as to the remainder estate, but not as to the life estate. There is no paramount ownership of the life estate. The vendor is actually restored to the possession of the property in its improved condition, and is, undoubtedly, entitled to its free use and enjoyment so long as the life tenant shall survive. Moreover, in the

account for rents she will have advantage of the improvements, since the amount of her credit for mesne profits will be determined from the annual rental or usable value of the land with the improvements upon it. Such equitable circumstances impel a court of conscience to grant the vendee a recovery for improvements to the extent that they may have permanently enhanced the rental or usable value of life estate.

Enter decree in accordance with this opinion, and remand for an account, in which Brannon will be credited with (1) purchase money and interest, (2) taxes paid, and (3) improvements, so far as they may have enhanced the rental or usable value of the life estate, and charged with the annual rents or use of the premises in the condition in which they may have been from time to time.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Peter GERBERT, Exr., etc., of John Snyder
Deceased, *Plff. in Err.*,
v.

CONGREGATION OF THE SONS OF
ABRAHAM.

(59 N. J. L. 160.)

*1. In an action on contract for breach of covenant to convey real estate with warranty of title, where the vendor's title is defective, nominal damages, only, can be recovered.

2. Where there is a contract to convey unimproved land with warranty of title, and the vendee, before conveyance is to be made, erects buildings upon the land without the request of the vendor, in an action on contract to recover damages for failure to convey, the vendor's title proving defective, the value of the buildings cannot be recovered by the vendee.

(November 23, 1896.)

ERROR to the Circuit Court for Essex County to review a judgment in favor of plaintiff in an action brought to recover damages for breach of contract to convey certain real estate. *Reversed.*

The facts are stated in the opinion.

Messrs. Collie & Swayze, with *Messrs. Blake & Howe*, for plaintiff in error:

The plaintiff below was not entitled to recover more than nominal damages for the breach of the covenant to convey.

If Snyder had made a conveyance in his lifetime to the defendant in error, con-

taining a covenant of warranty, and there had been an ouster by the remainder-men, and the defendant in error had brought an action for damages growing out of the breach of the covenant of warranty, it would have been entitled to recover, as damages, only the consideration money named in the deed, together with interest thereon not exceeding six years antecedent to the eviction, together with costs; and, in the event that the purchase money was wholly unpaid, it would then have recovered only nominal damages.

Stewart v. Drake, 9 N. J. L. 139; *Holmes v. Sinnickson*, 15 N. J. L. 313; *Morris v. Rowan*, 17 N. J. L. 304.

There ought to be, in our own state, a uniformity of doctrine as to the subject of damages where the injury is the same.

Since the decision of *Drake v. Baker*, 34 N. J. L. 358, the English cases relied on for that decision have been overruled, and have been declared not to express the law on the subject.

Bain v. Fothergill, L. R. 7 H. L. 158; *Rowe v. School Board*, L. R. 36 Ch. Div. 619.

If the defendant in error was entitled to recover substantial damages for the loss of its bargain, the trial court erred in including therein the sum of \$2,632.99, the cost of the improvements put by the lessee upon the property. Improvements of the character in question were not removable as between landlord and tenant; but, assuming that they were removable, then, under the facts in this case, no damages can be claimed based upon their value. If they were not removable fixtures, as between landlord and tenant, then the tenant could

*Headnotes by VAN SYCKEL, J.

NOTE.—As to measure of damages for failure to convey real estate, see *Morgan v. Bell*, 16 L. R. A. 614, also the case immediately preceding this one.
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have no claim against the landlord for payment therefor.

Kutler v. Smith, 2 Wall. 491, 17 L. ed. 830; *Taylor, Land. & T.* § 552; *Lee v. Risdon*, 7 Taunt. 188; *Thresher v. East London Waterworks*, 2 Barn. & C. 608; *Loughram v. Ross*, 45 N. Y. 792, 6 Am. Rep. 173; *Shepard v. Spaulding*, 4 Met. 416.

It was stipulated in the original lease that the new demise should be "upon the same terms as to the amount and payment of rent." By this stipulation, it was cut off from claiming the right, under the new demise, to reserve to itself the right to remove the "improvements." As a consequence, it cannot now have any claim for damages by reason of any supposed interest in the "improvements," as connected with any breach of any covenants in relation to such new lease or renewal.

Lanigan v. Kille, 97 Pa. 120.

Even where the improvements were made by a vendee in possession, and the vendor is unable to make title, it has been decided that, neither with nor without a covenant on the subject, can the vendee recover for improvements made.

Dorsey v. Jackman, 1 Serg. & R. 42, 7 Am. Dec. 611; *Staats v. Ten Eyck*, 3 Caines, 111, 2 Am. Dec. 254; *Pitcher v. Livingston*, 4 Johns. 1, 4 Am. Dec. 229; *Bender v. Fromberger*, 4 Dall. 436, 1 L. ed. 898; *Hayden v. Mentzer*, 10 Serg. & R. 329; *Bolton v. Johns*, 5 Pa. 145, 47 Am. Dec. 404; *Smith v. Smith*, 28 N. J. L. 217, 78 Am. Dec. 49; *Gillet v. Maynard*, 5 Johns. 85, 4 Am. Dec. 329; *Shreve v. Grimes*, 4 Litt. (Ky.) 224, 14 Am. Dec. 117; *Freeman v. Headley*, 33 N. J. L. 538; *Worthington v. Warrington*, 8 C. B. 134; *Engel v. Fitch*, L. R. 3 Q. B. 328; *Bain v. Fothergill*, L. R. 7 H. L. 188; *Schreiber v. Dinkel*, 54 L. T. N. S. 911.

Mr. James E. Howell, for defendant in error:

Snyder agreed to sell the land for \$7,000. At the time the covenant was broken the court below found that the land was worth \$375 a foot, making \$9,750. Deducting the price agreed to be paid, the court found that the damages on this branch of the case amounted to \$2,750. This seems to be entirely within the opinion of the court in *Drake v. Baker*, 34 N. J. L. 358.

King v. Ruckman, 24 N. J. Eq. 305.

Even if the building had been removable as between the church corporation and John Snyder, it was not removable as between the church corporation and the reversioner.

Erickson v. Bennet, 39 Minn. 326, 40 N. W. 157; *Sedgw. Damages*, 8th ed. §§ 1001, 1017; *Bellamy v. Ragsdale*, 14 B. Mon. 364; *Skeard v. Welburn*, 67 Mich. 389, 34 N. W. 716.
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The English rule, which, in a case of fraud on the part of the vendor, would drive the vendee to an action for deceit, has not been generally adopted in America.

Maupin, Marketable Title to Real Estate, § 90.

Van Syckel, J., delivered the opinion of the court:

On the 1st of March, 1884, the plaintiff's testator, John Snyder, entered into a lease with the defendant in error for premises known as "No. 226 Washington street," in the city of Newark, New Jersey, for the term of five years from April 1, 1884. The lease contained a stipulation for a further term of five years, provided notice should be given by the lessee, three months before the expiration of the term, of the election of the lessee to take a further term. On the 12th of October, 1888, notice was given by the lessee that a further term was desired. No new lease was actually executed, but the lessee continued in possession of the premises after the expiration of the first term. The plaintiff's testator died in April, 1892, during the running of the second term of five years. The lease of March 1, 1884, contained the following clause. "And, further, that if the said party of the second part shall desire to purchase the demised premises, that he [the lessor] will any time during the tenancy hereby created or agreed upon, for the consideration of seven thousand dollars, sell and convey by warranty deed, with the usual covenants, free and clear of all encumbrances, the demised premises to the said party of the second part, or such person or persons as they shall desire, upon their giving to him, his heirs, executors, or administrators notice that they desire such conveyance; such conveyance to be made within thirty days after giving of such notice, and the payment of rent to cease at the delivery of such deed; and, if not delivered within the said thirty days, then said rent to cease at the end of that time."

After the death of Snyder, the lessor, to wit, on the 1st day of June, 1892, a demand was made upon the executor of Snyder for a conveyance pursuant to the aforesaid provision. He was unable to make a conveyance because the testator had a life estate only, in the premises as tenant by the curtesy; the title to the property having been in the wife at the time of her decease, which was before the lease was made. This suit was instituted for a breach of the covenant to convey pursuant to the demand made upon the lessor's executor.

The sole question to be decided is the measure of damages in this action on con-

tract. Immediately after entering into possession under the lease in 1884, the defendant in error built a synagogue upon the premises, and expended thereon over \$2,600. This money was expended before a demand for a renewal of the lease, and several years before a conveyance was demanded. On the trial below, the defendant in error recovered damages for the loss of its bargain arising out of the increased value of the land, and also damages for the loss of the building which had been erected upon the premises. Upon the question as to damages arising from an appreciation in the value of the land, the trial judge was bound by the decision of the supreme court of this state in *Drake v. Baker*, 34 N. J. L. 358, and he properly followed that case.

The first question to be determined is whether the rule adopted by our supreme court in *Drake v. Baker* shall be adhered to. Under the long-settled law of this state, if Snyder had conveyed in his lifetime to his lessee with a covenant of warranty, and if thereafter the grantee had been evicted by the remainder-men, in an action on contract for damages flowing from a breach of the covenant of warranty, the only damages recoverable would have been the consideration money paid and the interest thereon; and, if the purchase money was wholly unpaid, nominal damages, only, could have been recovered. *Stewart v. Drake*, 9 N. J. L. 139; *Holmes v. Sinnickson*, 15 N. J. L. 313; *Morris v. Rowan*, 17 N. J. L. 304. This rule has been so long recognized in our jurisprudence that it cannot now be subverted. That there is no substantial difference in the injury resulting, where there is an ouster after conveyance with warranty, and where there is a refusal of conveyance in pursuance of the contract to convey, when the vendor is unable to make title, which can reasonably support a rule for damages in the former case wholly different from that which prevails in the latter case, is too obvious to require discussion. The injury in both cases is the same,—the loss of the property; the loss of such profit as would have been incident to increased value. The loss in both cases arises from the breach of the vendor's covenant on account of the defect in his title. There can, therefore, be no solid basis for diversity in the rule of damages applicable to the two conditions, and the rule should be unified if there is no serious obstacle in the way.

The rule in *Drake v. Baker* was adopted upon the authority of the English cases, which at the time of the decision of that case had limited the application of the rule laid down in *Flureau v. Thornhill*, 2 W. Bl. 1078, that on breach of contract to convey, where the vendor's title proved defect-

ive, nominal damages, only, could be recovered. The exceptions ingrafted upon *Flureau v. Thornhill* in *Pounsett v. Fuller*, 17 C. B. 660; *Robinson v. Harman*, 1 Exch. 850; *Engel v. Fitch*, L. R. 3 Q. B. 315; and *Hopkins v. Grazebrook*, 6 Barn & C. 31,—all cited in *Drake v. Baker*, and there relied upon,—greatly narrowed the sphere in which *Flureau v. Thornhill* would be a controlling authority. Since *Drake v. Baker* was decided, this rule has been most elaborately and exhaustively discussed and reviewed in the House of Lords in England in the case of *Bain v. Fothergill*, L. R. 7 H. L. 158, and the rule in England finally settled by discarding the distinctions which had been previously ingrafted upon the case of *Flureau v. Thornhill* in the cases relied upon in our court in *Drake v. Baker*. In *Bain v. Fothergill* the defendants were in possession of a mining royalty, under a written agreement for a lease, of which they had taken an assignment from one H. In H.'s agreement for a lease with the owners, it was stipulated that he should not assign without their permission. The defendants contracted with the plaintiff to sell their interest in the royalty, and this action was for the breach of that contract, in consequence of the inability of the defendants to make title for want of the owners' assent to the assignment to them. The owners were willing to consent to the assignment to the plaintiff if he would stipulate not to assign without their permission. One of the defendants knew that this consent was necessary; the other did not. The court of exchequer held the case to be within the rule in *Flureau v. Thornhill*, and gave judgment for nominal damages only. The case was carried to the House of Lords, and there affirmed. Three questions were propounded by the Lord Chancellor to the judges: (1) Whether, upon a contract for the sale of real property, where the vendor, without his default, is unable to make a good title, the purchaser is by law entitled to recover damages for the loss of his bargain. To this the answer was, he is not entitled. (2) Whether the actual possession of the property, the subject of the contract, is essential to bring the case within the rule laid down in *Flureau v. Thornhill*. To this the answer was in the negative. (3) Whether, if the rule of law is correctly laid down in *Flureau v. Thornhill*, the circumstances of the present case distinguish it, and take it out of that rule. To this the reply was also in the negative. The discussion in *Bain v. Fothergill* is most able and interesting, and, after a thorough review of all the previous English cases, the House of Lords expressed the opinion that *Flureau v. Thornhill* was established law,

and that *Hopkins v. Grazebrook* was no longer the rule; that *Flureau v. Thornhill* applied to every case where the vendor failed to convey through inability to make title; that the rule was the same whether the vendor had been guilty of fraud or not, for the motive of the defendant was immaterial in measuring damages for breach of contract; and that, therefore, even if there had been fraud, the vendee could not have recovered substantial damages in contract, but must have proceeded in an action for deceit. The cases upon which the doctrine approved in *Drake v. Baker* was rested having been so completely overruled by the English court, that case should, in our judgment, be now disregarded, and the law in this state be made harmonious in the two instances, where there is in all material respects precise similarity of circumstances, and no difference of substance upon which to support a difference in the rule of damages. Where fraud or deceit enters into the transaction, the vendee should be left to his action for deceit to recover for the loss he may sustain thereby. On this branch of the case nominal damages, only, should have been recovered. The only question submitted to this court in the case of *Sons of Abraham v. Gerbert*, 57 N. J. L. 395, 31 Atl. 383, was whether the covenant to convey applied to the renewal period of five years. The rule of damages applicable to the case was not discussed; nor did the court intend to make any deliverance on that subject.

The question remains whether the lessee was entitled to recover for the cost of the improvements put upon the premises, as before stated. The first term under the lease ran from April 1, 1884, to April 1, 1889. The improvements included in the damages recovered below were all made soon after the lessee entered into possession in 1884, and the demand for a conveyance was not made until after the lessor's death, in 1892. The lease contained the following covenant: "And the said party of the second part [the lessee] hereby agrees that all improvements of any kind made on or about the said premises shall be and become the property of said party of the first part at the expiration of this lease or any renewal thereof." The covenant in the lease is simply to convey land; there is no agreement to convey land and buildings erected thereon by the lessee after entry. Under the common-law rule, buildings erected on the premises by the tenant become part of the freehold, and are the property of the lessor, without any allowance to the tenant. An exception has been ingrafted on this rule, that under certain circumstances gives the tenant the right of removal before the expiration of

his term. But the common-law rule is still so rigidly adhered to that if a tenant, at the end of his term, renews his lease, and thereby acquires a new interest in the premises, his right to remove improvements is forfeited, unless he takes the precaution to reserve such right in the renewal lease. This is the established English rule, and it has also received the sanction of the New York court of appeals in *Loughran v. Ross*, 45 N. Y. 792, 6 Am. Rep. 173, where the English cases are cited and relied upon. In *Smith v. Smith*, 28 N. J. L. 208, 78 Am. Dec. 49, Chief Justice Green distinguishes between a vendee in possession under a parol agreement to purchase, who makes improvements expecting them to be for his own benefit, and not at the instance of his vendor, and a tenant who makes improvements under the assurance of his landlord that he shall have a conveyance of the premises with the improvements. In the former case he denies the right of the vendee to compensation on failure to obtain a conveyance. This accords with the doctrine of the English court as pronounced in *Worthington v. Warrington*, 8 C. B. 134. There the party entered into possession under an agreement for a two-years term with leave to make improvements at his own expense, with the option of purchasing at any time during the two years. The lessor, it afterwards appeared, had no title to the premises, and the action was brought to recover damages for breach of the contract, and for the cost of the improvements. The court said: "If the purchaser thinks proper to enter into possession, and to incur expenses in alterations before the title is ascertained, he does so at his own risk. I see nothing in this case to distinguish it from the ordinary one. The plaintiff should have taken care to ascertain that the title was good, before he proceeded to lay out money upon the premises." The reason which lies at the foundation of the rule in *Flureau v. Thornhill* pertains here, and is clearly expressed by Lord Hatherley in *Bain v. Fothergill*. In distinguishing *Engel v. Fitch*, he said: "The vendor in that case was bound by his contract . . . to do all that he could to complete the conveyance. Whenever it is a matter of conveyancing, and not a matter of title, it is the duty of the vendor to do everything that he is enabled to do by force of his own interest, and also by force of the interest of others whom he can compel to concur in the conveyance. . . . The foundation of the rule [in *Flureau v. Thornhill*] has been already more clearly expressed by my noble and learned friend who has preceded me, in saying that, hav-

ing regard to the very nature of this transaction in the dealings of mankind in the purchase and sale of real estates it is recognized on all hands that the purchaser knows on his part that there must be some degree of uncertainty as to whether, with all the complications of our law, a good title can be effectively made by his vendor, and, taking the property with that knowledge, he is not to be held entitled to recover any loss on the bargain he may have made, if, in effect, it should turn out that the vendor is incapable of completing his contract in consequence of his defective title."

In this case it must be held that the lessee made the improvements at his own risk, and not under an assurance that a title would be given including such improvements, inasmuch as they were made long before the lessee announced his election to purchase. The rights of the parties must be adjudged according to the status at the time the improvements were made, and that was the relation of landlord and tenant. The question now under discussion does not in fact differ from the question previously disposed of. By the renewal of the lease without any provision as to the buildings put upon the premises by the tenant, such buildings, as before stated, became incorporated with the real estate, and were the property of the lessor and the remaindermen. The subsequent election of the tenant to take a conveyance gave him a right to a conveyance of the real estate of which the buildings were part, and from which they were no longer, in legal contemplation, separate. The buildings could no longer be considered as improvements made by the lessee. The recovery of nominal damages for failure to convey will satisfy the legal claim for damages for failure to convey both land and buildings, the two being now one and inseparable. Where there is a contract to convey unimproved land, and the vendee, before conveyance, erects buildings upon it without the request of the vendor, it would be a rule of exceeding hardship which compels the vendor, when his title proves defective, to pay the cost of such improvements to any extent which the vendee might choose to put upon it. Such a result could not reasonably be supposed to have been within the contemplation of the parties when the contract was executed. The vendor would be compelled to pay for improvements which he did not authorize to be made, and from which he would derive no benefit whatever if the vendee failed to perform on his part. In my opinion, *the judgment below* was also in this respect erroneous, and it *should therefore be reversed*.

69 L. R. A.

Andrew ALBRIGHT, *Plff. in Err.*,

v.

SUSSEX COUNTY LAKE & PARK COMMISSION.

(71 N. J. L. 303, 309.)

*1. The right to fish in an inland lake in New Jersey cannot be separated from the ownership of the lake, and taken under the power of eminent domain, because, first, the natural supply of fish therein is so small as to be incapable of meeting a public demand; and, second, the object of acquiring such a right is not use, which implies utility, but mere sport or pastime. *Query*: Is the value of such a right capable of estimation, so that a compensation may be awarded therefor which shall be just with respect both to the private owner and to the public purchaser?

On Rehearing.

2. In "An Act to Acquire Rights of Fishing Common To All in Fresh-Water Lakes in Certain Counties," etc., approved March 22, 1901 (P. L. p. 333), the unconstitutionality of the provisions intended to delegate the power of eminent domain renders the whole act invalid.

(*Gummere, Ch. J., and Vroom, J., dissent from paragraph 1.*)

(February 29, 1904.)

ERROR to the Supreme Court to review a judgment upholding a proceeding instituted for the purpose of obtaining the right of fishery in a private lake. *Reversed*. The facts are stated in the opinion.

Messrs. Charles D. Thompson and Charles L. Corbin for plaintiff in error.
Messrs. Griggs & Harding for defendant in error.

Dixon, J., delivered the opinion of the court:

"An Act to Acquire Rights of Fishing Common to All in Fresh-Water Lakes in Certain Counties, to Acquire Lands Adjoining Thereto for Public Use and Enjoyment Therewith, and to Regulate the Same" (P. L. 1901, p. 333, chap. 161), declares that in any county of the state wherein are fresh-water lakes having an area of water surface exceeding 100 acres a commission may be appointed, which shall have power to take in fee or otherwise by purchase, gift, devise, or eminent domain, and to maintain and make available to the public, the right of fishing in such lakes. Under this statute a commission has been appointed in Sussex county, and is attempting to take by eminent domain the right of fishing in Swartswood lake, which belongs to the plaintiff in error. The plaintiff resists

*Headnotes by DIXON, J.

NOTE.—For a full review of the whole subject of the right to fish, see *note to State v. Shaw*, 60 L. R. A. 481.

this attempt upon the ground mainly that the power of eminent domain cannot constitutionally be exercised for the stated purpose. In olden times the eminent domain seems to have been employed only in cases of state necessity, and there is no instance of its exercise in New Jersey prior to 1776 except for highways. But undoubtedly its scope has been much enlarged in recent times to keep pace with the advance in social conditions. *Scudder v. Trenton Delaware Falls Co.* 1 N. J. Eq. 694, 23 Am. Dec. 756. Still, even as late as 1852 Chief Justice Green spoke of the objects for which the state exercises this power as being few in number. *Smith v. Applegate*, 23 N. J. L. 357. Under our state Constitution (art. 1, § 16) private property can be taken only for public use. Whether the end sought to be attained by the taking is a public use is a question to be determined by the courts, although it is said there is a presumption in favor of a use declared by the legislature to the public. *Mills, Em. Dom.* § 10; *Lewis, Em. Dom.* § 158; *Scudder v. Trenton Delaware Falls Co.* 1 N. J. Eq. 694, 727, 23 Am. Dec. 756; *Olmsted v. Morris Aqueduct*, 47 N. J. L. 311; *National Docks R. Co. v. Central R. Co.* 32 N. J. Eq. 755, 764. The language of the Constitution does not authorize property to be taken "for public enjoyment," or "for public purposes," or generally "for the public." Its expression is "for public use," which implies an idea of utility, of usefulness, not necessarily inherent in the other phrases mentioned. The duty is therefore devolved upon this court to determine whether the object to be subserved by the condemnation of the right to fish in the plaintiff's lake is a public use.

In order that a use may be public, it is not essential that the whole community should be able directly to participate in it. Thus, a free school for children is for a public use, although only a fraction of the community can attend it. But it is essential that the utility should in a substantial measure concern the public; as, for example, the education of the young concerns the community. The right to be condemned under this statute is merely the right to fish. Such a right is in the ancient legal French called a right *profit à prendre*, a right so peculiarly for personal enjoyment that it is incapable of being acquired by the general public, either by custom (*Cobb v. Davenport*, 32 N. J. L. 369), or by dedication (33 N. J. L. 223, 97 Am. Dec. 718; *Albright v. Cortright*, 64 N. J. L. 330, 48 L. R. A. 616, 81 Am. St. Rep. 504, 45 Atl. 634). No doubt there is a public right of fishing recognized by municipal law. It exists in the water of the ocean along the coast, and in the arms

of the sea as far as the tide ebbs and flows. But this right differs from that now under consideration in several important respects. In the first place, it is a mere incident of the public ownership of the public waters, while the object of the present proceedings is to sever the right of fishing from the title to the lake, and give it an independent existence. If the legislature had provided for the condemnation of the lake, so as to confer upon the public the right of resorting thereto for all purposes to which it is adapted, the condemnation might then have been supported on the precedents which find a public use in parks, and the right to fish would have passed as an incident of the public title. But under this statute the ownership of the lake is to remain private. In the next place, the natural supply of fish in the public waters is practically inexhaustible if the right to fish therein be subjected to such regulations as will reasonably guard it for the free enjoyment of the general public. But the natural supply of fish in the inland lakes of New Jersey is so small that, if the right to catch fish therein were exercised by persons sufficiently numerous, to be deemed the public, the supply would soon come to an end. Lastly, fishing in the public waters has from time immemorial constituted an industry fostered by law for the supply of the general market, while fishing in these private waters has been and can be only for individual amusement and gain. We think, therefore, that for present purposes there is no substantial resemblance between the common right to fish in public waters and the right now in question.

I turn, then, to the consideration of the matter in view of the rules which have been laid down as aids in determining what is a public use within the meaning of this provision of the Constitution. A definition of the phrase has not, I think, been judicially attempted, but among the statements of the doctrine to be found in the books that of Prof. Cooley seems most likely to subserve the general welfare for which the constitutional power is delegated, and at the same time to protect private property, which is equally a ward of our Constitution. He says (*Const. Lim.* 6th ed. 655): "The reason of the case and the settled practice of free governments must be our guides in determining what is or is not to be regarded a public use, and that only can be considered such where the government is supplying its own needs, or is furnishing facilities for its citizens in regard to those matters of public necessity, convenience, or welfare which, on account of their peculiar character, and the difficulty . . . of making provision for them otherwise, it is alike proper, useful, and needful for the government to provide." Applying

this as the test, the present statute cannot be supported. The right to be enjoyed under this statute is necessarily the right of each individual who exercises it to abstract from what is designed by the statute to be a common stock such portion as he can secure, and to appropriate that to his own benefit. This is for private, rather than public, advantage. The statute does, indeed, contemplate the acquisition of the common stock by public agents, but they are to acquire it for private benefit. If the common stock thus to be acquired were capable of supplying an unlimited number of persons, then they might be deemed in a constitutional sense the public; but, as already stated, the stock would be quite inadequate for such a demand. The fact that a small supply is tendered free to the first takers does not show that the public can enjoy it.

But not only does the Constitution require that the property taken should be for the public; it is also necessary that it should be for use. The chief purpose in the enjoyment of the property must be utility. But it cannot be doubted that the main object of the present statute is to furnish a means of amusement or sport to the few persons who have the inclination and leisure for such pastime. The public utility to be subserved by such indulgence is imperceptible. "The reason of the case" therefore does not seem to warrant the conclusion that the proposed taking is "for public use." When we look to "the settled practice of free governments," we find no parallel for the present enterprise. There are many instances of the exercise of eminent domain for the purpose of furnishing facilities to be enjoyed by individuals; such are parks, highways, ferries, railways, telegraph and telephone lines, etc. But these differ from the right now under consideration in important respects. First, they are essentially useful; secondly, they are used by great numbers of people; and, thirdly, their use by the individual abstracts nothing appreciable from the common opportunity of use. There are also some instances of the exercise of the power in order to afford facilities for private enjoyment where it is intended that each individual shall abstract a portion from the common stock. An example appears in the condemnation of water for domestic purposes in populous neighborhoods. But here, also, marked differences from the present scheme are observable. The end sought is utility of the greatest urgency, and the natural supply is so abundant that private abstraction cannot exhaust it. In all such instances these characteristics will be found in substantial measure to make them of use to the public. We have found no instance of the exercise

of the power in order to afford a means of pastime capable of being enjoyed by only a few persons.

There is another consideration deserving of some weight. The Constitution requires that on taking private property for public use just compensation should be made to the owner; and this implies that the property taken shall be reasonably capable of just estimation. The lake itself could no doubt be fairly appraised, as could, probably, the right of any individual, or of any specified number of individuals, to fish therein. But I know of no criterion by which the right of an unlimited number of persons to spend their time upon the lake for the purpose of catching fish could be valued. It might be that the appraisers would evade the difficulty by awarding to the owner the full value of the lake; but in that case justice would require that the lake itself, and not a mere incidental right in it, should become public property. We think, therefore, that neither in the reason of the case, nor in the settled practice of free governments, is there legal support for the proposed condemnation.

The power of eminent domain is one of the extreme powers of government. When employed for the purpose of enabling it to perform its own functions, its scope is limited only by the wisdom of the legislature. But, when it is exerted with the view of furnishing facilities to private individuals, it so easily runs into the taking of one man's property to give it to others, in disregard of that right which the Constitution declares to be inalienable,—the right of protecting property,—that it behooves the courts, where private owners can be fully heard in their own behalf, to take care that constitutional rights are guarded and constitutional limitations observed. On full consideration, we are constrained to adjudge that the present proceedings are designed to take the plaintiff's property for other than the public use, and are therefore illegal.

The judgment of the Supreme Court should be reversed and a judgment entered setting aside the proceedings taken under the statute.

Gummere, Ch. J., and Vroom, J., dissent.

A reargument having been granted, Dixon, J., on November 14, 1904, handed down the following additional opinion:

In the opinion delivered in this cause February 29, 1904 (71 N. J. L. 303, *ante*, 768, 57 Atl. 398), it was assumed that, if the provisions of the act of March 22, 1901 (P. L. p. 333), so far as they relate to the power of eminent domain, were unconstitutional, the proceeding under review must necessarily be illegal. This assumption was

unwarranted, because the proceeding was merely an affirmation by the supreme court of the appointment of commissioners under that statute, and, as the statute purported to confer upon such commissioners other powers than that of eminent domain, it did not follow as a matter of course that their appointment would be nugatory if the attempt to delegate the power of condemnation failed. This mistake having been called to the attention of the court by an application for a rehearing, the court ordered that the following question should be argued: "Assuming that the provisions of chapter 161 of the Laws of 1901, relating to the power of condemnation, are unconstitutional, should the judgment of the supreme court in this case be reversed." This argument having been heard, the question is now before us for decision.

The act purports to authorize the acquisition of the rights contemplated "by purchase, gift, devise, or eminent domain." P. L. p. 335, § 2. But almost all the provisions of the statute relate to the acquisition by purchase or condemnation, and it is incredible that the act would have been passed merely to permit the acceptance of gifts or devises. The only substantial powers were those of purchase and condemnation. The question therefore is, Should the invalidity of the grant of the power to condemn defeat the grant of the power to buy?

The general rule with regard to the validity of a statutory scheme, some feature of which proves to be unconstitutional, is that, if the objectionable feature be not so important to the legislative design as to war-

rant the opinion that the scheme would not have been authorized without it, then the residue of the scheme will be upheld; otherwise the entire scheme will fail. *Johnson v. State*, 59 N. J. L. 535, 38 L. R. A. 373, 37 Atl. 949, 39 Atl. 646. The scheme designed by the statute under consideration was the acquisition by any county, at public expense, of a common right to fish in fresh-water lakes within the county. The lakes falling within the purview of the act are now private property, and, unless the power of eminent domain can be exercised, the right desired can be obtained only at such price as the owners may be willing to accept. Some counties have not more than one of these lakes, and consequently in those counties there could be no competition among private owners to keep their demands within reasonable bounds. With such conditions in view, the duty of the legislature could best be fulfilled by providing some guard against an extravagant disbursement of public funds; and, for the purpose of discharging this duty, we think the legislature intended to confer upon the counties the right to have the price fixed by disinterested appraisers under the power of eminent domain. To infer, from the attempt to delegate an authority thus shielded from imposition, a willingness to dispense with the safeguard and yet continue the authority, would be unreasonable. Our conclusion is that the vice of the condemnation provision infects the whole act.

The judgment of the supreme court should be reversed, and the order appointing commissioners should be set aside.

MINNESOTA SUPREME COURT.

F. M. LOOMIS, *Appt.*,

v.

Charles WALLBLOM *et al.*, *Respts.*

(.....Minn.....)

*1. A full discharge of individual

*Headnotes by JAGGARD, J.

NOTE.—Discharge of partnership liability in individual bankruptcy proceedings.

I. Scope, 772.

II. Provability of partnership debts in individual proceedings.

a. Introductory, 772.

b. In general, 773.

c. Exceptions.

1. Absence of joint assets or solvent partners.

(a) In general, 775.

(b) When partnership assets have been assigned to bankrupt, 777.

2. Fraudulent abstraction of partnership funds by bankrupt, 777.

liability of one partner on a firm debt may be had in bankruptcy proceedings concerning that partner only.

2. Such discharge is a good defense in an action brought against two partners to renew a judgment on a partnership debt, the process in which action was served only on the partner who

II., c—continued.

3. Right of petitioning joint creditor to prove, 778.

III. Discharge of partnership liability in individual proceeding.

a. Discharge of liability by reason of provability of claim.

1. In general, 778.

2. The English doctrine, 779.

b. Necessity of making firm or co-partners parties.

1. Under bankruptcy law of 1887.

(a) In general, 780.

(b) In absence of joint assets, 782.

had been duly discharged in bankruptcy proceedings, where it appeared that, many years before, the parties had dissolved the firm, and the firm had, to the actual knowledge of the judgment creditor, made an assignment of all unexempt firm and individual property under a state insolvency law; and where it did not affirmatively appear that any firm assets now exist; and where it appeared that the claim was properly scheduled, and notice thereof was duly given.

3. Held, that the claim was duly scheduled on the facts here presented.

(April 7, 1905.)

A PPEAL by plaintiff from an order of the District Court for Ramsey County denying a motion for new trial after verdict in defendants' favor in an action brought to renew a judgment. *Affirmed.*

The facts are stated in the opinion.

Mr. James E. Trask, for appellant:

Wallblom's discharge in bankruptcy did not terminate the existence of, or discharge the debt against, the partnership, or take away plaintiff's right to renew the partnership judgment in an action against Wallblom and Thorsell as partners.

When the essential rights of the parties are influenced by the nature of the original contract, the courts will look into the judgment for the purpose of ascertaining what the original contract was.

Owens v. Bowie, 2 Md. 457; *Second Nat. Bank v. Townsend*, 114 Ind. 534, 17 N. E. 116.

The National Wall Paper Company never appeared in the bankruptcy proceedings, or had any actual notice thereof.

Tyrrel v. Hammerstein, 33 Misc. 505, 67

III., b.—continued.

2. Under bankruptcy law of 1898.

(a) *In general*, 783.

(b) *In absence of joint assets*, 784.

I. Scope.

Since the bankruptcy act of 1898 provides that "a discharge in bankruptcy shall release a bankrupt from all of his provable debts;" and since some of the other bankruptcy acts in England (6 Geo. IV. chap. 16, § 121; 24 & 25 Vict. chap. 134, § 161; 46 & 47 Vict. chap. 52 § 30 (2)), and in this country (Act 1800, § 34; Act 1841, § 4; Act 1867, § 19), contained similar provisions,—it has seemed necessary to include, besides decisions upon the specific point which is the subject of this annotation, also those cases in which the question arises of the provability of partnership debts in individual proceedings in bankruptcy. This necessitates, of course, the inclusion of those cases holding joint debts payable out of the separate estate under certain conditions. All decisions under insolvency acts have been excluded.

II. *Provability of partnership debts in individual proceedings.*

a. *Introductory.*

Whether partnership debts are provable in an individual proceeding in bankruptcy is a question resting in much confusion and conflict. Its solution is affected by the way the courts dispose of another question, which is the real one to be dealt with, *viz.*, whether, and, if so, under what circumstances, joint debts are payable out of a separate estate. If they are so payable, they are of course provable in an individual proceeding. The difficulty the courts have experienced in dealing with this latter question has arisen largely by reason of the equity rule that the joint estate is applicable to partnership debts, and the separate estate to separate debts, and, on the other hand, by the desirability, in bankruptcy proceedings, of releasing a bankrupt from all claims against him, both joint and separate. The various complications that arose in the minds of the courts 69 L. R. A.

endeavoring to settle this question are obvious upon reflection. Thus, if a joint creditor were allowed to prove his claim in an individual proceeding, and receive a dividend *pari passu* with the separate creditors, when joint assets existed, he would have a great advantage over them, since he could still resort to the joint estate, and they could not, unless a surplus existed therein; also, if a joint claim was proved against one partner individually, and a dividend received thereon, that entailed a cumbersome suit in equity on his part for contribution from the remaining partners. The theory that the assignee in the individual proceeding might, if joint creditors proved their claims therein, take possession of the bankrupt's interest in the partnership property, and then grant a dividend *pari passu* to all alike, was advocated by some, but held untenable by others on the ground that such an assignee could have no power or authority to meddle with partnership property. Some courts, following strictly the equitable rule of distribution, were of opinion that the joint creditor must be allowed no dividend out of the separate estate until the separate creditors were paid in full, but the hardship of this doctrine was obvious when no joint assets, or only a very small amount, existed; since joint debts are equally binding obligations upon the bankrupt as are his separate debts.

The earliest rule in England, in support of which no specific decisions are found, but which is referred to by later judges, was that a joint creditor, where there was a separate commission, was to be admitted to prove his claim, but only for the purpose of assenting to or dissenting from the certificate, and receiving a dividend out of any surplus there might be beyond the amount of the separate debts.

Lord Thurlow, in 1784, made a new rule, that joint debts should be provable in a separate commission, and payable *pari passu* with the separate creditors out of the bankrupt's estate, which should be composed of his separate estate and his moiety of the joint estate taken possession of by the assignee in the separate proceedings.

Lord Loughborough, in 1796, dissented from Lord Thurlow's rule, not being able to get away from the equity doctrine that partnership debts are payable out of the joint estate, and sepa-

N. Y. Supp. 717; *Fider v. Mannheim*, 78 Minn. 309, 81 N. W. 2; *Collins v. McWalters*, 35 Misc. 648, 6 Am. Bankr. Rep. 593, 72 N. Y. Supp. 203; *Liesum v. Kraus*, 35 Misc. 376, 71 N. Y. Supp. 1022.

Not only is the joint partnership liability of the firm of Wallblom & Thorsell unaffected by the individual discharge of Wallblom, but the individual or several partnership liability of Wallblom, which is a part of, or incident to, said joint partnership liability, is also unaffected by such discharge.

It is nowhere provided in the act of Congress that the individual discharge of a person shall release the debts of any partnership of which such person may chance to be a member.

A partnership is a distinct entity, and the release or discharge in bankruptcy of

Wallblom upon his individual petition could no more discharge the debts of the partnership of Wallblom & Thorsell than it could the individual debts of Thorsell.

Re Mercur, 58 C. C. A. 472, 122 Fed. 388; *Strause v. Hooper*, 5 Am. Bankr. Rep. 225; *Re Meyer*, 39 C. C. A. 368, 3 Am. Bankr. Rep. 559, 98 Fed. 976; *Re Grant Bros.* 5 Am. Bankr. Rep. 837; *Re Kersten*, 6 Am. Bankr. Rep. 516, 110 Fed. 929; *Re Borden*, 4 Am. Bankr. Rep. 31, 101 Fed. 553; *Re Farley*, 8 Am. Bankr. Rep. 266, 115 Fed. 359.

A partnership, in the eyes of the law, continues to exist as such as long as any of its debts remain unpaid or undischarged; and, until the debts of a partnership have been paid or satisfied, it cannot be said that

b. In general.

In 1784, Lord Chancellor Thurlow, in *Es parte Cobham*, 1 Bro. Ch. 576, said that the question of the provability of joint debts against the separate estate of one of the partners had never been decided; but that he did not see why the rule applying to the case of separate creditors proving debts under a joint commission was not applicable, his only doubt being to what extent this benefit should be allowed; that it would be hard that the joint creditors should come upon the separate estate to the prejudice of the separate creditors, and still have an exclusive power of coming upon the joint estate; and, therefore, that he thought that the separate assignees might, if they pleased, possess themselves of the bankrupt's proportion of the partnership effects, and then both the joint and separate creditors could come in *pari passu* upon both funds.

In the following year (1785), in *Es parte Hodgson*, 2 Bro. Ch. 5, he held that a partnership debt was provable under a separate commission, saying that debts, whether sole or joint, ought to be paid *pari passu* with the separate creditors out of the bankrupt's estate, which is composed of his separate estate and his moiety of the joint estate.

These cases announce what is called Lord Thurlow's rule; and for a few years thereafter the question was regarded as settled.

Thus, joint creditors were admitted to prove their debts in a separate commission against one partner, and take a ratable dividend with the rest of the creditors. *Es parte Page* (1786) 2 Bro. Ch. 119.

It was declared settled that joint creditors might prove under a separate commission. *Es parte Flintum* (1786) 2 Bro. Ch. 120.

A joint creditor is entitled to prove his debt under a separate commission, taken out against one of the partners. Lord Thurlow, *Es parte Copland* (1787) 1 Cox, Ch. Cas. 420.

Creditors of partners on a bond for money which came to the use of the partnership were held entitled to prove their claim against the joint estate, or the separate estates, of the partners. *Es parte Clowes* (1789) 2 Bro. Ch. 595.

But, in 1796, Lord Loughborough, in *Es parte Elton*, 3 Ves. Jr. 238, upon the ground that each estate should bear its own debts,

rate debts out of the separate estate, and also on account of the inconvenience, as it seemed to him, of a bankrupt, out of whose estate a joint debt was paid, being obliged to institute proceedings in equity against the other partners for contribution. He therefore went back nearly to the old rule, and announced that joint creditors could prove their claims in a separate proceeding, but could not receive a dividend until an accounting was had of the two estates, so that a settlement of the two classes of claims could be made according to the equity rule of distribution.

Then, some decisions went still farther, and held that, if there was any joint estate at all, however trifling, the joint creditor could not prove against the separate estate, and share therein,—at least until the separate debts were paid.

All along, from 1785 down, there had been decisions that, if there was no joint estate in existence, then the joint creditors could prove their claims, and share *pari passu* with the separate creditors in an individual proceeding.

Other exceptions to the denial of the joint creditor's right to share in the separate estate came to be made during that time and since, by statute and decisions. Thus, it has been held that, when partnership funds had been fraudulently abstracted by the bankrupt, the joint creditors might prove against and share in his separate estate; and when the joint creditor, desiring to prove his claim, was the petitioning creditor in the individual proceeding, he was allowed to do so; so, too, when partnership assets had been assigned to the bankrupt upon condition that he meet the partnership debts, joint creditors were allowed to prove their claims against him.

Therefore, if it is justifiable to draw any rule from the decisions as they stand, it is that joint debts are provable in a separate commission for some purposes, but are not payable out of the separate estate; this prohibition against sharing in the estate, however, not being applicable when there are no joint assets; when the bankrupt has fraudulently abstracted firm funds; when he has received an assignment of the partnership assets; or when the joint creditor, desiring to prove and share in the separate estate, is the petitioning creditor himself.

there has been any "final settlement thereof" under § 5 of the bankruptcy act.

Re Freund, 1 Am. Bankr. Rep. 25; *Re Noonan*, 3 Biss. 491, Fed. Cas. No. 10,292; *Hudgins v. Lane*, 2 Hughes, 361, Fed. Cas. No. 6,827; *Re Mercur*, 58 C. C. A. 472, 122 Fed. 388.

Neither a copartnership, nor a corporation, can withdraw its debts from the jurisdiction of the bankruptcy court by an attempted dissolution.

Re Storck Lumber Co. 8 Am. Bankr. Rep. 86; *Re Independent Ins. Co.* Holmes, 103, Fed. Cas. No. 7,017; *Scheuer v. Smith*, & *M. Book & Stationery Co.* 7 Am. Bankr. Rep. 384.

The trustee in bankruptcy of an individual bankrupt is not entitled to take, hold,

recover, or administer the assets of any firm of which such bankrupt may be a member, there having been no adjudication in bankruptcy against such firms.

Re Mercur, 58 C. C. A. 472, 122 Fed. 388; *Re Meyers*, 2 Am. Bankr. Rep. 714, 96 Fed. 408, 3 Am. Bankr. Rep. 260, 97 Fed. 757; *Nutting v. Ashcroft*, 101 Mass. 300; *Am-sinck v. Bean*, 22 Wall. 404, 22 L. ed. 804; *Strause v. Hooper*, 5 Am. Bankr. Rep. 225.

Inasmuch as a partnership is a distinct entity, and the bankruptcy act (providing the only way by which a partnership can be adjudged bankrupt) applies equally to all partnerships, whether defunct or going concerns; and inasmuch as a partnership continues to exist in the eyes of the law so long as it has unpaid debts, and the

made a change in the rule. He admitted joint creditors to prove claims in a separate commission, but ordered the dividend reserved until an account was taken of what they had, or might have, received from partnership effects.

And, again, in 1799, in *Ex parte Abell*, 4 Ves. Jr. 837, he held, upon the ground that the separate estate should be applied first to the separate debts, that, upon the proof of a joint debt in a separate commission, payment of dividend should be refused until the separate creditors had each received 20s. in the pound.

The rule thus laid down was called Lord Loughborough's rule, and was followed in a number of subsequent decisions.

Lord Eldon, in *Ex parte Clay* (1802) 6 Ves. Jr. 813, reviews the situation up to that time in the following language: "The rule that prevailed in Lord Hardwicke's time, and down to the time of Lord Thurlow, was, that joint creditors should not be admitted to prove under a separate commission for the purpose of receiving dividends with the separate creditors. Lord Thurlow altered that upon much consideration, thinking the joint creditors ought to be admitted with the separate creditors; and left it so when he left this court. Lord Loughborough thought that was not right, and got back again not quite to the old rule; but he settled it that they should prove only for the purpose of keeping separate accounts, but not to receive a dividend." The order was taken according to Lord Loughborough's rule.

Joint creditors were admitted to prove their claims in a separate commission, and also to take dividends provided they paid the separate creditors, in *Ex parte Chandler* (1803) 9 Ves. Jr. 35.

Joint creditors were allowed to prove their debts under a separate commission, for the purpose only of assenting to, or dissenting from, the certificate, not to receive dividends, in *Ex parte Taitt* (1809) 16 Ves. Jr. 196.

It was declared in *Heath v. Hall* (1812) 4 Taunt. 326, that a joint creditor had a right to prove his debt against the separate estate of one of the partners, although he could not receive a dividend until the bankrupt's separate debts were fully paid.

A partnership debt may not be proved against the separate estate of a bankrupt partner so as to come in competition with the separate credit-
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ors. *Ex Parte Clark* (1864) 10 L. T. N. S. 165.

A provision embodying Lord Loughborough's rule was enacted in the bankruptcy act of 6 Geo. IV., chap. 16, § 62, to the effect that a joint creditor might prove his debt in a separate commission for the purpose of voting as to assignees, but could not receive a dividend out of the separate estate until all of the separate creditors were paid in full.

A similar provision is contained in 12 & 13 Vict., chap. 106, § 140, law of 1849.

Also in 46 & 47 Vict., chap. 52, § 59 (1), law of 1883, it is provided that a joint creditor shall not receive a dividend out of the separate estate until the individual creditors are paid in full.

In an American decision under the bankrupt law of 1800, which was almost a copy of the English bankruptcy law in force at that time. Lord Loughborough's rule was considered, but construed somewhat differently. The court held partnership debts provable under the bankruptcy law, without regard to whether there were joint assets or not; but that equity would restrain the collection of a dividend until it could be ascertained what, according to the equitable rule of distribution, it ought to be. *Tucker v. Oxley* (1809), 5 Cranch, 34. 3 L. ed. 29.

Later, in *Re Frear* (1868) 2 Ben. 467, Fed. Cas. No. 5,074, under the bankruptcy act of 1867, it was held that joint debts were provable in an individual proceeding, whether there were any assets of the partnership or not; and that, if such assets existed, they were to be administered according to § 36 of the bankruptcy act of 1867, which provides for an accounting of the two estates, and administration of the proceeds according to the principles of the equity rule.

So, in *Re Bates* (1900) 100 Fed. 263, under the bankruptcy act of 1898, a partnership debt was held provable in an individual proceeding, notwithstanding there were joint assets. The court said that, whether a debt is provable depends upon the nature of the liability, and not upon whether there are assets applicable to it. It was further held that the proceeds of the two estates must be accounted for and administered according to the statute, which provided for the application of individual assets to individual debts, and joint assets to joint debts, according to the equitable rule.

affairs of an insolvent firm which has not been adjudged bankrupt cannot be administered in the individual bankruptcy proceedings of a member of such firm,—the discharge in bankruptcy of an individual upon his individual petition, asking only for a discharge from his individual debts, does not release him from partnership debts.

Hudgins v. Lane, 2 Hughes, 361, Fed. Cas. No. 6,827; *Re Little*, 2 Ben. 186, 1 Nat. Bankr. Reg. 341, Fed. Cas. No. 8,390; *Corey v. Perry*, 67 Me. 140, 24 Am. Rep. 15; *Re Jewett*, 7 Biss. 473, 16 Nat. Bankr. Reg. 48, Fed. Cas. No. 7,307; *Re Webb*, 4 Sawy. 326, Fed. Cas. No. 17,317; *Re Noonan*, 3 Biss. 491, Fed. Cas. No. 10,292; *Re Grady*, 3 Nat. Bankr. Reg. 227, Fed. Cas. No.

5,654; *Re Levy*, 2 Am. Bankr. Rep. 21, 95 Fed. 812.

Writing the name "National Wall Paper Company" into Wallblom's list of individual debts, without anywhere in the proceeding naming, or in any way referring to, the firm of Wallblom & Thorsell, or any other copartnership, does not properly name the creditor as a creditor of the firm, or constitute a proper scheduling of a partnership claim.

Tyrrel v. Hammerstein, 33 Misc. 505, 6 Am. Bankr. Rep. 430, 67 N. Y. Supp. 717; *Fider v. Mannheim*, 78 Minn. 309, 81 N. W. 2; *Collins v. McWalters*, 35 Misc. 648, 6 Am. Bankr. Rep. 593, 72 N. Y. Supp. 203. The bankruptcy proceedings of Wallblom

In *Re Webb* (1877) 4 Sawy. 326, Fed. Cas. No. 17,317, it was held that a joint creditor might prove his claim in an individual proceeding in bankruptcy so as to vote for the assignee. Beyond this the decision did not go.

After Lord Loughborough's rule had become recognized and been followed in several instances, the decisions in England went still farther, headed by *Ex parte Peake* (1814) 2 Rose, 54, holding that "joint creditors are not permitted to prove against the separate estate, where there is a joint property, however trifling in amount." 2 Mews, Eng. Case Law Dig. 726.

So, it appearing that property is outstanding in the partnership name, a joint debt is not provable against the separate estate. *Ex parte Harris* (1816) 1 Madd. 583.

While there is any other fund, however small, to resort to, joint creditors cannot prove against the separate estate of one of the partners who has become bankrupt. *Ex parte Jamson* (1818) 3 Madd. 231.

Joint creditors were not admitted to receive dividends out of the separate estate of one of the partners until the separate creditor had been paid, where it appeared that there was a joint estate of £13. *Ex parte Kennedy* (1852) 2 De G. M. & G. 228.

It is perhaps justifiable, then, to say that the rule, generally speaking, to be drawn from these decisions, is, that partnership debts are provable in an individual proceeding, but not for the purpose of receiving a dividend,—at least until the separate creditors are all paid.

In the subdivisions following are collected decisions showing exceptions to the rule, or situations when the denial of the right to share in the separate estate is not applicable.

c. Exceptions.

1. Absence of joint assets or solvent partners.

(a) In general.

As appears by the class of cases last above shown, the courts went so far as to hold that, when there are any joint assets whatever, however trifling in amount, the equitable rule of distribution must be followed, and the joint claims paid out of the joint assets, the individual claims out of the individual assets; and only in the event of a surplus of the separate L. R. A.

rate estate over the individual debts, could the joint creditors obtain any relief therefrom. We cannot be certain that the courts in this class of cases still admitted the right of the joint creditors to prove their claims in an individual proceeding for certain purposes, in the nature of voting as to the assignee, etc.; but it is probable that they did, for these cases are a following out to its logical conclusion of Lord Loughborough's rule, which admitted that right.

In consistency with this class of cases above referred to, and with due regard to the application of the equitable rule of distribution when both funds existed, the courts have nevertheless been holding, from 1785 down to the present time, with the exception of two cases under our present bankruptcy law of 1898, that when there are no joint assets in existence, and no solvent partner, then the joint creditors may resort to the separate estate with the separate creditors in an individual proceeding, and share *pari passu* with them. Decisions of this nature, of course, of necessity include and concede the joint creditor's right to prove his claim in an individual proceeding under such circumstances.

The courts do not always make clear, however, the distinction between the provability of a claim in an individual proceeding and the right of a joint creditor to share in a separate estate.

Thus, upon a separate commission of bankruptcy against one partner, the joint creditors petitioned, and were allowed, to prove their debts, and to receive a dividend *pari passu* with the separate creditors, there being no joint estate in *Ex parte Hayden* (1785) 1 Bro. Ch. 454.

Proof of a joint debt was admitted in a separate commission when there was no joint property, in *Ex parte Pinkerton* (1801) 6 Ves. Jr. 814, note.

There being, strictly speaking, no joint estate, joint debts were held provable in a separate commission, in *Ex parte Hill* (1802) 2 Bos. & P. N. R. 191, note.

Where one of two former partners became bankrupt, and a proof was tendered against his estate in respect of a partnership liability, the court allowed such proof on the official receiver as trustee, admitting that he was satisfied the other partner was utterly insolvent, although he had not been judicially declared bankrupt or insolvent. *Ex parte Carpenter*, 7

are not made in any way to involve the affairs of the firm of Wallblom & Thorsell.

Re Laughlin, 3 Am. Bankr. Rep. 1, 96 Fed. 689; *Re Tinker*, 3 Am. Bankr. Rep. 580, 99 Fed. 79; *Re Hartman*, 3 Am. Bankr. Rep. 65; *Re McFaul*, 3 Am. Bankr. Rep. 66.

Since, as stated in Wallblom's petition, he did not have enough property to pay his debts in full, partnership creditors were not entitled to share in the individual estate before the bankruptcy court; and, not being so entitled to share in such estate, the partnership claims were not provable against such estate within the provisions of § 17 of the bankruptcy act.

If there is no joint estate, and no surplus of the separate estate after paying the

separate debts, the creditors of the partnership can receive no dividend.

Howe v. Lawrence, 9 Cush. 553, 57 Am. Dec. 68; *Somerses Potters Works v. Minot*, 10 Cush. 592; *Murrill v. Neill*, 8 How. 414, 12 L. ed. 1135; *McCulloh v. Dashiell*, 1 Harr. & G. 97, 18 Am. Dec. 271; *Story*, Partn. p. 376; *Woddrop v. Ward*, 3 Desauss., Eq. 203; *Bell v. Newman*, 5 Serg. & R. 78; *Black's Appeal*, 44 Pa. 503; *McCormick's Appeal*, 55 Pa. 252; *Hawkins v. Mahoney*, 71 Minn. 155, 73 N. W. 720; *Weyer v. Thornburgh*, 15 Ind. 124; *Warren v. Able*, 91 Ind. 109; *Warren v. Farmer*, 100 Ind. 595.

Mr. Otto Kueffner, for respondents:

The bankruptcy act of 1898 provides that the discharge shall be a discharge of all

Morrell, 270, 2 Mews, Eng. Case Law Dig. p. 733.

But a joint creditor was not allowed to prove his claim in a separate commission of bankruptcy for the purpose of receiving dividends, when there was a solvent partner, although there was no joint estate. *Ex parte Kensington* (1808) 14 Ves. Jr. 447.

Proof of joint debts was admitted in a separate commission in *Ex parte Sadler* (1808) 15 Ves. Jr. 52, there being no joint estate or solvent partner.

So, the proof of a joint debt of two houses was allowed against the separate commission of one of them, there being no joint estate. *Ex parte Machell* (1813) 2 Ves. & B. 218.

And, in the absence of joint property, proof of a joint claim was allowed against the separate estate of a bankrupt, notwithstanding the claim had been previously partly met by a pledge of joint property. *Ex parte Geller*, (1817) 2 Madd. 202.

The fact that the estate of a deceased partner is solvent does not affect the joint creditor's right to prove under a separate commission, when there is no joint estate and no other solvent partner. *Ex parte Bauerman* (1838) 3 Deacon, Bankr. 476.

But an inquiry as to the existence of a joint estate was directed where a joint creditor proved his claim in a separate commission, notwithstanding the previous dissolution of the partnership. *Ex parte Birley* (1840) 1 Mont. D. & De. G. 387.

A comparatively recent English decision adheres to the doctrine of the earlier cases above set out, holding that when there is no joint estate the joint creditors are entitled to have their claims paid out of the separate estate of the partners *pari passu* with the separate creditors. *Re Budgett* [1894] 2 Ch. 557, 63 L. J. Ch. N. S. 847, 71 L. T. N. S. 72.

The decisions of our own country, with the exception of the two decisions under our present act, show the same doctrine as the English cases. The following are under the bankruptcy act of 1867:

Where there is no joint estate, and no solvent living partner, the joint creditors shall prove their claims, and share *pari passu* with the separate creditors of an individual petitioner in bankruptcy. *Re Jewett* (1868) 1 Nat. Bankr. Reg. 491, Fed. Cas. No. 7,304; *Re Downing* (1870) 3 Nat. Bankr. Reg. 748, 69 L. R. A.

Fed. Cas. No. 4,045; *Re Knight* (1871) 8 Nat. Bankr. Reg. 436, Fed. Cas. No. 7,880; *Re McEwen* (1875) 6 Biss. 294, 12 Nat. Bankr. Reg. 11, Fed. Cas. No. 8,783; *Re Pease* (1876) 13 Nat. Bankr. Reg. 168, Fed. Cas. No. 10,881; *Re West* (1880) 30 Fed. 203.

A joint creditor is bound to prove, at the request of the separate creditors, his whole debt against the joint assets; but only the deficiency against the separate estate of one of the partners. *Re May* (1878) 17 Nat. Bankr. Reg. 192, Fed. Cas. No. 9,327.

The following decisions are under the bankruptcy law of 1898:

Where there are no partnership assets, and the firm has been dissolved, § 5, cl. f, relating to the marshalling of assets, does not apply; and a partnership creditor is entitled to share with the individual creditors of a member of the firm who became bankrupt, in the absence of a solvent partner. *Re Green* (1902) 116 Fed. 118.

So, where there are no partnership assets, and no solvent partner, firm creditors share in the separate estate of the bankrupt partner *pari passu* with the individual creditors. *Conrader v. Cohen* (1903) 58 C. C. A. 249, 121 Fed. 801.

Of course, in the two decisions above set out, under our law of 1898, the right to share in the separate estate in the absence of joint assets makes the joint debt provable in an individual proceeding under such circumstances; but in the two decisions following, which present the conflicting doctrine that, under no circumstances, except in the event of a surplus, can the joint creditor share in the separate estate, obviously no inference can be drawn as to the court's opinion upon the specific question of the joint creditor's right to prove his claim for other purposes than to receive a dividend, in the absence of any expression in regard thereto. The cases are inserted herein, however, because the class to which they belong would be incomplete without them, and in order that what light they may indirectly throw upon the point in question herein may be at hand.

In the first case, *Re Wilcox* (1899) 94 Fed. 84, after an exhaustive review of earlier English and American decisions, partnership creditors were held not entitled to receive dividends out of the separate estate of one of the

debts, claims, and demands against the bankrupt or his estate, excepting only four classes.

If the creditor had actual notice, no scheduling whatever is required.

Fider v. Mannheim, 78 Minn. 308, 81 N. W. 2; *McKittrick v. Cahoon*, 89 Minn. 383, 62 L. R. A. 757, 99 Am. St. Rep. 606, 95 N. W. 223.

After the discharge is granted, it is good, and includes all claims.

Curtis v. Woodward, 58 Wis. 499, 46 Am. Rep. 647, 17 N. W. 328; *Wilkins v. Davis*, 2 Low. Dec. 511, 15 Nat. Bankr. Reg. 60, Fed. Cas. No. 17,664; *Re Abbe*, 2 Nat. Bankr. Reg. 75, Fed. Cas. No. 4; *Re Freund*, 1 Am. Bankr. Rep. 31; *Jarecki Mfg. Co. v. McElwaine*, 107 Fed. 249.

partners, until the individual creditors were paid in full, notwithstanding the fact that there were no partnership assets. This decision is based upon the following grounds: The bankruptcy act of 1898, provides (§ 5, cl. f): "The net proceeds of the partnership property shall be appropriated to the payment of the partnership debts, and the net proceeds of the individual estate of each partner to the payment of his individual debts. Should any surplus remain of the property of any partner after paying his individual debts, such surplus shall be added to the partnership assets, and be applied to the payment of the partnership debts. Should any surplus of the partnership property remain after paying the partnership debts, such surplus shall be added to the assets of the individual partners in the proportion of their respective interests in the partnership." The court says: "Considering the plain language of the bankrupt act, which recognizes no exceptions to the general rule, the history of the exception in the absence of joint estate, the discredit and misconception which that exception has brought upon the general rule both in England and this country, . . . I think that I am justified in holding that the exception is inapplicable under the present bankrupt act."

Upon the same reasoning, it was held in *Re Janes* (1904) 67 C. C. A. 216, 133 Fed. 912, Reversing 128 Fed. 527, that, where there are no solvent partners and no partnership assets, firm creditors are not entitled to share in the individual assets of one of the partners, as those assets must be distributed wholly among the individual creditors. It was insisted by counsel that, when there are no firm assets and no solvent partner, an "exception" is created, to which the rule of the statute does not apply; but the court referring to *Re Wilcox*, (1899) 94 Fed. 84, refused to sustain the contention, saying: "We are of the opinion that the rule to be applied is the rule laid down in the sections above quoted from the bankrupt act. It was within the discretion of Congress to leave this subject of the marshaling of assets to the courts, to be disposed of in accordance with equity principles and practice, or to provide that the general rule should be modified in particular cases. It has done neither. . . . The language is plain, explicit, and unambiguous; it names no 'exception'; its phraseology 69 L. R. A.

An assignment under the insolvency laws, even by one partner, is *ipso facto* a dissolution of the firm.

Wilkins v. Davis, 2 Low. Dec. 511, 15 Nat. Bankr. Reg. 60, Fed. Cas. No. 17,664; *Davis v. Megroz*, 55 N. J. L. 427, 26 Atl. 1009.

Jaggard, J., delivered the opinion of the court:

On November 27, 1893, defendants, partners doing business as Wallblom & Thorsell, executed a deed of assignment under the state insolvency law, both as individuals and as partners, of all their unexempt property, which was filed in the district court of Ramsey county. The National Wall Paper Company filed and proved its claim in

conveys no intimation that any 'exception' is contemplated."

(b.) *When partnership assets have been assigned to bankrupt.*

If it can be shown that the partnership assets have passed into the hands of the bankrupt, the decisions uphold the joint creditors' right to prove their claims against his estate in an individual proceeding brought by or against him.

Joint debts were held provable against the separate estate of a continuing partner who, upon the dissolution of the partnership, had taken an assignment of the partnership property, agreeing to indemnify the withdrawing partner against partnership debts. *Es parte Burdekin* (1842) 2 Mont. D. & De G. 704, 6 Jur. 977.

A joint creditor proving his claim against the separate estate of one of the partners was held entitled to receive a dividend upon proving that the partnership assets had been assigned to the bankrupt upon his covenant to discharge the partnership debts. *Es parte Taylor* (1842) 2 Mont. D. & De G. 753.

The decisions of our own country are to the same effect.

Firm creditors may prove their claims against the estate of a partner who, upon the dissolution of the firm, agreed to receive the firm assets and pay the firm debts. *Re Long* (1874) 9 Nat. Bankr. Reg. 227, Fed. Cas. No. 8,476; *Re Collier* (1874) 12 Nat. Bankr. Reg. 266, Fed. Cas. No. 3,002.

The joint creditors may prove their debts against the estate of a partner to whom had been sold all of the partnership interests. *Re Rice* (1874) 9 Nat. Bankr. Reg. 373, Fed. Cas. No. 11,750.

Where one of the partners takes the firm assets, and agrees to pay the joint debts, he becomes individually liable; and the partnership creditors may, at their option, prove against his estate in bankruptcy, and share *pari passu* with the separate creditors. *Re Lloyd* (1884) 22 Fed. 88.

2. *Fraudulent abstraction of partnership funds by bankrupt.*

Another of the situations recognized as an exception to the rule that joint creditors may

the assignment matter, but did not file a release, and received no dividend. In March, 1895, it brought an action against Charles Wallblom and John Thorsell, as copartners doing business as Wallblom & Thorsell, in the district court of Ramsey county, alleging in its complaint the sale of goods of the value of \$254.77, and default in payment. There was no allegation that the goods were sold to the firm, or purchased for partnership purposes. Default was made, and judgment entered on the 9th day of April, 1895, against "Charles Wallblom and John Thorsell, as copartners doing business as Wallblom & Thorsell, and each of them." On the 4th day of August, 1898, Charles Wallblom filed his individual petition in bankruptcy, and was on August 5th ad-

judged a bankrupt. The claim of the National Wall Paper Company was listed as follows: "National Wall Paper Co., Chicago, Ill. \$254.77. Consideration, goods bought." On December 19, 1898, Charles Wallblom was discharged from all his debts. This appellant, as assignee of said judgment, thereafter brought this action to renew the judgment hereinbefore set forth. Respondent Wallblom answered, setting up his discharge in bankruptcy as a defense. The reply does not deny actual notice of the bankruptcy proceedings on the part of the National Wall Paper Company, but denies that notice was given to the partnership creditors. It does not appear that defendant John Thorsell was served or appeared in the proceeding. Upon the trial it was ad-

not prove against the separate estate to receive a dividend is where the bankrupt partner had fraudulently abstracted funds.

Lord Thurlow, in *Ex parte Lodge* (1790) 1 Ves. Jr. 166, made the first decision to this effect, allowing partnership creditors of a partnership which had failed to prove their claims against the separate estate of one partner, who had taken partnership funds without the privity of the other.

And proof of joint debts may be admitted against the separate estate of a partner who had fraudulently abstracted firm funds. *Lacey v. Hill* (1876) L. R. 4 Ch. Div. 537.

So, in an Irish case joint creditors were admitted to prove their claims against one of the partners upon the ground of a fraudulent abstraction of partnership funds. *Ex parte Smith* (1821) 1 Glyn. & J. 74.

3. Right of petitioning joint creditor to prove.

Another exception is that, when the petitioning creditor in the individual proceedings is himself a joint creditor, he may prove his claims with the separate creditors.

Thus, in *Ex parte Hall* (1804) 9 Ves. Jr. 349, a joint creditor, who was the petitioning creditor in a separate commission, was admitted to prove with the separate creditors. Lord Chancellor Eldon said: "I think that was right; that being the petitioning creditor, he has a right like the separate creditors. The reason of Lord Thurlow's orders was that he could not conceive how one joint creditor could be in a different situation from all the other joint creditors. But the practice is now settled."

So, in *Ex parte Ackerman* (1808) 14 Ves. Jr. 604, a joint creditor, who was the petitioning creditor, was, on that account, held entitled to prove his claim, and receive a dividend *pari passu* with the separate creditors.

Again, in *Ex parte Detastet* (1810) 17 Ves. Jr. 247, Lord Eldon held that a joint creditor, who is the petitioning creditor in a separate commission, may take dividends with the separate creditors, although he is the only joint creditor who can come in with the separate creditors against the separate estate; and although he holds claims merely as the trustee of another joint creditor, who cannot prove them.

The doctrine of these decisions was later em-
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bodied in 6 Geo. IV., chap. 16, § 62, providing that a joint creditor shall not receive a dividend out of the separate estate until the separate creditors are paid in full, unless the joint creditor shall be the petitioning creditor in the separate commission.

III. Discharge of partnership liability in individual proceeding.

a. Discharge of liability by reason of provability of claim.

1. In general.

As far as the mere provability of partnership debts in an individual proceeding is concerned, without regard to the question whether they may be proved against the separate estate for the purpose of receiving a dividend, it would seem, from the great majority of the cases above set out in II., that they are, under all circumstances, provable in such a proceeding for the purpose of allowing the joint creditor to vote for an assignee, to assent or dissent to the certificate of discharge, and to be cognizant generally of the administration of the estate, in order that he may know that the proceeds are being properly distributed; for all decisions, even those strictly advocating the equitable rule of distribution, admit that, if a surplus exist in the separate estate over the individual debts, the joint creditors shall receive the benefit of it; and, therefore, the joint creditor is practically interested in the individual proceeding, to the extent, at least, of seeing that the separate estate is prudently administered.

If, then, joint debts are provable in the individual proceeding, even for the purposes above indicated only, there would seem to be good ground for holding, as some decisions have done, that a discharge therein is effectual as to such claims, since the bankruptcy acts, almost without exception, contain provisions to the effect that a discharge in bankruptcy shall release a bankrupt from all of his provable debts. (*Supra*, I.)

The court, in *Re Jewett* (1877) 7 Biss. 328, 15 Nat. Bankr. Reg. 126, Fed. Cas. No. 7,306, recognizes the conflict upon the point whether the discharge in bankruptcy of an individual partner discharges him from liability to part-

mitted that the copartnership of Wallblom & Thorsell ceased to do business in 1893, and that the partnership was dissolved so far as it could be done by the acts of the partners. The debt here sued upon was not paid or discharged. The court found that notice had been given to all creditors whose claims were scheduled, and ordered judgment in favor of Wallblom upon the merits. From an order denying plaintiff's motion for a new trial, this appeal was duly taken.

Appellant's assignments of error involve the determination of this question, namely: "Did the court err in holding as a proposition of law that the individual discharge in bankruptcy of Wallblom released him from the claim here sued upon?"

1. The answer to that question depends,

nership creditors, but declares the weight of authority in favor of the view that such debts can be proved in an individual proceeding, and are therefore necessarily released by the discharge therein.

So, it is declared that a prayer to be discharged from all debts provable under the bankrupt law is virtually a prayer for discharge from partnership debts, since they, as well as individual debts, are provable under the bankrupt law. *Re Pierson* (1874) 10 Nat. Bankr. Reg. 107, Fed. Cas. No. 11,153.

In the leading case of *Wilkins v. Davis* (1876) 2 Low. Dec. 511, Fed. Cas. No. 17,664, it was held that, if one member of a firm becomes bankrupt and obtains his discharge, he is released from all his debts, joint and separate. This holding is based upon the ground that a joint creditor may prove his debt under a separate bankruptcy. The court says, with a clear insight into the question: "The fact that joint creditors cannot prove against the separate estate might mislead a careless reader of some of the cases into an impression that they could not prove at all; but the true rule is that they prove, and may vote for assignee, and be heard on the discharge, and examine the debtor, and share any joint assets, or any surplus of the separate assets."

Since firm debts are provable against the individual estate of one of the partners, the individual discharge of the latter in bankruptcy frees him from partnership liabilities also, although the partnership is not brought into bankruptcy. *Mattix v. Leach* (1896) 16 Ind. App. 112, 43 N. E. 909.

In a suit against a firm, where one partner filed a plea of bankruptcy, stay of proceedings was entered as to him, and judgment rendered against the firm property and the individual property of the other partner. *Lomme v. Kintzing* (1871) 1 Mont. 290.

A discharge in bankruptcy granted to a person where the proceeding is one as to him individually operates to discharge him from his liability as a member of a firm to creditors of the firm,—since a discharge in bankruptcy discharges the bankrupt from all debts provable against his estate, and joint debts, as well as separate, are provable. *Hamilton v. Cutler* (1884) 9 Ohio Dec. Reprint, 187.

"Cases often occur where a partner may be bankrupt, while the remaining parties, as individual, and even the firm itself, are entirely

in the first place, upon a construction of the bankruptcy act. The certificate of discharge recited that the bankrupt had conformed to all the requirements of law in that behalf. The court thereby decreed that the bankrupt "be forever discharged from all his debts and claims which by said act were made provable against his estate, and which existed on the 4th day of August, 1898, on which day the petition for adjudication was filed by him, excepting such debts, if any, as are by said act excepted from the operation of a discharge in bankruptcy." There is no claim that the discharge was invalid by reason of any of the things mentioned in chapter 3, §§ 14 and 15, of the bankruptcy act of July 1, 1898 (chap. 541, 30 Stat. at L. 550, U. S. Comp. Stat. 1901, pp. 3427, 3428.

solvent. In such case no adjudication against the firm could be made. But the bankrupt partner would, nevertheless, have an unquestionable right to be discharged from all his debts provable under the act." *Re Stevens* (1870) 1 Sawy. 397, 5 Nat. Bankr. Reg. 112, Fed. Cas. No. 13,393.

In a decision under our bankruptcy law of 1898, *Jarecki Mfg. Co. v. McElwaine* (1901) 5 Am. Bankr. Rep. 751, 107 Fed. 249, the discharge of one partner was held to release him from partnership indebtedness, on the ground that provisions exist in the statute to the effect that partnership liabilities are provable against an individual estate, such as the one providing that, where one copartner becomes bankrupt, the partners not adjudged bankrupt must wind up the business, and account to the trustee for the bankrupt's share; and, also, the provision that the discharge of a bankrupt shall not alter the liability of his partner.

A plea by a defendant, of a discharge in bankruptcy, without stating specifically that he was decreed a bankrupt as partner, was held sufficient in an action on a partnership claim. *Morrison v. Woolson* (1851) 23 N. H. 11.

An individual bankrupt, against whose estate copartners did not prove their claims for contribution on account of partnership debts paid by them, was held relieved from such claims by his discharge in bankruptcy; since, "if they might have proved in respect to his share of the indebtedness, they were bound to do so." *Butcher v. Forman* (1844) 6 Hill, 583.

But these American decisions are in the minority so far as numbers are concerned. Under subsds. III., b, 1, (a), and III., b, 2, (a), *infra*, will be found other decisions under the acts of 1867 and 1898, not in harmony with these above shown, upholding the necessity of making the firm or copartners parties to a proceeding by one partner, in order to allow the bringing in of the firm assets, and having an adjudication of all matters in the one proceeding.

2. The English doctrine.

Two cases have settled the rule in England in accordance with the principle above indicated (II., a, 1), *viz.*: That a discharge in an individual proceeding releases the debtor from partnership debts, because such debts are provable in bankruptcy proceedings.

The discharge did not purport to forever release the bankrupt from all his debts and liabilities, but only from all such "debts and claims" as were by said bankruptcy act "made provable against his estate." That the debt was one which might have been proved in bankruptcy proceedings against the estate of the individual partner is evident from the whole tenor of the law, and especially from chapters 1, 3, §§ 1, 4 (30 Stat. at L. 544, 547, U. S. Comp. Stat. 1901, pp. 3418, 3423), chap. 3, §§ 4, 5, of that law (30 Stat. at L. 547, U. S. Comp. Stat. 1901, pp. 3423, 3424). See also § 16 (30 Stat. at L. 550, U. S. Comp. Stat. 1901, p. 3428). Indeed, subdivision "g" of said § 5 expressly provides that the court may "permit the proof of the claim . . . against the in-

dividual estates and *vice versa*, and may marshal the assets of the partnership estate and individual estates so as to prevent preferences and secure the equitable distribution of the property of the several estates." The history and present status of this case differentiate it from any authority to which our attention has been called, or which careful search has enabled us to find. Collier, Bankr. 5th ed. § 5a, p. 74. The partnership ceased to do business, and had been dissolved, so far as the parties could dissolve it, in 1893. Moreover, in that year, by general assignment under the state insolvency law, the partners conveyed all their unexempt individual and firm assets to an assignee. The plaintiff has not made it appear that any such firm assets now exist. This court

The first decision, *Ex parte Yale* (1721) 3 P. Wms. 25, note a, was as follows: "So, on the other hand, if there be two partners, and one of them becomes a bankrupt, and, on a separate commission being sued out against him, his certificate is allowed, this does not only discharge the bankrupt of what he owed separately, but also of what he owed jointly, and on the partnership account; because by the act of Parliament the bankrupt, upon making a full discovery and obtaining his certificate, is to be discharged of all his debts. Now, the debts he owes jointly with another are equally his debts as what he owes on his separate account; consequently, he is to be discharged of both his joint and separate debts."

The other decision is *Ex parte Hammond* (1873) L. R. 16 Eq. 614, 29 L. T. N. S. 72, 21 Week. Rep. 865, which holds that a certificate of discharge, granted in an individual proceeding for liquidation brought by one partner, is a complete release of all his debts, both joint and separate. This decision is placed upon the ground that the statute provides that an order of discharge releases the debtor from all debts provable under the bankruptcy, and the joint debts are provable thereunder.

These two decisions are consistent with the practice justifiably inferred from the correlative English decisions (II.) in regard to the provability of joint debts in an individual proceeding; and seem to be regarded as having settled the law in England upon the question at issue.

A few other English decisions have been found which bear out the cases establishing the rule as above shown.

In an action upon a promise against two jointly as partners, one pleaded that he was a bankrupt, and that the cause of action arose before he was a bankrupt; whereupon the plaintiff entered a *nolle prosequi* as to him. *Noke v. Ingham* (1745) 1 Wils. Ch. 89.

In an action against partners on a bill of exchange, one of them pleaded bankruptcy and a certificate in bar; whereupon the plaintiff entered a *nolle prosequi* as to him. *Aflalo v. Fourdrinier* (1829) 6 Bing. 306.

So, one of several defendants in an action of debt having pleaded bankruptcy, plaintiff entered a *nolle prosequi* as to him. *Booth v. Middlecoat* (1830) 6 Bing. 445.

Where a joint debt had been proved under a separate commission in bankruptcy, and a divi-

dend received thereon, the creditor, upon afterwards bringing an action against the solvent partner and the bankrupt jointly, for the same debt, was required to furnish full indemnity to the bankrupt against all costs of the action. *Ex parte Stanton* (1840) 1 Mont. D. & De G. 273.

In allowing a rule discharging from custody a bankrupt detained on account of a debt, it was held that, when he obtained his certificate of discharge in bankruptcy, he was entitled to personal immunity against any execution which might be issued in reference either to a partnership or a separate liability. *Thomson v. Harding* (1857) 3 C. B. N. S. 254.

b. Necessity of making firm or copartners parties.

1. Under bankruptcy law of 1867.

(a) In general.

Under III., a. 1, are shown some decisions rendered during the operation of the bankruptcy law of 1867, in harmony with the English rule that, partnership debts being provable in an individual proceeding in bankruptcy, they are necessarily released by the discharge therein.

But there is a serious conflict among the decisions rendered under the law of 1867, and against the line of cases above indicated stands a class holding to the doctrine that the bankrupt cannot be relieved from his firm debts unless he make the firm or copartners parties to his proceeding in some way so as to have the firm adjudicated bankrupt, and give the court, or the assignee appointed, jurisdiction over the joint assets.

As it is said in *Re Elliott* (1900) 2 N. B. N. Rep. 350: "Under the act of 1867, the authorities were conflicting as to the effect of a discharge of a partner upon his individual petition, without any proceedings on behalf of the partnership, or without making the copartners parties to the proceeding. It was held by some cases that such discharge released the bankrupt from his individual debts, and also his partnership obligations. This was also the rule in England. But it was held by other courts that such discharge did not release the bankrupt from partnership obligations."

The leading case of this latter class of cases

will not presume that they do. This case therefore does not involve any question of marshaling assets, nor of the right of the plaintiff against the firm assets or the other partner. Respondent alone appears to have been served with summons in this action. The question here presented to this court affects the judgment against him alone. It is also to be borne in mind that this is not an objection to the entry of a decree of discharge, but only to the right of the appellant to renew or extend this judgment. The entry of the judgment materially affected the nature of the claim on which it was based, so far as these proceedings are concerned. It might be that in certain contingencies this court would examine that judgment for the purpose of ascertaining

what the original contract was. Such a proposition is, however, academical in this case. When the judgment was entered it became a lien on any unexempt real estate within the county where the judgment was docketed, which belonged to the defendant and respondent Wallblom, and the creditor became entitled to appropriate new rights and remedies against him in consequence. So far as this case involves that judgment, the original cause of action was merged therein. In *McKittrick v. Cahoon*, 89 Minn. 383, 62 L. R. A. 757, 99 Am. St. Rep. 606, 95 N. W. 223, this court held that where, by an order in bastardy proceedings, the putative father of a natural child was required to pay a monthly stipend for its support, and upon refusal a final money judgment was

was *Re Little* (1868) 2 Ben. 186, 1 Nat. Bankr. Reg. 341, Fed. Cas. No. 8,390. Here, a member of a firm who had filed an individual petition in bankruptcy in which no allusion was made to the firm, although a large part of the debts specified were copartnership debts, and the statement of assets included copartnership assets, was held entitled to amend so as to join his partner with him in the proceeding, on the ground that, until that was done, he could not be discharged from the firm debts. This decision was based upon the theory that the intent of the statute is that the creditors of a firm shall be required to meet but once, and in one bankruptcy forum, all questions in regard to the bankruptcy of a firm and their debts against it.

Numerous decisions to the same general effect followed, based on various grounds.

Where there are firm debts and firm assets, a member of the firm cannot, upon his individual petition, without joining the remaining members and having the firm declared bankrupt, be discharged from his partnership liabilities. *Re Winkens* (1869) 2 Nat. Bankr. Reg. 349, Fed. Cas. No. 17,875.

There must be an adjudication of bankruptcy against all the partners composing a firm before any step can be taken to reach in bankruptcy the partnership assets. An assignee appointed in an individual proceeding of one of the partners has no right to interfere therewith. *Re Shepard* (1869) 3 Ben. 347, 3 Nat. Bankr. Reg. 172, Fed. Cas. No. 12,754.

"It is difficult to see how any member of a firm can be released from his personal liability as such without the court substantially looking into all the transactions of the firm and settling up its affairs. A man cannot be discharged from his liabilities as a member of a firm, unless the debts and assets of the firm are considered and adjudicated upon by the court." *Re Noonan* (1873) 3 Biss. 491, Fed. Cas. No. 10,202.

The discharge of a bankrupt, granted upon his individual petition to which the members of a firm of which he was a member were in no way parties, does not discharge him from the partnership debts. *Hudgins v. Lane* (1874) 2 Hughes, 361, Fed. Cas. No. 6,827.

So, the discharge of a partner under a petition in involuntary bankruptcy filed against him individually, and not against the firm property, does not discharge him from firm

liabilities, when it appears that there were at the time of the proceeding copartnership assets. *Crompton v. Conkling* (1877) 9 Ben. 225, Fed. Cas. No. 3,407.

A member of a firm filing a petition in bankruptcy asking only for a discharge as an individual, omitting to set forth the fact of his membership in a firm, or a statement of firm debts and assets, is, by his discharge therein, discharged only from his individual indebtedness. *Corey v. Perry* (1877) 69 Me. 140, 24 Am. Rep. 15, 17 Nat. Bankr. Reg. 147.

When there were assets of a firm in existence at the time of its dissolution, an individual petition in bankruptcy, subsequently brought by one of the members without making the others parties, does not give the court jurisdiction of the firm assets so that it can discharge the petitioner from the debts he owes as a member of the firm. *Re Plumb* (1878) 9 Ben. 279, Fed. Cas. No. 11,231.

It seems that in individual bankruptcy proceedings giving no schedule of firm debts or assets, nor praying for a discharge from firm liabilities, the discharge granted relieves the bankrupt only from individual indebtedness, and not from partnership liability; as the assignee, under such a proceeding, acquires no title to firm assets.

An individual discharged in a bankruptcy proceeding begun, carried on, and ended by him solely is not relieved, by force of his discharge, from partnership debts. *Trimble v. More* (1881) 15 Jones & S. 340.

A member of a late partnership cannot, in case of the existence of partnership assets, be discharged from the liabilities of the firm, unless the firm is declared bankrupt, and the firm assets are brought into the bankruptcy court to be administered according to the provisions of the bankruptcy act. *Honegger v. Wettstein* (1881) 15 Jones & S. 125.

The discharge in bankruptcy of a firm and its members individually from their debts does not discharge a member from debts he owed as a member of another firm, when no claims against that firm were proved in the proceeding, and the assets thereof were not administered. *Perkins v. Fisher* (1882) 80 Ky. 11.

The court held, incidentally, in *Re Johnston* (1883) 17 Fed. 71, that the individual obligations only of a bankrupt partner were discharged in a separate commission in bank-

obtained for the total amount due, the rights of the person entitled to recover under the order of filiation were merged in the judgment, and the debt evidenced thereby was not excepted from the operation of the bankruptcy act of 1898 (§ 17), although the claim on which the judgment was based, standing by itself, would not have been discharged.

Such a judgment as the one here sought to be extended, filed in the bankruptcy proceedings, might, under appropriate conditions, have been paid in full or in part by the application thereto of the whole or a proper part of the funds in the hands of the respondent's trustee in separate bankruptcy proceedings. Its full discharge as an individual liability on a firm debt may accord-

ingly be had in bankruptcy proceedings. *Jarecki Mfg. Co. v. McElwaine*, 5 Am. Bankr. Rep. 751, 107 Fed. 249; *Curtis v. Woodward*, 58 Wis. 499, 46 Am. Rep. 647, 17 N. W. 328. Collier, in his note to *Re Freund*, 1 Am. Bankr. Rep. p. 31, says: "Both on principle and by the weight of authority it would seem to be law that a discharge granted to one member of the firm releases him from all his provable debts and liabilities,—both from those incurred individually and from those incurred as a member of the partnership. The few cases which held to the contrary under the former act seem to have been based upon a misconception of the extent of the rights of an assignee in the bankrupt's property, and as to the effect upon the firm of the bankruptcy

ruptcy brought by him, it appearing that there were assets of the firm in existence.

A practice, not in harmony with the doctrine of the cases above shown, seems to be advanced in *Re Grady* (1870) 3 Nat. Bankr. Reg. 227, Fed. Cas. No. 5,654, which holds that, where a bankrupt was a member of two firms, and, without notice to his copartners, filed an individual petition in voluntary bankruptcy, including a statement of the assets and liabilities of the two firms, the assignees in bankruptcy may compel an adjudication of the bankruptcy of the firms so as to have an administration of the firm assets, in order that the bankrupt may be discharged from all his liabilities.

b. In absence of joint assets.

The decisions are practically unanimous, under the bankruptcy law of 1867, that, in the absence of joint assets, a discharge in an individual proceeding in bankruptcy is effectual as against the partnership debts.

Where a member of a late copartnership files his individual petition under the bankrupt act, and inserts in his schedules debts contracted by the copartnership; and there are no partnership assets to be administered,—he will be entitled to be discharged from all his debts, individual as well as copartnership; and it is not necessary to make the other partners parties to the proceeding. *Re Abbe* (1868) 2 Nat. Bankr. Reg. 75, Fed. Cas. No. 4.

A petition was drawn for the discharge of the petitioner individually; but, he being the surviving partner of a firm all the other members of which had died insolvent, and nearly all of the debts being firm debts, leave to amend so as specifically to include partnership liabilities was applied for. The court, in granting the application, remarked that, without examination of the question, he was of the opinion that a discharge granted in the petition as filed would discharge the petitioner from his copartnership as well as individual liability; but that it would certainly be safer to amend the petition. *Re Bidwell* (1868) 2 Nat. Bankr. Reg. 229, Fed. Cas. No. 1,392.

The necessity of joining the other members of the firm was declared to exist only as to copartnerships actually existing, or where there

are assets belonging to the firm, and not to copartnerships previously terminated by bankruptcy, insolvency, assignment, or otherwise. In *Re Winkens* (1869) 2 Nat. Bankr. Reg. 349, Fed. Cas. No. 17,875.

Where there are no partnership assets to be collected and paid out, one member of a former partnership may be, upon his individual petition, discharged from all his debts, partnership and private. *Re Marks* (1877) Fed. Cas. No. 9,094.

It is stated, *obiter*, in *Honegger v. Wettstein* (1881) 15 Jones & S. 125, that a member of a late partnership may, upon his individual petition, be discharged from all his debts, partnership as well as individual, provided there are no partnership assets.

A former partner petitioning alone, after dissolution of the partnership, and when there are no assets in existence, is, by the order of discharge, discharged from all debts, both partnership and individual. *Keeler v. Snodgrass* (1882) 8 Ohio Dec. Reprint, 490.

It is declared in *Sarver v. Scarlett* (1883) 9 Ohio L. J. 312, citing *Keeler v. Snodgrass*, 8 Ohio Dec. Reprint, 490, that, where a partner in an individual proceeding in bankruptcy states his joint debts, the discharge obtained is against them as well as his individual debts.

If there are no partnership assets, partnership claims are provable in an individual proceeding by one of the partners; and, therefore, the discharge of a partner therein relieves him from firm liabilities. *Curtis v. Woodward* (1883) 58 Wis. 499, 46 Am. Rep. 647, 17 N. W. 328.

When, before the individual petition in bankruptcy of one of the members was filed, the firm had been dissolved, and a general assignment made of all its property, the discharge granted operates as a discharge of partnership liabilities as well as of individual indebtedness. *West Philadelphia Bank v. Gerry* (1887) 108 N. Y. 467, 13 N. E. 453.

In one case, *Daugherty v. Strauss* (1880) 1 Tex. App. Civ. Cas. (White & W.) p. 509, it does not appear whether partnership assets existed or not. It was held therein that a discharge in bankruptcy of a member of a copartnership releases him, not only from his individual debts, but from the debts of the firm also.

of one member." In *Re Meyers*, 96 Fed. 408, relied upon by appellant, upon an objection to discharge on the ground of fraud, there were independent and merely individual proceedings by the two partners. The petition asked for discharge of both individual and partnership debts. Brown, J., said (p. 411): "No adjudication of the firm as a bankrupt is asked, nor could such an adjudication be made without a formal application therefor, and the presence of both partners in the same proceedings. Where there are absolutely no firm assets, separate proceedings may be valid, and a discharge of each partner separately may possibly be had, because the firm debts are several as well as joint." Appellant also relies largely upon *Re Mercur*, 58 C. C. A.

472, 122 Fed. 389. That case involves an obviously different state of facts, and is in its reasoning not of necessity entirely inconsistent with the rule here applied.

In the early history of partnership law, the courts fell into the habit of speaking of a partnership as "a separate entity." The inaccuracy and impropriety of such nomenclature was so clearly and repeatedly demonstrated as to lead to its substantial abandonment. Recent decisions on the marshaling of assets under the present bankruptcy law have led to the undesirable resurrection of the phrase. Its misleading and ambiguous character is well illustrated by the subtleties of appellant's brief and by his use of it as a justification for a fallacious conclusion derived by unwarranted deduc-

2. Under bankruptcy law of 1898.

(a) In general.

There are at least two classes of cases under the bankruptcy law of 1898, in relation to the practice when joint assets exist.

According to one class, it seems that, in order to secure a discharge from firm debts, an adjudication of the firm as bankrupt, or other proceedings in which it is joined, is necessary in order to give the trustee appointed the right to interfere with the firm assets, and, also, in order that the rights and liabilities of all the parties may be arrived at in a single proceeding.

Thus, when there is evidence of the existence of firm assets, or circumstances justifying the presumption of their existence, a discharge from firm debts cannot be had in individual proceedings by the partners; the partnership itself must be brought into bankruptcy, and the firm assets duly administered in a single proceeding. *Re Meyers* (1899) 96 Fed. 408.

Whenever a person who is a member of an existing partnership, or who was a member of a defunct partnership, desires to go into a court of bankruptcy, he must bring the firm and the other partners into court with him; so long as there is partnership property to be administered or partnership debts to be paid, "everybody, whether creditors or partners, having an interest in the fund or in the liability existing, should be before the court, . . . to the end that, when the proceeding is closed, the rights and liabilities of all parties shall be determined for all time." *Re Freund* (1899) 1 Am. Bankr. Rep. 25.

A partner cannot obtain a discharge from partnership liabilities, unless there are proceedings had on behalf of the partnership itself, or unless the copartners are made parties to the individual proceedings. *Re Elliott* (1900) 2 N. B. N. Rep. 350. Some of the reasons given by the court why a partner should not be discharged from firm obligations in the absence of proceedings on behalf of the firm, are: "1. The effect of a discharge in such cases would be to impose upon the other partners who are not parties to the proceedings the entire obligations of the firm. 2. The presence of the other partners may develop the fact to be that the petitioning individual is really indebted to his late firm. 3. The partners who

are not parties may, above all other, be the parties who have knowledge of the real financial condition of the petitioning individual."

Individual proceedings against all the members of a firm do not authorize the trustee appointed to interfere with firm assets in the absence of a petition and adjudication against the firm. *Re Mercur* (1903) 58 C. C. A. 472, 122 Fed. 389.

Since, in order to secure a discharge from firm debts, there must be an adjudication of the firm as bankrupt, and a firm trustee appointed where there are firm assets, a discharge obtained in an individual proceeding discharges from individual liabilities only. *Dodge v. Kaufman* (1905) 46 Misc. 248, 91 N. Y. Supp. 727.

According to the other class of decisions, both firm and individual assets and liabilities must be scheduled, and prayer be specifically made for a discharge from firm as well as individual debts; and due notice of the proceeding and petition for discharge from firm debts must be given to the remaining partners and all firm creditors.

The proper foundation to be laid when a partner in an individual bankruptcy proceeding desires to be discharged also from partnership debts is very explicitly set out in *Re Laughlin* (1899) 96 Fed. 589, 3 Am. Bankr. Rep. 1, in the following language: "In the petition originally filed it should be averred that the petitioner is indebted in his individual capacity, if such be the fact, and also as a member of a firm, naming it, and giving the names of the several partners; and the petition should pray for a discharge from the firm as well as his individual debts. To this petition should be attached the proper schedules, setting forth the firm debts, the firm property, if any, and all other matters, the same as is required in the case of a proceeding brought by all the partners. Schedules of the individual property and debts should also be attached to the petition. In the notice to the creditors to attend the first meeting, it should be stated that the firm, as well as the individual, creditors, are notified to attend, as the bankrupt is seeking a discharge from both classes of claims; and also in the petition for a discharge a release from the firm, as well as the individual, debts, should be asked; and, in the notice to creditors of the filing and hearing upon the petition for discharge, the fact that a release from the firm debts is prayed for

tions from a fiction of law. His argument commands admiration for its ingenuity and industry, but compels the conviction that its result would be a plain perversion of the letter and purposes of the bankruptcy law. The learned trial court properly held that the discharge in bankruptcy operated as a full defense.

2. The most serious question in this case is this: Was the indebtedness properly

scheduled, so as to give notice to the plaintiff's assignor? This question must also be answered in the affirmative. In the schedule, the name of the original debtor, the nature and the amount of the original debt, are correctly stated. The evidence shows that respondent owed the creditor no other debt. Notice was properly given.

Order affirmed.

should be specifically set forth. Notice of the filing of the petition, and of the creditors' meetings, should be sent to the nonjoining partner or partners, in order that, if necessary, they may appear and protect their rights and interests in the proceedings. The attention of the referees in this district is called to this matter, and they are instructed that it is their duty to examine all petitions referred to them; and, if it appears that the bankrupt is seeking a discharge from firm, as well as individual, debts, then, if necessary, the petition and schedules must be amended so as to comply with the foregoing requirements, before the adjudication is entered thereon; and care must be taken, in framing the notices to creditors, that they conform to the views herein expressed." Followed in *Re Hartman* (1899) 96 Fed. 593.

The adoption of the practice above set out is apparent in a number of subsequent decisions.

Thus, where, in a voluntary petition filed by a member of a firm, the petition for adjudication, the notice to creditors, and the petition for discharge make no reference to firm liability, and do not ask any relief against firm debts, a discharge granted on such a record will not operate to bar firm debts, but will only affect the debts owing by the bankrupt individually, notwithstanding the schedules attached to the petition show that a large part of the indebtedness of the bankrupt consists of firm debts. *Re McFaun* (1899) 96 Fed. 592.

So, where a partner in an individual proceeding desires a discharge against firm creditors, the petition must show that he was a member of the firm, and must aver that he asks a discharge from the firm, as well as individual, creditors; and this fact must be set forth in the notice given to creditors for the first meeting, and also in the petition for discharge, and in the notice to creditors thereof. *Re Russell* (1899) 97 Fed. 32.

And where, in an individual petition in bankruptcy, no reference is made to a firm which had gone out of business, but the affairs of which had not been formally settled, although the bulk of the indebtedness set forth in the schedules was for goods purchased by the firm; and where the adjudication was entered against the petitioner only,—he is entitled to ask a discharge only against his individual creditors. *Re Carmichael* (1899) 2 Am. Bankr. Rep. 815.

Where two copartners, petitioning as individuals, asked for an adjudication against the firm, which had been previously dissolved, but gave no notice of the proceedings to the other partners, who did not join in, an adjudication declaring the petitioning partners bankrupt "as copartners and as individuals" was vacated. *Re Altman* (1899) 2 Am. Bankr. 69 L. R. A.

Rep. 407, 95 Fed. 263, Affirming 1 Am. Bankr. Rep. 689.

An individual petition in bankruptcy in order to obtain the petitioner's discharge from the firm debts, after an unsuccessful attempt to obtain the discharge of the firm as such, must state the adjudication of the firm and the members composing it, as bankrupts, and must pray for a discharge from both firm and individual debts, and show full notice to creditors of those facts. *Re Meyers* (1899) 2 N. B. N. Rep. 111, 3 Am. Bankr. Rep. 260, 97 Fed. 757.

There is one decision under the law of 1898, *Jarecki Mfg. Co. v. McElwaine* (1901) 107 Fed. 249 (III., a, 1), in harmony with the English rule.

b. In absence of joint assets.

With one exception, the decisions under the act of 1898, as under the act of 1867, agree that a discharge in an individual proceeding is effectual as against partnership debts in the absence of joint assets.

It is declared by the court in *Re Hirsch* (1899) 2 N. B. N. Rep. 137, 3 Am. Bankr. Rep. 344, 97 Fed. 571, that, under the act of 1898, as under the act of 1867, a partner may, at his option, proceed upon his individual petition for his own adjudication and discharge without reference to the other partners, where all are insolvent, and there are no firm assets whatever. "There is nothing in the present act or rules necessarily excluding this course in such a case; it prejudices no one; and it is recommended by its simplicity and convenience in often avoiding the useless burden of proceeding adversely and by publication against an insolvent partner who may be inimical, or whose whereabouts may be unknown, and whose presence in the cause, real or constructive, would not be of the least benefit to creditors."

It is conceded, *obiter*, in *Re Meyers* (1899) 1 N. B. N. 575, 2 Am. Bankr. Rep. 707, 96 Fed. 408, that, where there are absolutely no firm assets, a discharge of firm debts in a separate proceeding may be valid, because firm debts are separate as well as joint.

A partner who filed a petition in bankruptcy asking to be adjudged a bankrupt, and included in his schedules partnership indebtedness, and gave notice of the first meeting to both firm and individual creditors, is by his discharge released from both firm and individual debts; since, by the act of 1898, firm debts were provable against his estate, there being no partnership assets. *Re Kaufman* (1905) 136 Fed. 262.

It not appearing in *LOOMIS v. WALLBLOW* that any firm assets existed, that decision harmonizes with the cases above shown.

One decision, however, under the law of 1898, is not in line with those above set out. It being held that where, in an individual peti-

tion in bankruptcy, no reference was made to partnership assets and liabilities, although partnership debts were included in the schedule, and a discharge was asked from all debts provable against the petitioner's estate, he may not have a discharge from firm debts, although the firm is without assets and no longer exists, and the debts are barred by the statute of limitations. To accomplish that purpose in an individual proceeding, the court declares that the procedure should have been as pointed out in *Re Laughlin* (1890) 96 Fed. 591, *supra*, III., b, 2, (a). M. M. M.

Henry E. LADD, Appt.,

v.

Rosa WEISKOPF et al., Respts.

(62 Minn. 29.)

- *1. A decree of distribution by the probate court construed as assigning the entire estate in the property of the deceased to the persons therein named, to wit, a life estate to the widow and a vested remainder to seven others, share and share alike.
2. A decree of a probate court, having jurisdiction, assigning the residue of the estate of the deceased person, is conclusive upon all persons interested in the estate, whether then in being or not. It is in the nature of a judgment *in rem*, which binds all the world.
3. Where the contract between vendor and vendee calls for "good" title, the vendee is entitled to a title that is "marketable," as well as good in fact. He is not bound to accept a title which is so doubtful as to be unmarketable; and the rule is the same whether the action is one brought by the vendor to compel specific performance, or by the vendee to recover back his earnest money. But a title is not unmarketable, within the meaning of this rule, where no question of fact is involved, but only one of law, arising exclusively upon the construction of a record muniment of title, and all parties in interest are before the court, so that its decision will be a final determination of the matter. Hence, a doubt as to the construction of a decree of distribution by a probate court, which is conclusive upon all parties interested in the estate, will not render a title unmarketable within the meaning of the rule.

(July 10, 1895.)

A PPEAL by plaintiff from an order of the District Court for Hennepin County denying a new trial after verdict for defendants in an action brought to rescind a con-

*Headnotes by MITCHELL, J.

NOTE.—As to what is a marketable title, see *Moot v. Business Men's Invest. Assn.* 45 L. R. A. 666; *Baldwin v. Trimble*, 36 L. R. A. 489; *Moore v. Williams*, 5 L. R. A. 654; *Townshend v. Goodfellow*, 3 L. R. A. 739; *Kullmann v. Cox*, 53 L. R. A. 884; and the case succeeding this one, of *Talor v. Evans*, 60 L. R. A.

tract for the purchase of real estate because of a defect in defendants' title, and to recover purchase money paid upon the contract. *Affirmed.*

The facts are stated in the opinion.

Messrs. Jackson & Atwater, for appellant:

Under the will of Leopold Weiskopf, the ultimate remainder-men are such of the testator's children (and children of any deceased child) as may survive the testator's widow, Rosa. Until her death it will be impossible to determine who these remainder-men are.

Armstrong v. Armstrong, 54 Minn. 248, 55 N. W. 971; *Fleming v. Burnham*, 100 N. Y. 1, 2 N. E. 905; *Radley v. Kuhn*, 97 N. Y. 26; *Wells v. Wells*, 88 N. Y. 333; *Monarque v. Monarque*, 80 N. Y. 324; *Teed v. Morton*, 60 N. Y. 506; 20 Am. & Eng. Enc. Law, p. 838, notes, title *Remainders*; *Harris v. Strodl*, 132 N. Y. 392, 30 N. E. 962; *Kilpatrick v. Barron*, 125 N. Y. 751, 26 N. E. 925.

The title of the testator's children, and the title which would pass by their deed, cannot be a title in fee simple absolute, and is not, therefore, such title as the vendee had a right to require and receive under his contract.

Cogan v. Cook, 22 Minn. 137; *Fleming v. Burnham*, 100 N. Y. 1, 2 N. E. 905; *Kilpatrick v. Barron*, 125 N. Y. 751, 26 N. E. 925; *Methodist Episcopal Church Home v. Thompson*, 108 N. Y. 618, 15 N. E. 193; *Armstrong v. Armstrong*, 54 Minn. 248, 55 N. W. 971.

The executors in no manner represented these unborn grandchildren devisees; there is no privity between them, and they, the devisees, are not bound by the judgment.

Dale v. Roosevelt, 1 Paige, 35; *Osgood v. Manhattan Co.* 3 Cow. 622, 15 Am. Dec. 304; *Muson v. Peter*, 1 Munf. 446; *Kent v. St. Michael Church*, 136 N. Y. 10, 18 L. R. A. 331, 32 Am. St. Rep. 693, 32 N. E. 704; *Monarque v. Monarque*, 80 N. Y. 320; *Davis v. Hudson*, 29 Minn. 36, 11 N. E. 136.

A decree of distribution is not binding on heirs or devisees who were not personally served or present in court, and especially in the case of unborn or afterborn heirs or devisees.

Ruth v. Oberbrunner, 40 Wis. 238; *Bressee v. Stiles*, 22 Wis. 120; *Black, Judgm.* §§ 580, 638, 643; *Brigham v. Fayerweather*, 140 Mass. 411, 5 N. E. 265.

The purchaser is entitled to a marketable title. He should be protected against the risk suggested.

Moore v. Appleby, 108 N. Y. 241, 15 N. E. 377; *Methodist Episcopal Church Home v. Thompson*, 108 N. Y. 618, 15 N. E. 195;

Harris v. Strodl, 132 N. Y. 392, 30 N. E. 962.

A probate court has no jurisdiction to reform a will.

Sherwood v. Sherwood, 45 Wis. 357, 30 Am. Rep. 757; *Christian v. Colbert*, 33 Minn. 509, 24 N. W. 301.

The title was doubtful and not "marketable," and, as such, the purchaser ought not to be required to take it.

Moore v. Appleby, 108 N. Y. 241, 15 N. E. 377; *Methodist Episcopal Church Home v. Thompson*, 108 N. Y. 618, 15 N. E. 195.

The action is brought on in proper form. 15 Am. & Eng. Enc. Law, p. 640; 2 Pom. Eq. Jur. § 849; *Champlin v. Laytin*, 1 Edw. Ch. 467; *Boas v. Farrington*, 85 Cal. 535, 24 Pac. 787.

On petition for rehearing.

Under a contract for the sale of real estate, the vendee has the right, not merely to have conveyed to him a good title, but an indubitable title.

Swayne v. Lyon, 67 Pa. 436; *Dobbs v. Norcross*, 24 N. J. Eq. 327.

The probate court has undoubted power to make such revision of its decree, and to make it even against purchasers, if they are properly served with notice of the application.

McNamara v. Casserly, 61 Minn. 335, 63 N. W. 880.

In what manner such power might be exercised, and how far its exercise would be approved by the various appellate courts through which the litigation might drag, would be a chance which the unfortunate purchaser would have to take.

The giving of notice to a nonresident is jurisdictional; and a failure to give it is fatal to the decree of distribution.

Ruth v. Oberbrunner, 40 Wis. 238.

It is because of the very doubt as to the construction which the court of last resort may place on ambiguous or uncertain language in a will that specific performance has been denied in a large number of adjudged cases.

Messrs. Shaw & Cray, for respondents:

The probate judgment adjudges and declares the legal effect of said will, and assigns the land in question in accordance with the legal effect, and vests in Rosa Weiskopf a life estate, and the remainder in the other devisees named, in undivided interests, share and share alike. This judgment is conclusive, and cannot be attacked collaterally.

Davis v. Hudson, 29 Minn. 27, 11 N. W. 136; *State ex rel. Martin v. Ueland*, 30 Minn. 277, 15 N. W. 245; *Greenwood v. Murray*, 26 Minn. 259, 2 N. W. 945; *Wood v. Myrick*, 16 Minn. 494, Gil. 447; *Dayton v. Mintzer*, 22 Minn. 393; *Huntsman v. 69 L. R. A.*

Hooper, 32 Minn. 163, 20 N. W. 127; *Re Mousseau*, 30 Minn. 202, 14 N. W. 887; *Balch v. Hooper*, 32 Minn. 158, 20 N. W. 124.

This judgment construes the will of Leopold Weiskopf, determines and declares its effect, and assigns the whole estate in this land specifically.

This judgment, standing unappealed from and unreversed, is conclusive and binding as the law of that case, whether or not the judgment is such as this court would have pronounced, upon a consideration of the original question of the construction of said will.

An estate for life, with remainder to persons named, constitutes and comprises the whole estate.

2 Washb. Real Prop. 3d ed. 497, 498; Kent, Com. 9th ed. p. 227; *Miller v. Caragher*, 35 Hun, 485.

If the probate judge has, by any inadvertence, named that a conclusion of fact which is in truth a conclusion of law, that inadvertence will not be suffered to destroy or impair the legal effect of the judgment.

Davis v. Hudson, 29 Minn. 36, 11 N. W. 136; *Child v. Morgan*, 51 Minn. 116, 52 N. W. 1127.

The law has committed all this jurisdiction to the probate court. The conclusive presumption is that it will be honestly exercised.

With respect to the matter and property concerning which it adjudges, and upon which it operates, what it adjudges is binding and conclusive as against all persons then in being or afterwards to come into being; in other words, against the world.

Thompson v. Myrick, 24 Minn. 4; *Ames v. Slater*, 27 Minn. 70, 6 N. W. 418; *Allie v. Davidson*, 23 Minn. 442.

When the statute declares in terms that the final decree of the probate court in the assignment of an estate "shall be binding on all persons interested in the estate," it can mean nothing less than that all such persons are parties thereto, and to the proceeding in which such decree was rendered, and are bound by it.

Osgood v. Manhattan Co. 3 Cow. 622, 15 Am. Dec. 304; *Mason v. Peter*, 1 Munf. 446.

Upon the face of the will as to questions of original construction, those questions must be determined against the plaintiff, and in favor of the defendants.

The freehold can never be placed in abeyance.

Lyle v. Richards, 9 Serg. & R. 322.

The interests in the remainder of this estate, as to the land in question, or that remainder, were vested. If vested, then the title to this land is now, under the true construction of said will, a life estate in

the widow, Rosa Weiskopf, and the remainder in the children of the testator named in his will.

Moore v. Lyons, 25 Wend. 119; *Livingston v. Greene*, 52 N. Y. 118; *Heilman v. Heilman*, 129 Ind. 59, 28 N. E. 310; 2 Redf. Wills, § 218; *Harris v. Carpenter*, 109 Ind. 540, 10 N. E. 422.

Mitchell, J., delivered the opinion of the court:

The question in this case is whether the title tendered by defendants to plaintiff was good. The facts are these: One Leopold Weiskopf died testate, and seised of certain real estate, including the tracts here involved. The material provisions of his will are as follows: (1) "I give, devise, and bequeath unto my devoted wife, Rosa Weiskopf, for and during the remainder of her natural life, all these certain lands and real estate situate in said county of Hennepin and state of Minnesota, described as follows: [Here follow descriptions of property, which include all the tracts in question except lot 12, block 5, Hancock & Rice's addition to Minneapolis.] And it is my will that, from and after the death of my said wife, Rosa, and I hereby direct, give, devise, and bequeath, upon her decease, all the above-mentioned real and personal property unto our beloved children, Samuel Weiskopf, Henry Weiskopf, David Weiskopf, Bertha Weiskopf, Anna Markens (formerly Weiskopf), Georgiana Weiskopf, and William Weiskopf, or to such of them as shall be living at the time of their said mother, Rosa's, death, to them, their heirs, executors, administrators, and assigns forever, to be equally divided between them, share and share alike,—the child or children of any deceased of our said children, should any be deceased at said time, to represent his or her parent, and be entitled to take and receive the same shares therein as their, his, or her respective parent or parents would be entitled to, if then living.

... (6) I give, devise, and bequeath all the rest residue, and remainder of my estate, of whatsoever kind or sort, and where-soever situated not hereinbefore given and disposed of, unto my said children, to wit, Harry, David, Bertha, Samuel, Anna, Georgiana, and William, their heirs, executors, administrators, and assigns, to and for them, respectively, share and share alike, and to and for their respective use, absolutely and forever."

The will was duly proved. After payment of all claims against the estate, expenses of administration, and all specific and general legacies, the probate court, upon application of the executors, and upon due notice, made a decree of distribution 69 L. R. A.

of the residue of the estate in and by which, after finding that the real estate in question (specifically describing it) remained in the hands of the executors for distribution, further found, determined, and decreed "that by his said last will and testament testator devised the above-described parcels . . . to Rosa Weiskopf for life; and the remainder therein and all said other described real estate he devised to his children, Harry Weiskopf, David Weiskopf, Bertha Weiskopf, Samuel Weiskopf, Anna Markens, Georgiana or Georgiana Weiskopf, and William Weiskopf, share and share alike. As conclusions of law, the court finds that said devises are all valid and operative, and that the said devisees are entitled to said real estate according to the terms of said will. On motion of Messrs. Shaw & Cray, attorneys for said petitioners, it is ordered, adjudged, and decreed that the above-described real estate be, and the same hereby is, assigned to the said devisees, according to the terms and provisions of the said last will and testament of the deceased." This decree was rendered in 1886, and remains in full force, and has never been appealed from. Rosa, the widow of the testator, and all of his seven children named in the will, are still living; and it is their title, or title derived from them, which was tendered to plaintiff.

Defendants' contentions are (1) that this decree of distribution adjudges that the devisees named, to wit, the widow and seven children, were entitled to the property, and that it assigned the whole estate in the lands to them, and that such decree of distribution is conclusive and binding upon the whole world; (2) but, even if the decree is not conclusive and the question of the construction of the will is still an open one, then upon the face of the will it devises a life estate in the lands to the widow, Rosa, and a vested remainder to the seven children named, share and share alike. On the other hand, plaintiff's contentions are: (1) That the remainder-men under the will are, not the seven children named, but such of them, and the children of any of them that have deceased, as may survive the widow; and that the children, if any, of the deceased children will take by virtue of the will, and not by inheritance from their deceased parents; hence, until the death of the widow, it will be impossible to determine who these remainder-men are. (2) That the decree of the probate court does not purport to assign the whole estate in the land to the devisees named, but merely assigns it to them according to the terms and provisions of the will; so that we are referred back to the will to ascertain how the property is devised. (3) But, even if the decree did assume to assign the entire estate in the land

to the devisees named, it would not be binding upon the unborn issue of deceased children, if any, who might be living at the death of the widow, and who would take as remainder-men under the will. (4) That, even if the title was in fact good, it was not marketable.

Under the view we take of the case, it becomes unnecessary to consider what would be the proper construction of the will as an original question, for the reason that we are of opinion that the decree of the probate court must be construed as assigning the entire estate in the lands to the devisees named, and that, whether this was in accordance with the correct construction of the will or not, it is conclusive and binding upon "all parties interested in the estate of the deceased," whether in being at the time or not. The argument of counsel for plaintiff is that the only operative adjudication is the last clause, whereby it is ordered that the real estate be and hereby is assigned "to the said devisees, according to the terms and provisions of said last will and testament of the deceased;" that this does not attempt to define the nature or extent of the estate assigned, but merely refers back to the terms of the will itself. It seems to us that any such view of the meaning and effect of the decree is untenable. Whenever the jurisdiction of a court is properly invoked it is the duty of the court to exercise that jurisdiction, and render an effective judgment upon the subject-matter brought before it. This must be presumed to have been what the court intended to do in this case. But, if plaintiff's contention is correct, then the decree amounted to an adjudication of nothing. Moreover, if plaintiff's construction of the will is correct, there could be no assignment of the property until the death of the widow, for until that event occurred it could not be determined who a single one of the remainder-men would be. When the jurisdiction of the court was invoked in this instance it became his duty to construe the will, determine its legal effect, and assign the property in accordance with the terms of the will as thus construed. It seems to us that this is precisely what the court has done in this instance; and that there is no room for reasonable doubt, either as to how he construed the will, or as to the meaning and effect of the decree of assignment, when all parts of it are taken together. The court first construed the will as devising a life estate to the widow, Rosa, and the remainder to the seven children named, share and share alike. It then determines that these devises are valid, and that said devisees (the widow and seven children) are entitled to said real estate according to the

terms of said will, which must mean as thus construed. The court then orders and adjudges that the above-described real estate (not a part of it, or a contingent remainder, or a vested remainder subject to defeasance, but a vested estate in the whole of it) be and the same hereby is, assigned to said devisees,—that is, to the widow and all the seven children and not to such of them as should survive their mother, or to the children of such of them as might be then deceased. It is true he then adds, "according to the terms and provisions of said last will," etc.; but, in view of the adjudications which have preceded, this clearly means according to the terms and provisions of the will as thus construed. The fact that this construction is called a finding of fact, instead of a conclusion of law; or that it is not preceded by the formal words "ordered and decreed,"—is of no importance. It is a clear and explicit adjudication of the main question presented to him, to wit, Who were entitled to the property under the terms of the will? This being determined, all that remained to be done was to assign it accordingly. The statute requires that "in such decree the court shall name the persons and the proportions or parts to which each is entitled." This the court has done, although perhaps not in the most formal manner. Taking the entire decree together, the force and effect of it is to assign a life estate to the widow and the remainder to the seven children named in the will and the seven, share and share alike. See 1 Freeman, Judgm. § 47, and cases cited.

Whether this decree was in accordance with the correct construction of the will or not, it is binding and conclusive upon all persons interested in the estate of the deceased, whether under disability or not, or whether then in being or not. *Greenwood v. Murray*, 26 Minn. 259, 2 N. W. 945. Counsel admits the general rule, but insists that it is inapplicable to persons who were not born when the decree was rendered, and who would take, if at all, under the will, and not under or in privity with any person in being at the date of the decree,—that such persons cannot be parties to the proceeding, either in person or by representation, and hence are not bound by it. This argument is based upon a false conception of the nature of the proceedings. Proceedings in the probate court are not an action between party and party, but are in the nature of a proceeding *in rem*, acting directly on the *res*, which is the estate of the deceased. If the court had jurisdiction of the estate, and the jurisdiction is properly invoked, of which there is no question in this case, a decree of distribution is a judgment *in rem*, which conclusively determines the

right of all parties interested in the estate just as fully as a decree in admiralty or any other judgment *in rem*. It is on this ground that it has been held that, as respects proceedings for the probate of wills, or on the administration of the estates of deceased persons, it is not necessary to appoint a guardian for minors interested in the estate. *Re Mousseau*, 30 Minn. 202, 14 N. W. 887; *Huntsman v. Hooper*, 32 Minn. 163, 20 N. W. 127. There is no difference in principle between the case of persons in being who are under disability and persons yet unborn. The logic of counsel's argument would be equally applicable to any other decree or order of the probate court affecting the estate of the testator, as, for example admitting his will to probate; and the result would be that nothing could ever be conclusively determined as to the estate of a deceased person, for often it could not be positively assured that some person might not afterwards come into being who would be interested in the estate.

One of the tracts of which the testator died seised, and the title to which is here involved, is lot 12, block 5, in Hancock & Rice's addition to Minneapolis. This is not included in the descriptions contained in the second—the first above quoted—paragraph of the will; but there is included a description of lot 8, block 5, in the same addition; and the probate court, in the decree of distribution, finds that this was a mistake in the will, and that what the testator intended to devise was lot 12. The point is made that a probate court has no power to reform a will. This matter is wholly immaterial, for the reason that, if lot 12 did not pass under the specific devise in paragraph 2, it did pass to the same parties under the general residuary devise in paragraph 6 of the will.

There is nothing in the point that the deed of Harry Weiskopf (who was not a party to the contract) to his codevisee Georgiana Weiskopf did not convey to her all his interest or estate in the premises.

The last point made by plaintiff is that, although the title tendered him may be good in fact, yet it was involved in so much legal doubt as to be unmarketable, and therefore he was not bound to accept it. Although the contract only calls for a good title, yet we have no doubt that he was entitled not merely to a title good in fact, but to a marketable title. Neither do we assent to the distinction sought to be made by defendants' counsel between an action in equity to compel specific performance and an action at law to recover purchase money, or to recover back earnest money. A court refuses to compel specific performance on the ground that the title is unmarketable,

not because the granting of such relief is a matter in the discretion of the court, but because the vendee has not been tendered what he is entitled to according to the terms of his contract. And, if the title tendered is not what he is entitled to, why should he be compelled to pay for what he is not bound to accept? The rule is the same whether the action is one by the vendor to compel specific performance, or one by him to recover purchase money, or one by the vendee to recover back his earnest money. In each case the question is, Was the title marketable? The distinction between actions at law and actions in equity, made in *Romilly v. James*, 6 Taunt. 263, if it ever was good law, is not so now under our judicial system, where all distinctions between courts of equity and courts of law have been done away with. *Methodist Episcopal Church Home v. Thompson*, 108 N. Y. 618, 15 N. E. 193; *Moore v. Williams*, 115 N. Y. 586, 5 L. R. A. 654, 12 Am. St. Rep. 844, 22 N. E. 233. Therefore the question, in this action by the vendee to recover back earnest money, is, Was the title tendered such that, if an action had been brought by the vendor, the court would have decreed specific performance? We are of opinion that it was. The validity of the title did not depend upon matters of fact not of record. The title rested wholly upon record evidence. Hence the doubt, if any, was one purely of law, as to the construction and effect of these records. If the insufficiency of the title had depended upon the construction of the will, it would have been unquestionably doubtful and unmarketable. But it wholly depended upon the effect of the decree of distribution. The mere fact that laymen, or even some lawyers, may have had some doubt as to the conclusiveness of the decrees of the probate court upon persons not in being who may be interested in the estate of a deceased person, was not such a doubt as to render the title unmarketable in any legal sense, or constitute any ground for a court refusing specific performance. The only possible legal doubt worthy of consideration is as to the sufficiency of the decree of distribution, in form and substance, to constitute an assignment of the whole estate in the property to the devisees named. Generally, where courts have refused to compel specific performance on the ground of doubt on a question of law arising upon the construction or legal effect of record muniments of title, it has been where not only was the doubt a grave one, but where there were interested parties not before the court, and consequently not bound by its decision, who might afterwards subject the vendee to vexatious and expensive litigation. Except under such circumstances, the courts have usu-

ally construed the records for themselves, and granted or refused specific performance according as they found the title good or bad. A title cannot be considered doubtful where there is no question of fact involved in a decision as to its validity, but one of law only, upon which the court where

the controversy is litigated is competent finally to pass. *Chesman v. Cummings*, 142 Mass. 65, 7 N.E. 13. We think this is such a case.

Order affirmed.

Rehearing denied.

PENNSYLVANIA SUPREME COURT.

Benjamin TAYLOR

v.

Margaret EVANS, *Appt.*

(177 Pa. 286.)

Payment of the money cannot be enforced under a contract to purchase real estate which stipulates that the property shall be clear of all encumbrances, if the title has not been accepted, and there is an existing right on the part of a municipality to open a platted street over the property, which will destroy the buildings without making compensation for them.

(October 5, 1896.)

A PPEAL by defendant from a judgment of the Court of Common Pleas, No. 2, for Philadelphia County in favor of plaintiff in an action brought to recover the amount alleged to be due on a promissory note, in which defendant set up a counterclaim for damages for breach of contract to purchase certain real estate. *Affirmed.*

The facts are stated in the opinion.

Mr. J. Howard Morrison, for appellant:

An encumbrance is a burden upon land depreciative of its value, such as a lien, easement, or servitude, which, though adverse to the interest of the landowner, does not conflict with his conveyance of the land in fee.

10 Am. & Eng. Enc. Law, p. 361.

The mere existence of Hilles street upon the plan of the city of Philadelphia, it never having been opened, would not bring it within the definition of an encumbrance, for the reason that, upon its opening, whoever is the owner is entitled to be repaid for the damage which he suffers.

2 Greenl. Ev. ¶ 242; *Bailey v. Miltenberger*, 31 Pa. 37, 41; *Ake v. Mason*, 101 Pa. 17; *Memmert v. McKeen*, 112 Pa. 319, 4 Atl. 542; *Patterson v. Arthurs*, 9 Watts, 152; *Dobbins v. Brown*, 12 Pa. 75; *Wilson v. Cochran*, 46 Pa. 229; *Peck v. Jones*, 70 Pa. 83.

If the existence of the street was either

NOTE.—As to what is a marketable title, see the preceding case of *Ladd v. Weiskopf*, and note.

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an encumbrance upon the physical condition of the property, or merely a circumstance affecting its physical condition, the fact that it was confirmed and upon the city plans is notice.

Bailey v. Miltenberger, 31 Pa. 41; *Ake v. Mason*, 101 Pa. 21.

Mr. William H. Peace, for appellee:

The case is to be governed according to the principles of law governing actions for specific performance.

Herzberg v. Irwin, 92 Pa. 48; *Nicol v. Carr*, 35 Pa. 381; *Lesley v. Morris*, 9 Phila. 110.

If Mrs. Evans was not entitled to specific performance, she could not recover in this action.

The presence of Hilles street running through the whole length of the lot was an encumbrance or a restriction that affected the title.

People's Sav. Bank v. Alexander, 2 Sadler (Pa.) 287, 3 Atl. 821.

Where there is serious doubt as to the meeting of the minds, equity will not decree performance.

Cortelyou's Appeal, 102 Pa. 576; *Herman v. Somers*, 158 Pa. 424, 38 Am. St. Rep. 851, 27 Atl. 1050.

Notice, to bind in law, must be given by a person interested in the property, and in the course of the treaty for the purchase.

3 Sugden, Vendors, pp. 451, 452; *Kerns v. Swope*, 2 Watts, 75; *Boggs v. Varner*, 6 Watts & S. 469; *Peebles v. Reading*, 8 Serg. & R. 484.

Notice should be actual in the transaction.

Hottenstein v. Leroh, 104 Pa. 454.

Green, J., delivered the opinion of the court:

It was agreed upon the trial that Hilles street, between Frankford avenue and Thomas street, was laid out on the city plan as a public street 40 feet wide, and was confirmed, in 1858. It was never opened, and at some time after it was laid out, and before the title of Mrs. Evans accrued, certain buildings were erected on the front of the lot, and upon the part of it which was the bed of Hilles street. This was the situation

of the property when Mrs. Evans contracted to sell it to Taylor. Under the act of April 3, 1851 (P. L. 327), no damages could be recovered for the loss of these buildings by the opening of the street, because they were erected after the street was laid out and plotted on the city plan. The contract of sale by Mrs. Evans to Taylor, as expressed in the receipt for \$50 of the purchase money, was that the property was to be "clear of all encumbrances;" and the question is whether the right of the city to open the street without paying any damages for the buildings which were on the lot, and within the bed of the street, was an encumbrance, so as to constitute a breach of the condition against encumbrances contained in the receipt. So far as the offers of testimony to show knowledge of the encumbrance on the part of Taylor are concerned, we think they were immaterial, because he protected himself by a positive covenant that there was to be no encumbrance on the title, and he would, therefore, be entitled to the benefit of his contract, whether he had knowledge of an encumbrance or not. It is also to be borne in mind that the contract was executory, and not executed, and the case therefore involves the question whether the contract is to be enforced against the will of the purchaser. That the purchaser, if obliged to take the title, will or may suffer a serious detriment, is very manifest from the consideration that the buildings on the lot naturally constituted a large part of the value of the property. If these may be taken from him without compensation, he has no equivalent for their loss in a reserved right to have damages for the taking. He is therefore by that much a direct loser upon the terms of his contract as it was made, and presumably he would not have made it. But whether he would or would not have made it, if he had had knowledge of the contingency, he saw proper to stipulate for a title free of any encumbrance; and that feature of his contract cannot be rejected without altering the contract itself. This equity will not do, even when the title is clouded only, because specific performance is matter of grace, and not of strict right. But when a positive term of the contract must be disregarded, neither equity nor law will interfere, where the contract is executory. These considerations eliminate much of the discussion, and distinguish the present contention from the authorities relied upon for the appellant. While an existing street upon a lot, or the mere liability to have a street opened upon it, is matter of which a purchaser is bound to take notice, and therefore, on that account, cannot defend against an action for the purchase money after the deed has been accepted, the case is very different when no deed has been accepted, no mortgage or other lien for the purchase money has been given by the purchaser, no possession has been taken, nor any other act done by the purchaser in affirmation of the contract. And when, in addition to all this, a large loss of the actual consideration of the contract may, and probably will, be suffered by the enforcement of the contract against the will of the purchaser, surely an express provision against the possibility of such loss, embodied in the written terms of the contract, will not be violated or disregarded by the courts, when they are asked to enforce it as an executory contract only. This reasoning was followed and enforced in *People's Sav. Bank v. Alexander*, 2 Sadler (Pa.) 287, 3 Atl. 821, decided in 1886, in which the decree of the court refusing specific performance was affirmed by this court. The facts in that case were very similar to the facts in this, except that here buildings had already been erected on the lot, the loss of which could not be replaced by an assessment of damages when taken. In *People's Sav. Bank v. Alexander*, the master said: It has been stated in the findings of fact that this street has been laid out thirty feet wide over a portion of the lot. This fact presents a most serious obstacle to the granting of a decree for specific performance of the contract between the parties. It is true, the street is not opened, but is laid out on the city plan. The effect of this is to give notice to whomsoever takes the lot of the possibility, or rather the probability, that the street will be opened at any time; and therefore he cannot claim damages from the city should he erect improvements upon it. See act April 3, 1851 (P. L. 327). He finds himself in the awkward position of not being able to claim damages, as there has been as yet no physical taking, and yet he cannot improve except at his peril. At the best he is subject to uncertainties, and is liable to a lawsuit to test the question of benefits or damages to which he may be entitled, or for which he may be liable. This would seem to present a very similar state of facts to that governed by the decision of the supreme court in *Speakman v. Forepaugh*, 44 Pa. 374. This is an executory contract, and the rights of the vendee are more jealously guarded than if it were executed; or, perhaps more accurately, the presumptions of law are different from those arising where a contract has been executed. In the last case cited it is said: "In this state, when contracts for the sale of land have been executed, and securities for the purchase money have been taken, if there be a known defect of title, and no covenant

chase money after the deed has been accepted, the case is very different when no deed has been accepted, no mortgage or other lien for the purchase money has been given by the purchaser, no possession has been taken, nor any other act done by the purchaser in affirmation of the contract. And when, in addition to all this, a large loss of the actual consideration of the contract may, and probably will, be suffered by the enforcement of the contract against the will of the purchaser, surely an express provision against the possibility of such loss, embodied in the written terms of the contract, will not be violated or disregarded by the courts, when they are asked to enforce it as an executory contract only. This reasoning was followed and enforced in *People's Sav. Bank v. Alexander*, 2 Sadler (Pa.) 287, 3 Atl. 821, decided in 1886, in which the decree of the court refusing specific performance was affirmed by this court. The facts in that case were very similar to the facts in this, except that here buildings had already been erected on the lot, the loss of which could not be replaced by an assessment of damages when taken. In *People's Sav. Bank v. Alexander*, the master said: It has been stated in the findings of fact that this street has been laid out thirty feet wide over a portion of the lot. This fact presents a most serious obstacle to the granting of a decree for specific performance of the contract between the parties. It is true, the street is not opened, but is laid out on the city plan. The effect of this is to give notice to whomsoever takes the lot of the possibility, or rather the probability, that the street will be opened at any time; and therefore he cannot claim damages from the city should he erect improvements upon it. See act April 3, 1851 (P. L. 327). He finds himself in the awkward position of not being able to claim damages, as there has been as yet no physical taking, and yet he cannot improve except at his peril. At the best he is subject to uncertainties, and is liable to a lawsuit to test the question of benefits or damages to which he may be entitled, or for which he may be liable. This would seem to present a very similar state of facts to that governed by the decision of the supreme court in *Speakman v. Forepaugh*, 44 Pa. 374. This is an executory contract, and the rights of the vendee are more jealously guarded than if it were executed; or, perhaps more accurately, the presumptions of law are different from those arising where a contract has been executed. In the last case cited it is said: "In this state, when contracts for the sale of land have been executed, and securities for the purchase money have been taken, if there be a known defect of title, and no covenant

against it in the deed, there is a presumption that the purchaser undertook to run the risk of the defect; and, if he did, he cannot detain the purchase money on account of it. This is a rule in regard to executed contracts, but even in regard to those it is not a conclusive presumption. See *Rawle, Covenants for Title*, 723-727. It is inapplicable to a mere executory contract . . . which is only preparatory." In the foregoing case of *People's Sav. Bank v. Alexander*, the report of the master was sustained by the court below, and that decree was affirmed by this court in a *per curiam* opinion. There the proceeding was a bill for specific performance, and here the action is assumpsit to recover the purchase money. The same principles and reasoning are applicable in both. The defendant in this case has not conveyed, and is not able to convey, a title clear of encumbrance, and is therefore not entitled to the purchase money. The assignments of error are not sustained.

Decree affirmed, and appeal dismissed, at the cost of the appellant.

Mary SERVICE

v.

Louis SHONEMAN, *Appt.*

(196 Pa. 63.)

1. An employer is not liable to an employee for injuries caused by negligence in the handling of a boiler upon the premises by a coemployee, an engineer who is conceded to have been competent.
2. Negligence by an employer in furnishing an unsafe boiler is rebutted, so as to absolve him from liability for injuries to employees by its explosion, where, before its purchase, he made extended inquiries as to which boiler was best, and purchased the one recommended after its superiority was pointed out, paying a larger price than was asked for others; and it had been used in his establishment three years before the accident without complaint, and was exclusively used and favored by the owners.
3. That a boiler furnished by an employer for the use of his employees contains an unsafe device will not render him liable for injuries to them by reason of such defect, if he procured it in the exercise of business prudence, and it was one in ordinary use.
4. An employer without the necessary technical knowledge to enable him to determine whether or not a boiler furnished by him is safe may rely upon the statement of the official city boiler inspector, so far as his duty towards his employees is concerned.

(May 14, 1900.)

NOTE.—As to the discretion of the master in furnishing appliances in general use, see *Kehler v. Schwenk*, 13 L. R. A. 374.

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APPEAL by defendant from a judgment of the Court of Common Pleas, No. 2, for Philadelphia County in favor of plaintiff in an action brought to recover damages for the alleged negligent killing of plaintiff's husband. *Reversed*.

The facts are stated in the charge of the court below by WILTBANK, J., which was as follows:

"On the 31st of August, 1893, the defendant was carrying on business on Eighth street. He was a dry-goods merchant, and he had in his employ Thomas Service. On that day the engineer who had charge of Shoneman's engine and boiler asked Service to do something for him, which was this: He observed that the front of his boiler at a certain place at the edge of one of the plates that you have heard described to you showed evidences of leaking. There were steam and water coming out, he found, somewhere, about half the size of a lead pencil, as he described it. He called upon Service to hand him a wrench. Service's employment in that establishment was that, apparently, of porter, or general assistant, and it was in the line of his duty to hand the engineer that wrench. He handed it to him, and the engineer took it, adjusted it to the nut which was at the end of the pivot or rod which projected beyond the plate outside of the boiler, and then proceeded to so move that nut as to tighten up the plate. His object was to work on the nut on the thread on which it is usually worked, in a direction which would carry the nut towards the plate, and carry the plate closer to the head of the boiler. You will, of course, know that that thread on the nut, if worked in another way, would carry the nut away from the boiler. But the object of the engineer was to tighten the plate,—to carry the plate nearer the head of the boiler, to prevent the further emission of steam and water. Now, instead of producing that result, the plate opened. It not only did not come nearer the head of the boiler, but moved in its position so that it uncovered to a slight extent the chamber in which the steam and water were confined, and there being thus made a vent, there was, apparently, a heavy emission of steam and water. The engineer himself, standing in the direction of the current, was injured, and Service was thrown into the pit which was in front of the boiler, and so grievously injured that within a short time he died. Now, the plaintiff claims that Mr. Shoneman, who was the owner of the boiler, must answer in damages for the death of Mr. Service, and, in order to determine that question, you have to consider, under the proofs that have been produced to you, certain matters that I will submit,

"You will have no difficulty, I think, in reaching the conclusion that the cause of the accident was the moving of that plate; and the proofs make it equally clear that the object of the workman—the engineer—when he went to work, was not to do what did happen, but to do the other thing; that is to say, to tighten the plate up against the front of the boiler. At all events, as a consequence of what he did do, it moved, and there was thus created this vent, and accordingly there resulted the accident. It is the theory of the plaintiff's case that what the engineer did at that time was properly done; that the action which he concluded was necessary under the circumstances was prudent and proper. That is the theory of the plaintiff's case, and he suggests the question to you to be that that plate slipped because, whilst the engineer took proper steps to tighten it up against the boiler, it was not itself properly made; that it was so smooth on the edge that when it pressed against the head of the boiler, instead of holding there, it slipped aside. And it is contended for the plaintiff that you are to punish Mr. Shoneman in damages because of that condition of the plate, and also by reason of the fact that the plate was triangular, instead of being circular. You will remember that that plate covered an opening in the chest, or 'header,' as it was called, of the boiler, into which the ends of three tubes were introduced, and that that plate, in a proper position, stood directly over the holes of those three tubes. You can understand, therefore, that, as it was triangular in form, and as it is conceded that it covered tubes which would open on the spaces at either end of the three angles of this triangular plate, when that plate was moved it would be reasonable to suppose that part of a tube would be uncovered, and you can also understand the force of the argument that this would not have been the result if the plate had been a round one, because then it would have been immaterial how much it moved in position, unless it had dropped off, as one of the witnesses said. It would be immaterial how much it moved in position, if it still kept its place on the rod, because, being circular, it never would have left uncovered any part of the hole at the head of the tube. You have to consider, therefore, whether there was any negligence in the construction of that boiler due to the triangular form of that plate, and due to the alleged fact that the inner surface and the edges of that plate were too smooth for the purposes of its employment. Now, when you come to consider that fact,—and it is a very narrow question for you,—you will have to consider it by the light of certain suggestions. You must remember that both

the plaintiff and the defendant are to be regarded by you as unskilled in boilers, and as depending upon other people for their knowledge with regard to boilers. Mr. Shoneman, being a dealer in dry goods, and having charge of an establishment in which the use of a boiler may be regarded as necessary, could do no more than an ordinarily prudent dealer in dry goods would do, or an ordinarily prudent man unacquainted with matters of machinery would do, when he proceeded to buy a boiler. He could do no more from day to day, when people about the establishment were using that boiler. He cannot be regarded in any sense as a skilful engineer or a practical machinist, for he was neither one nor the other. He was merely a citizen, who, in the course of his business, was brought at no time into actual personal employment in the use of machinery himself as an operator; a citizen who was obliged to depend upon the information of others when he came to select the machinery and the boiler which was necessary to his establishment. You will have to remember, of course, also, that Mr. Service was a person in like position of unskilfulness. He was a carpenter by trade, and he was employed about this establishment as a man who would assist generally in the performance of the duties incident to the running of the place. He also would have to depend upon others for information. You may also, before you pass to consider the main question of the case, reflect, and very properly reflect, that if a given boiler, or one of a given class of boilers, is selected for an establishment of this character, it is necessary to consider the reputation and character of that boiler to aid in a determination whether or not there was negligence in its build and in its use. You will therefore recall the testimony as to the character of this boiler as to its age, as to its reputation, and if you find the character to be one of safety, and the age, and the number of boilers sold to indicate an ordinary general use; if you find that under such circumstances the reputation is good,—that must operate favorably when you come to consider whether or not the defendant used proper care in the selection of it by the advice of those who knew about such things, and in the management of it by his engineer.

"Now, as a matter of fact, both Mr. Shoneman and Mr. Service depended upon the engineer who had charge of that boiler. Mr. Shoneman had to depend upon him as a skilful man, who knew how to manage it; and, of course, Mr. Service had to depend upon him for the same reason, Mr. Shoneman being only brought in contact with the boiler as the owner of it and the head of the establishment, and Mr. Service having

his acquaintance with it by reason of the fact that he had to work around about it at times in the performance of his ordinary duty. If you proceed to consider the question by the light of these suggestions, it seems to me that you can resolve the problem of the case without much difficulty. The defendants were not bound to provide the safest or the newest and most approved appliances. If this boiler was of an ordinary character, and such as could, with reasonable care, be used without danger by a competent engineer, that is all that can be required of the defendants. As has been shown here by some of the witnesses, the attempt to tighten up the plate or cap was dangerous,—the taking of a risk, as it was called: but such attempt, according to the plaintiff's proofs, was incident to the employment, and was prudent under the circumstances. Therefore, by the plaintiff's theory, the question is, not whether the deceased was exposed to danger, but whether he was so exposed through neglect of Mr. Shoneman to provide a reasonably safe boiler. There is no contention that Mr. Service was exposed to danger by reason of any act of Mr. Shoneman's in employing Rubner. That you may dismiss from your minds. The theory of the plaintiff is that Rubner was a wholly competent engineer, and therefore it cannot be contended for a moment that any liability arose on the part of Mr. Shoneman by reason of the employment of Rubner, skilful and competent as, it is contended by the plaintiff, he was. The test of reasonable safety is ordinary use. The complaint of this boiler is directed exclusively to the style of plate or cap, and it is claimed that the triangular form of this plate or cap, in connection with the smoothness of its inner edge, induced the injury when Rubner used the wrench upon the nut, the smooth edge permitting the plate or cap to move around with the circular motion of the nut, and, as a consequence, the triangular shape permitting a vent, perhaps three vents, to appear at the head of the three tubes which the plate would have held closed if it had remained in its proper position. These results, the plaintiff contends, could not have arisen had there been asbestos about the inner edge of the plate to present a roughened surface to the head-er upon which it pressed, or had there been flanges or other device there for the same purpose; and they further contend that, even in the absence of such precaution, even had the plate or cap remained smooth, the escape of steam and water would have been avoided had the plate been round, and not triangular. It is for you to answer, Was this plate or cap, subject as it was to this criticism, of the ordinary character of those

in use at that time? To answer that question you have the aid of much testimony either way. I charge you that, if it was of the ordinary character, your verdict must be for the defendant. If it was not of the ordinary character, you must consider two other points, to which I shall later advert. The boiler was what is known as a 'water-tubular boiler,' by which description is meant a boiler made up of parallel tubes communicating with each other, with spaces between the tubes to hold water and the spaces between to hold fire, so that the operation of the heat might change the water to steam. Such tubes, it is clear, must be kept closed, just as any boiler must be kept closed when so active and forcible an agency as steam is engendered in it. Was this plate or cap an appliance for the closing of these tubes of the ordinary character, and such as could, with reasonable care, be used without danger to this man? Was it a reasonably safe appliance? If, as I have already said, you find from the evidence that it was such as was in ordinary use upon tubular boilers at that time,—that is, at the time of the accident,—then it is your duty to conclude that the defendants used due care in having it; that they acted according to the usages, habits, and ordinary risks of men using boilers in their establishment,—in an establishment of that character. The testimony on this head was given you by witnesses for the plaintiff and the defendant, quite a considerable number of each. Mr. Simmons, Mr. O'Donnell, Mr. Cree, Mr. Motson, and Mr. Eckman have all testified that the appliance called the triangular plate or cap was not such as at that time, in the state of the art in the manufacture and use of tubular boilers, was in general and ordinary use. On the other hand, Mr. Moore, Mr. Hodges, Mr. Overn, Mr. Fett, and others, whom I need not name, because I propose to dwell on the testimony of three of those gentlemen, specially, testify that there was nothing out of the ordinary in this plate and in its use at that time. Mr. Moore, the manufacturer of the boiler who devised the triangular plate, has so testified. He has stated the number of boilers that he had at that time made and put in use, and the number that have been since made and he has stated positively, independently of his special statement to which I shall call attention, that the triangular plate was such as was not without the ordinary use at that time; that it was a plate which might be considered a proper one for an ordinarily careful and prudent man to have at the head of the boiler. Mr. Hodges and Mr. Overn, who were the official inspectors of the city, and who examined that boiler inside and outside, and who made a

written report between them, which you will have out with you,—one being in a certificate signed by both of them, coming from the bureau of inspectors; and the other being a detailed report made by only one of them, who made a personal examination,—testified that the boiler was a proper one, and that the appliances were proper, and such as you may regard as having been in ordinary use at that time. I call your attention to Mr. Moore's testimony, because he has said that which, if you believe it, will make it necessary that you shall find a verdict for the defendant. Mr. Moore has described to you the triangular plate, and its position when in proper position on the head of the boiler. It must have struck you, as you proceeded in your inquiry, before you reached the testimony of Mr. Moore, as a very remarkable thing that any machinist should put at the head of a boiler, and any engineer should use, an appliance so put by any machinist which was capable of turning by the mere twisting of a nut. How can it be conceivably possible that the plate of a boiler, whether of the ordinary old-fashioned use before tubular boilers were introduced, or a boiler made as tubular boilers are, should be placed where their integrity and office depended upon one nut alone, and that a nut which might, by the operation of a wrench for an inappreciable distance upon the face of the boiler, cause an explosion or an emission of steam. I say it must have struck you as evidence of negligence which might be well described as gross that anybody would manufacture a boiler of that character. But when we came to hear the manufacturer himself describe this boiler we found that such was not the case, and that, if we are to believe this gentleman, we may conclude that that plate which was put there at that time if properly put in position, was as firmly placed and as safe as any other plate or any other boiler, providing that the same is in the ordinary condition which a good boiler for proper use should be in. Mr. Moore testified that this triangular plate was provided with what he called a 'seat.' You will have to find what was meant by a seat, but it would appear from the testimony that a seat is perhaps a depression in the header, into which the plate would, to a certain extent, sit or move when it was properly screwed up against the head of the boiler; and, if such is the case, then you would find that a plate thus properly screwed up would be in a depression in the head of that boiler. It would be in a seat, as Mr. Moore has said, from which it would be impossible to move it by adding pressure to the head of the boiler, because any such pressure would only make it more firm in its seat; and

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while you are going through the operation of adding that pressure, you certainly would not enable it to move away from the seat, or socket, or depression into which it was originally set. Mr. Moore, therefore, if you believe that part of his testimony, has indicated that which would make it impossible for you to conclude that there was any negligence in the use of this plate, assuming it to have been in its proper position. But he has also told you more than that. He has told you that this boiler head comprises several of these plates (I think he said a dozen in this boiler), and that the plate which did move (and there is no doubt about that,—that one of these plates did move) could not have been in position, because, if in position, not only would it have been in this seat, but it would have been in such position relatively to the plates on either side of it in that bottom row of plates that there would not have been sufficient space between the edge of this plate and the edge of the other two plates to enable it to move sufficiently far to create the vent through which the steam that produced the accident came. You will understand that, I think, without my saying more about it. These plates, if they were imbedded in their several seats in the proper way, according to the design of the patentee, could not have been moved by the effort to tighten them up, because that effort would have made them go further into their seat; and, assuming that Mr. Moore was mistaken in that, they could not have moved sufficiently to create this vent, because that would have required a movement to the extent of three quarters of an inch. I think he said, and the only shifting allowed by reason of the proximity to the other plates would have been about a quarter of an inch. Therefore, if you believe what Mr. Moore has said, you are bound to find a verdict for the defendant, because there was thus in use a boiler as to which there could not be any reasonable complaint made of this one plate growing out of the fact that it was triangular in form. If, however, you consider that it is your duty to proceed further, I instruct you that, should you find that the plate was not such as was in ordinary use by the light of my instructions, you are then to determine the two points to which I have already adverted: First, whether or not the engineer, by his manner of working on that nut with the wrench, negligently caused that plate to turn; and, if you find that he did, and that this accident would have been avoided had he used reasonable care at that time, then your verdict must be for the defendant.

"Now, it has been suggested on the part of the defendant that it must be that this

man, Mr. Rubner, made a mistake. He meant to do his duty. He meant to do an entirely proper thing, but it has been suggested to you with some force, in view of the proofs, that he must have made a mistake, and that, instead of working the wrench in a direction to give a motion of that nut towards the boiler, he worked it the other way, and really loosened the plate himself. Without admitting it at all, the plaintiff says that, even if that is so, it would be the result of confusion on his part, due to the crisis,—to the sudden fear that something was going wrong,—and that the law would not visit him with the consequences of that. I instruct you that if this gentleman did, by the use of that wrench, cause the loosening of this plate, it was while entirely innocently done on his part, such negligence in law as would preclude a recovery here; that there was not such a condition or crisis of danger as would justify your overlooking that which you found otherwise to have been negligence. If, therefore, this accident was due to that, you must find a verdict for the defendant. You must also consider the fact that this leak, as it originally appeared may have been due—although it will be for you to say upon the proofs whether it was or not—to the imperfect resetting of that boiler after the inspection of August 28th. It was inspected on August 28th, and the accident happened on August 31st. The engineer who was then in charge has testified that it was taken apart, and these plates taken off on the 28th, and that he himself put it together again afterwards. He said he oiled up the nuts, and cleaned up the plates of the boiler, and saw it in clean condition after the inspection, as he put it up. If it is a fact that he put it up negligently, so that, with regard to this plate in question, he did not put that into its seat, assuming that you find it had a seat (and that will be for you to say, depending upon your weighing the evidence and the credence you may give Mr. Moore), if there was such a seat there, or whether there was one there or not; if he did not adjust that plate correctly when he set that boiler in the manner he testified to doing it,—setting it in order after the inspection,—then the defendants could not be charged with the consequences of this accident: and you would have to find a verdict in their favor.

“Lastly, I have to charge you upon the effect of the official inspection of this boiler, so far as it would operate to relieve Mr. Shoneman, if it would operate at all, from responsibility in the premises. As I have already told you, Mr. Shoneman was bound, in the purchase of this boiler, and in per-

mitting its continued use on his premises, to use such a degree of care as you would find to be the duty of an ordinarily careful man under the circumstances. Now, you may conclude from the proofs, though it will be for you to conclude one way or the other, that this boiler was regularly inspected from the time of its purchase down to the time of the accident, in each year. It was purchased in 1888. The proofs would justify your concluding that it was inspected at least once a year in the interval between the purchase and the accident. You may conclude otherwise. But you cannot help finding, because it is undisputed, that it was inspected by officials of the city on the 28th of August, 1893, just three days before the accident. As I have already said to you, the measure of care required of Mr. Shoneman being that which you would require of an ordinarily prudent citizen in the conduct of his business,—such a business as this, needing the use of a boiler and engine,—what are you to conclude in this case? The system of boiler inspection is one which is created for the safety of the public, both individuals and the general public; and, if you find such a system in existence in this city (and you are bound so to find, because the legislative creation of the system is before you, and it is not disputed), then you are to consider that there has been established by general consent (that is to say, by the citizens of this state) a certain measure of care. Citizens say by their legislation, ‘You must have your boilers examined, and you must have skilled men appointed to examine them; and if those skilled men are of the opinion that your boilers are all right, people may go on and use them, and if they are of the opinion that they are defective, in any particular, people may not go on and use them.’ Now, what more could Mr. Shoneman do, if he was proceeding to buy a boiler, or proceeding to use one that he had bought some time before and if he desired most earnestly to know that the boiler was one which could be used with ordinary safety in his establishment, than have it inspected by skilled inspectors, and have it passed upon? And if you find that in this case he did so do, and that there was a proper official inspection of that boiler, and that the report thereon was that it was such a boiler as might, not only as a whole, but with regard to its several appliances (among others, with regard to these triangular plates,—this one plate in question), be used by an ordinarily prudent man, you are bound to find a verdict for the defendant. On the other hand, if you find that the engineer was not guilty of negligence leading to the accident, then, if you also find that the plate was not such

as was in ordinary use, and that the inspection was not adequate and by official city authority, you may find a verdict for the plaintiff. Should you find a verdict for the plaintiff, the measure of damages would be the pecuniary value of the life of this unfortunate man. In order to determine what was the pecuniary value of his life, you are to consider his age at the time of his death, which was somewhat less than thirty-three years. You are to consider the probable duration of his life, in view of the proofs of the condition of his health at that time, and the probabilities of his remaining in good health. You are to consider the vicissitudes of illness and accident which might terminate his life earlier than in the ordinary course of nature it would terminate; and you are to consider his earning power, assuming him to live for the period of time which, under the proofs and my instructions, you believe he would have lived, and what that would represent in money that he would have earned in that time; from which, however, it is necessary that you should deduct a proper allowance which must be made for his own support had he continued to live, because, obviously, that would not be for the benefit of his family. You will not make any attempt to capitalize any money which you believe he would have made had he continued in life. The fact that he left a family is a fact which is before you; but that has no bearing upon your estimate of the damages which you should allow. It appears that, unfortunately, he has left two children and a widow; but, had he left a dozen children, it would have had no other bearing on this point. It cannot affect your determination of the value of his life. Of course, in reaching your conclusion you will endeavor, without sentiment, and with a conscientious recognition of your duty, to settle these various problems that I have put before you, running down into the one problem as to the propriety of that triangular plate, dispassionately, and according to the proofs."

Messrs. Joseph H. Taulane and Richard P. White, for appellant:

Defendant was only bound to exercise ordinary care and diligence to furnish a reasonably safe and proper boiler; and he was under no absolute duty to furnish a safe boiler.

Peoria, D. & E. R. Co. v. Hardwick, 48 Ill. App. 582; *Doyle v. White*, 14 Misc. 417. 35 N. Y. Supp. 760; *Probst v. Delamater*, 100 N. Y. 266, 3 N. E. 184; *Louisville & N. R. Co. v. Allen*, 78 Ala. 494.

The test of ordinary care and diligence is whether the boiler was in ordinary use.

Titus v. Bradford, B. & K. R. Co. 136 Pa. 69 L. R. A.

618, 20 Am. St. Rep. 944, 20 Atl. 517; *Reese v. Hershey*, 163 Pa. 253, 43 Am. St. Rep. 795, 29 Atl. 907.

If the boiler was in ordinary use, that is conclusive of its safety.

Kehler v. Schwenk, 144 Pa. 348, 13 L. R. A. 374, 27 Am. St. Rep. 633, 22 Atl. 910; *Keenan v. Waters*, 181 Pa. 247, 37 Atl. 342; *Fick v. Jackson*, 3 Pa. Super. Ct. 378.

The burden of proof was on the plaintiff to show that the Moore boiler was not in ordinary use.

Titus v. Bradford, B. & K. R. Co. 136 Pa. 618, 20 Am. St. Rep. 944, 20 Atl. 517.

If the Moore boiler was in ordinary use, it is wholly immaterial that other boilers were safer, or better constructed and less dangerous, because an employer is not bound to adopt the newest or latest improvements.

Payne v. Reese, 100 Pa. 301; *Delaware River Iron-Ship Bldg. & Engine Works v. Nuttall*, 119 Pa. 149, 13 Atl. 65; *Northern C. R. Co. v. Husson*, 101 Pa. 1, 47 Am. Rep. 690; *Allison Mfg. Co. v. McCormick*, 118 Pa. 519, 4 Am. St. Rep. 613, 12 Atl. 273; *Lehigh & W. B. Coal Co. v. Hayes*, 128 Pa. 294, 5 L. R. A. 441, 15 Am. St. Rep. 680, 18 Atl. 387; *Pittsburgh & C. R. Co. v. Sentmeyer*, 92 Pa. 276, 37 Am. Rep. 684; *Faber v. Carlisle Mfg. Co.* 126 Pa. 387, 17 Atl. 621; *Keenan v. Waters*, 181 Pa. 247, 37 Atl. 342.

The employer has the right to select any one of several machines or appliances in ordinary use that he considers best suited to his purpose; and he cannot be held liable for the exercise of his judgment, even though it may turn out to be erroneous.

Dooner v. Delaware & H. Canal Co. 171 Pa. 581, 33 Atl. 415; *Kehler v. Schwenk*, 144 Pa. 348, 13 L. R. A. 374, 27 Am. St. Rep. 633, 22 Atl. 910; *Harley v. Buffalo Car Mfg. Co.* 142 N. Y. 31, 36 N. E. 813; *Richards v. Rough*, 53 Mich. 212, 18 N. W. 785; *Georgia P. R. Co. v. Propst*, 83 Ala. 518, 3 So. 764; *Washington Asphalt Block & Tile Co. v. Mackey*, 15 App. D. C. 410; *Reese v. Hershey*, 163 Pa. 253, 43 Am. St. Rep. 795, 29 Atl. 907.

A master who purchases a machine or appliance from a reputable manufacturer has fulfilled his full duty to furnish safe and proper machinery to his employees.

Ardesco Oil Co. v. Gilson, 63 Pa. 146; *Munsfield Coal & Coke Co. v. McEnery*, 91 Pa. 185, 36 Am. Rep. 662; *Carlson v. Phœnix Bridge Co.* 132 N. Y. 273, 30 N. E. 750; *Sheu v. Wellington*, 163 Mass. 364, 40 N. E. 173.

The law presumes that public officers perform their duty; and, in fact, it presumes that everyone performs his duty until the contrary is shown.

Mansfield Coal & Coke Co. v. McEnery, 91 Pa. 185, 36 Am. Rep. 662; *Oglesby v. Missouri P. R. Co.* 150 Mo. 137, 51 S. W. 758.

The burden of proof was on the plaintiff to show that the inspections were inadequate.

Racine v. New York C. & H. R. R. Co. 70 Hun, 453, 24 N. Y. Supp. 388; *McGregor v. Reid, M. & Co.* 76 Ill. App. 610; *Patton v. Texas & P. R. Co.* 37 C. C. A. 56, 95 Fed. 244; *Bucher v. Prygibil*, 19 App. Div. 126, 45 N. Y. Supp. 972; *Alaska Treadwell Gold Min. Co. v. Whelan*, 168 U. S. 86, 42 L. ed. 390, 18 Sup. Ct. Rep. 40; *Mansfield Coal & Coke Co. v. McEnery*, 91 Pa. 185, 36 Am. Rep. 662.

Messrs. Charles Goldsmith, Maxwell Stevenson, and Thad. L. Vanderlice, for appellee:

The duty is on the employer to furnish his employees reasonably safe appliances with which to do the work assigned to them. It is also his duty to know what appliances are suitable and in common and ordinary use for the purpose.

Bannon v. Lutz, 158 Pa. 174, 27 Atl. 890.

We find in the possession of the defendant a defective and unsafe boiler, made so by reason of the use of a plate not used anywhere else, and used, according to the testimony, upon only one or two boilers, such as the defendant had. Having shown that this contrivance was not in ordinary use, and having shown, also, that there were other appliances or contrivances which, if applied to this cap or plate, would have rendered it perfectly safe, the burden then shifted to the defendant to show what he attempted to show in his defense, and that was: (1) That the engineer did a careless thing in attempting to screw up the plate under pressure; (2) that the plate and boiler were in ordinary use; (3) that he had done all that a prudent man could do to determine whether this was a safe boiler or not; (4) the inspection by the city officials relieved him.

Where there is conflicting testimony as to the reasonable safeness of the appliances, etc., the question is for the jury.

Philadelphia, W. & B. R. Co. v. Keenan, 103 Pa. 124.

Where there is any evidence of negligence on the part of the defendant it must be submitted to the jury.

Murphy v. Crossan, 98 Pa. 495; *Philadelphia, W. & B. R. Co. v. Keenan*, 103 Pa. 124; *Spear v. Philadelphia, W. & B. R. Co.* 119 Pa. 61, 12 Atl. 824; *Kohler v. Pennsylvania R. Co.* 135 Pa. 357, 1 Atl. 1049; *Glossen v. Gehman*, 147 Pa. 619, 23 Atl. 843; *Cougle v. McKee*, 151 Pa. 602, 25 Atl. 115; *Walbert v. Trexler*, 156 Pa. 112, 27 Atl. 69 L. R. A.

65; *Bannon v. Lutz*, 158 Pa. 166, 27 Atl. 890; *Folk v. Schaeffer*, 186 Pa. 255, 40 Atl. 401.

The inspection of the officials, unless adequate and proper, rose no higher than any other inspection by servants of the employer, and at any rate was properly submitted to the jury upon the question of whether the employer had exercised due care.

Flike v. Boston & A. R. Co. 53 N. Y. 549, 13 Am. Rep. 545; *Booth v. Boston & A. R. Co.* 73 N. Y. 38, 29 Am. Rep. 97; *Mehan v. Syracuse, B. & N. Y. R. Corp.* 73 N. Y. 585; *Fuiter v. Jewett*, 80 N. Y. 46, 36 Am. Rep. 575; *New York, L. E. & W. R. Co. v. Bell*, 112 Pa. 400, 4 Atl. 50; *Lewis v. Seifert*, 116 Pa. 628, 2 Am. St. Rep. 631, 11 Atl. 514; *Smith v. Hillside Coal & I. Co.* 186 Pa. 28, 40 Atl. 287.

Dean, J., delivered the opinion of the court:

The defendant is a merchant in the city of Philadelphia, using steam power in conducting his business. On the 31st of August, 1893, plaintiff's husband, Thomas Service, was killed, not exactly by a boiler explosion, but by the sudden and unusual escape of steam in great force and large volume from the end of the boiler. At the time of the accident the boiler and engine were in charge of one Rubner, a competent engineer. Service, the deceased, was a sort of porter or "all around man" in the establishment. At the exact time of his death he was helping the engineer in the boiler room. From the testimony of the engineer, who is the only living witness as to how the accident occurred, the boiler and all its attachments were in proper order in the morning when the fire was kindled. About 11 o'clock in the forenoon he heard a hissing noise, as if of escaping steam, in the end of the boiler, where was a three-cornered plate covering three of the boiler tubes, and secured by bolt and nut. He discovered a small jet of steam, about the diameter of a lead pencil, escaping from one side of the plate, which to him indicated the plate was loose. At his request, Service handed him a wrench, wherewith, by screwing down the nut on the bolt, the plate would be made tight. As he turned the wrench, the three-cornered plate, instead of tightening, turned around with the wrench, greatly enlarging the aperture, whereby the steam escaped with great force in large quantity, severely, though not fatally, scalding the engineer, but Service so badly that he died in twenty minutes. The plaintiff, alleging that defendant had furnished a dangerously constructed boiler, and one not in ordinary use, brought this suit for damages. The learned judge of the

court below, in a charge admirable for its lucidness, as well as exhaustiveness, in that it presented impartially every question which could be raised on the evidence, submitted the case to the jury to find whether the construction of the boiler, as to this plate and the method of attachment, was such as was in ordinary use, and had been inspected while in use with ordinary care; saying to them, if they found against defendant in these particulars, they might find a verdict for plaintiff. There was a verdict for plaintiff in sum of \$5,000, and from the judgment entered on it we have this appeal by defendant, with five assignments of error. No one of them is of sufficient merit to warrant discussion, except the fifth, which asks the court, under all the evidence, to direct a verdict for defendant. The case is a close one. We have most carefully considered the evidence in all its bearings, and the law that applies to it, and have concluded that to permit the judgment, under the undisputed or established facts, to stand, would fix a precedent practically imposing on the employer the responsibility of an insurer of his employees against accident. However varying may be the rule in some other states, in this it is settled. Take the rule as stated by our Brother Mitchell in *Titus v. Bradford, B. & K. R. Co.* 136 Pa. 618, 20 Am. St. Rep. 944, 20 Atl. 517. He says: "Absolute safety is unattainable, and employers are not insurers. They are liable for the consequences, not of danger, but of negligence; and the unbending test of negligence in methods, machinery, and appliances is the ordinary usage of the business. No man is held by law to a higher degree of skill than the fair average of his profession or trade; and the standard of due care is the conduct of the average prudent man." For this rule he cites not less than six of our own cases which preceded it, and certainly not less than ten have followed; the latest being *Keenan v. Waters*, 181 Pa. 247, 37 Atl. 342. Of course, a steam boiler is dangerous, even if of the very best construction. All that can be hoped for is that the danger shall be minimized by care in construction and use. Take the undisputed facts as to the care exercised by the owner in the selection of this boiler. When he bought it, three years before the accident, he inquired of a large number of business men who had knowledge on the subject as to the best boiler, and came to the conclusion to see Edward J. Moore, who was said to sell a nonexplosive boiler which he had invented. He sent for Moore, who came. He determined to take this one, after Moore had pointed out its ex-

cellencies and superiority. He paid a higher price for it than many others were offered for. Moore gave him the names of a large number of persons who had bought and were then using the boiler. He then employed Rubner, a competent engineer. This is conceded by plaintiff. He ran the boiler and engine for about three years, or up to the date of the accident, without complaint as to its safety. It was operated for nearly four years afterwards, when it was sold, only because a larger one was needed. Moore, from whom the boiler had been purchased, had a large experience in the use of boilers, and then invented this pattern. He testifies that he recommended this boiler to Shoneman as the only nonexplosive boiler then in use; that it was used all over the United States, and to some extent in Europe; that at the date of the purchase there were twelve, and at the date of the accident eighty-three, of the same type in use in Philadelphia and vicinity; that the boiler was perfectly safe, and that he had never known of an accident by reason of their use. He gives the names and places of business of those using the boiler at the date of the purchase by Shoneman, and of many of those who used it afterwards. Other witnesses—engineers—were called, who had charge of the same kind of boilers, and testified that they believed it entirely safe. Their opinion was that the accident arose from attempting to screw down the plate while the pressure from the steam was on; that Rubner should first have either drawn his fires, or directed the escape of steam through the safety valve, before attempting to manipulate the screw. This, however, is immaterial, for the competency of the engineer is conceded by plaintiff; hence, if the accident came from his neglect, the defendant is not answerable to a co-employee for it; and so the court instructed the jury. The question is whether Shoneman negligently furnished to Service and other employees dangerous machinery or appliances wherewith to carry on the operations of his business. And, as is said in *Titus v. Bradford B. & K. R. Co.* 136 Pa. 618, 20 Am. St. Rep. 944, 20 Atl. 517, the unbending test of negligence is the ordinary usage of the business. The care exhibited by defendant in the selection of this boiler then in use, and which to him seemed safer than other boilers; the long use of it without complaint by the engineer; that it was extensively used and favored by many other owners and manufacturers,—absolutely rebut the charge of negligence. Assume that there was some conflict in the evidence as to whether the plate over the tubes could

have been made safer by some other device or arrangement, nevertheless, defendant was not bound to adopt the safest attachment. Over and over we have said no such burden is imposed upon an employer. Assuredly, there were in use thousands of different patterns of other boilers which had no such attachment; but there was no evidence that this had ever been rejected because unsafe, or that it had not such extended use as defendant claimed, and adduced evidence to establish. He was neither a boiler maker, nor an engineer. He could only select one at the suggestion of those who used boilers, or on the recommendation of those who were experts. If, in the exercise of business prudence, he got an unsafe boiler, yet one which was in ordinary use, he is not answerable for the consequences.

Another point was made at the trial which calls for notice. It was alleged on the part of plaintiff that there was no proper inspection of the boiler; that age and use had impaired its strength, and that the consequent weakness may have aggravated the disaster, if it did not cause it. We cannot see how other than one view can be taken of the evidence; either the accident was caused by the unsafe design of the plate over the tubes, or by the negligence of the engineer in manipulating the nut with the wrench; but, assume that neither was the cause, and that it had its source in the weakness of an impaired boiler, then was there sufficient evidence of neglectful inspection to render defendant answerable? The boiler was several times inspected by the official boiler inspector of the city, who declared it to be in safe condition; the last time just three days before the accident, when the inspector, after examination, delivered to defendant his official certificate of inspection, setting out that the boiler would stand a working pressure of 90 pounds to the square inch,—just twice that which was on it when the accident occurred. This official must be presumed to have done his duty. Nor is there anything in the evidence to rebut that presumption. But, even if he failed, how can defendant be held responsible? He had not the knowledge which fitted him to inspect. What else, in the exercise of care, could he do, than rely upon the official certificate of a competent and sworn officer? We think there was no evidence from which the jury could find absence of care on part of defendant in this particular. To hold otherwise would place employers in a situation of as great risk as that of accident insurance companies.

The judgment is reversed, and judgment is entered for defendant.

69 L. R. A.

Alexander B. COHN, *Appt.*,

v.

Simon MAY.

(210 Pa. 615.)

The occupant of the lower floors of a building, who blocks the stairway leading from the upper floor to the ground so that a tenant of such floor, in seeking to escape a fire, is compelled to drop a considerable distance to reach the ground, is liable for the injury resulting to him therefrom.

(February 20, 1905.)

A PPEAL by plaintiff from a judgment of the Court of Common Pleas, No. 1, for Philadelphia County in favor of defendant in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Reversed.*

From the testimony at the trial it appeared that the plaintiff and his brother occupied the fifth story of a building of which defendant occupied the lower floors. A fire occurred in the building, and plaintiff, in attempting to escape by a flight of stairs, found the exit cut off by obstructions placed by defendant. He then attempted to use a rope fire escape which did not reach below the second story, and was compelled to drop from the end of it to the ground to his injury.

Further facts appear in the opinion.

Mr. Samuel Englander, for appellant:

The statement filed in this action is sufficient whichever way it is looked at, whether the clause impliedly charging the defendant as lessor is treated as an inducement, and is immaterial, and can be treated as surplusage, or whether treated as a material allegation, and thus charging a double cause of action, to wit, charging him as landlord and as cotenant.

Inducement states under what circumstances the contract was made, and is explanatory.

5 Am. & Eng. Enc. Law, p. 355; *Erie City Iron Works v. Barber*, 118 Pa. 6, 12 Atl. 411; *Martens v. O'Connor*, 101 Wis. 20, 76 N. W. 774; *Repsher v. Shane*, 3 Yeates, 575; *Spencer v. Dawson*, 1 Moody

NOTE.—As to effect of intervening cause on liability for negligence, see also cases in notes to *Smith v. County Court*, 8 L. R. A. 82, and *Smithwick v. Hall & U. Co.* 12 L. R. A. 279; also the later cases, in this series, of *Pennsylvania R. Co. v. Hammill*, 24 L. R. A. 531; *Goodlander Mill Co. v. Standard Oil Co.* 27 L. R. A. 583; *Stone v. Boston & A. R. Co.* 41 L. R. A. 794; *Southern R. Co. v. Webb*, 59 L. R. A. 109; *Cole v. German Sav. & L. Soc.* 63 L. R. A. 416; *Hebert v. Lake Charles Ice, Light, & Waterworks Co.* 64 L. R. A. 101; *Nelson v. Naragansett Electric Lighting Co.* 67 L. R. A. 116.

& R. 552; *Geddis v. Irvine*, 5 Pa. 508; *Miltenberger v. Schlegel*, 7 Pa. 241; *Smith v. Teacle*, 8 Pa. Co. Ct. 150; *Kline v. Guthart*, 2 Penr. & W. 490; *Com. use of Haffey v. Haffey*, 6 Pa. 348; *Filson v. Dunbar*, 26 Pa. 475; *Frankum v. Falmouth*, 2 Ad. & El. 452; 22 Enc. Pl. & Pr. p. 604; *Walsh v. Hastings*, 20 Colo. 243, 38 Pac. 324; *McAdams v. Sutton*, 24 Ohio St. 333.

If a number of grounds or causes of action are alleged, and only one proved, the plaintiff can succeed.

Thomas v. Central R. Co. 194 Pa. 511, 45 Atl. 344; *Valentine v. A. Colburn Co.* 10 Pa. Super. Ct. 453; *Coates v. Chapman*, 195 Pa. 109, 45 Atl. 676; *Snyder v. Witmer*, 12 W. N. C. 301; *McIntire v. Westmoreland Coal Co.* 118 Pa. 108, 11 Atl. 808; *Sidcell v. Frans*, 1 Penr. & W. 383, 21 Am. Dec. 387; 22 Enc. Pl. & Pr. p. 567; *Platz v. McKean Twp.* 178 Pa. 601, 36 Atl. 136; *Ben Franklin F. Ins. Co. v. Flynn*, 98 Pa. 627; *Pennsylvania F. Ins. Co. v. Dougherty*, 102 Pa. 568; *Magill v. Swearingen*, 10 Pa. 497; *McEachin v. Stewart*, 106 N. C. 336, 11 S. E. 274.

Plaintiff's injuries were the proximate result of defendant's negligence, exclusive of statutory regulation.

21 Am. & Eng. Enc. Law, 2d ed. pp. 487, 488; *Hey v. Philadelphia*, 81 Pa. 44, 22 Am. Rep. 733; *Oil City Gas Co. v. Robinson*, 99 Pa. 1; *Bunting v. Hogsett*, 139 Pa. 363, 12 L. R. A. 268, 23 Am. St. Rep. 192, 21 Atl. 31, 33, 34; *Quigley v. Delaware & H. Canal Co.* 142 Pa. 388, 24 Am. St. Rep. 504, 21 Atl. 827; *Drake v. Kiely*, 93 Pa. 492; *Vallo v. United States Exp. Co.* 147 Pa. 404, 14 L. R. A. 743, 30 Am. St. Rep. 741, 23 Atl. 594; *Sturgis v. Kountz*, 165 Pa. 358, 27 L. R. A. 390, 30 Atl. 976; *Webster v. Monongahela River Consol. Coal & Coke Co.* 201 Pa. 278, 50 Atl. 964; *Pittsburgh v. Grier*, 22 Pa. 54, 60 Am. Dec. 65; *Scott v. Hunter*, 46 Pa. 192, 84 Am. Dec. 542; *Morrison v. Davis*, 20 Pa. 171, 57 Am. Dec. 695; *Brown v. Lynn*, 31 Pa. 510, 72 Am. Dec. 768; *McGrew v. Stone*, 53 Pa. 436; *Chambers v. Carroll*, 199 Pa. 371, 49 Atl. 128; *Sevell v. Moore*, 166 Pa. 570, 31 Atl. 370.

Plaintiff's injuries were the proximate result of defendant's negligent act, by act of assembly of June 8, 1893.

21 Am. & Eng. Enc. Law, 2d ed. p. 478; *Lederman v. Pennsylvania R. Co.* 165 Pa. 118, 44 Am. St. Rep. 644, 30 Atl. 725; *Connor v. Electric Traction Co.* 173 Pa. 602, 34 Atl. 238.

The fact that the statute or ordinance in question does not in terms impose a civil liability for its violation does not affect evidence of its violation as going to show negligence.

60 L. R. A.

21 Am. & Eng. Enc. Law, 2d ed. p. 483; *Pauley v. Steam Gauge & Lantern Co.* 131 N. Y. 90, 15 L. R. A. 194, 29 N. E. 999; *Parker v. Barnard*, 135 Mass. 116, 46 Am. Rep. 450; *Correll v. Burlington, C. R. & M. River R. Co.* 38 Iowa, 120, 18 Am. Rep. 22; *Reynolds v. Hindman*, 32 Iowa, 146; *Dodge v. Burlington, C. R. & M. River R. Co.* 34 Iowa, 276; *Bott v. Pratt*, 33 Minn. 323, 53 Am. Rep. 47, 23 N. W. 237; *Garibaldi v. O'Connor*, 112 Ill. App. 53; *King v. Russell*, 6 East, 429; *Com. v. Passmore*, 1 Serg. & R. 217; *People v. Cunningham*, 1 Denio, 524, 43 Am. Dec. 709; *Murphy v. Leggett*, 29 App. Div. 309, 51 N. Y. Supp. 472, Affirmed in 164 N. Y. 121, 58 N. E. 42; *Linehen v. Western Electric Co.* 29 App. Div. 463, 51 N. Y. Supp. 1080.

Mr. George P. Rich, for appellee:

The probable consequence is one that is more likely to follow the supposed cause than it is to fail to follow it.

Hoag v. Lake Shore & M. S. R. Co. 85 Pa. 293, 27 Am. Rep. 653; *South Side Pass. R. Co. v. Trich*, 117 Pa. 390, 2 Am. St. Rep. 672, 11 Atl. 627; *Wood v. Pennsylvania R. Co.* 177 Pa. 306, 35 L. R. A. 199, 55 Am. St. Rep. 728, 35 Atl. 699; *Swanson v. Crandall*, 2 Pa. Super. Ct. 89; *Elliot v. Allegheny County Light Co.* 204 Pa. 568, 54 Atl. 278.

Although the defendant's violation of a statute, and the plaintiff's injuries consequent thereupon, be shown, the former will not be liable merely because his act constituted a violation of the law, but only if it proximately caused the injuries complained of.

Christner v. Cumberland & E. L. Coal Co. 146 Pa. 67, 23 Atl. 221; *Sevell v. Moore*, 166 Pa. 570, 31 Atl. 370; 21 Am. & Eng. Enc. Law, p. 480.

Plaintiff sought to amend by introducing a new cause of action, to wit, an action of tort, for obstructing a stairway, after the statute of limitations, to wit, two years, had become a bar. This cannot be permitted.

Royse v. May, 93 Pa. 454; *Philadelphia v. Hestonville, M. & F. R. Co.* 203 Pa. 38, 52 Atl. 184; *Grier v. Northern Assur. Co.* 183 Pa. 334, 39 Atl. 10; *Murphy v. Crawford*, 114 Pa. 496, 7 Atl. 142; *Trego v. Lewis*, 58 Pa. 463; *Smith's Appeal*, 108 Pa. 508; *Duffey v. Houtz*, 105 Pa. 96; *Tyrrill v. Lamb*, 96 Pa. 464.

Potter, J., delivered the opinion of the court:

In the statement of claim filed by the plaintiff in this case it was averred that the plaintiff's firm "rented the fifth floor of the said building of the defendant, who was then and there lessee of the entire premi-

ses," and that it was the duty of defendant to accord to the plaintiff ready and convenient ingress and egress from the building by the back stairway; and it was charged that the defendant had negligently violated such duty by blocking up the stairway by placing boxes upon it. Upon the trial it appeared that plaintiff's firm did not rent from defendant, but that both leased from a third party, agent for the owner of the building. Plaintiff moved to amend the statement to accord with the facts, but the court refused to allow the amendment, holding that it would introduce a new cause of action. No exception was taken to the refusal to allow plaintiff to amend. At the close of the plaintiff's testimony a compulsory nonsuit was entered, which the court subsequently refused to take off. This refusal is the only question properly raised upon this appeal. It seems that, while the trial judge was of opinion that there was a material variance between the allegations and the proof, yet the refusal to take off the nonsuit was based upon the ground that the negligence of the defendant was not the proximate cause of the accident. An examination of the statement shows that the substantial cause of action which it sets forth is that upon which the plaintiff relied at the trial. The statement as to the respective tenancies of the parties was merely explanatory, and might have been omitted. It is clearly set out that the plaintiff's firm were occupants of the fifth floor of the building, and the defendant "then and there occupied certain floors of said building below plaintiff;" that defendant, his servants, and agents permitted and caused to be placed upon a certain stairway, leading to and from the fifth floor, divers boxes, so that the stairway became choked and blocked with said boxes, and ingress to and egress from the fifth floor by way of said stairway was cut off, and, as a result thereof, the plaintiff was injured. This was a direct averment of negligence on the part of the defendant, which the evidence produced at the trial tended to prove. We think it was sufficient. See *Coates v. Chapman*, 195 Pa. 109, 45 Atl. 676. In his opinion refusing to take off the nonsuit the trial judge says that, under the evidence, the jury would have been warranted in finding that the boxes placed by defendant's workmen upon the back stairway constituted the obstruction which prevented the plaintiff from making use of that means of exit. But he does not think this act of negligence can be considered as the proximate cause of the injuries which resulted to plaintiff. In this conclusion we cannot agree. A case much like the present one in some of its facts was *Seucll v. Moore*, 106

Pa. 570, 31 Atl. 370. There the plaintiff was prevented from reaching the fire escape by the fact that the door leading to it was locked, and she then jumped from a window, and was injured. The court said, at page 576 of 166 Pa., page 373 of 31 Atl.: "The difficulty was in the locking of the door that led to . . . [the fire escape] on the third floor. The plaintiff got to this in time, and, had it been open, as it should have been, she could have escaped . . . injury. . . . The only proximate and effective cause of the injury was the locking of the door." A cause is not too remote merely because it produces the damages by means of an intermediate agency. Where the injury was the immediate consequence of some peril to which the injured party was obliged to expose himself in order to avoid the peril arising from the defendant's negligence, it is proximate enough. *Pittsburgh v. Grier*, 22 Pa. 54, 60 Am. Dec. 65; *Vallo v. United States Exp. Co.* 147 Pa. 404, 14 L. R. A. 743, 30 Am. St. Rep. 741, 23 Atl. 594. The cases upon this subject are reviewed in *Gudfelder v. Pittsburgh, C. C. & St. L. Co.* 207 Pa. 629, 57 Atl. 70; and the test of proximate cause is again cited as being whether the facts between the negligent act and the final result to the plaintiff constitute a continuous succession of events, so linked together that they become a natural whole.

In the present case, danger from fire was reasonably to be apprehended and guarded against at all times. The stairways, both front and back, formed the natural means of passage to and from the upper stories, and common prudence required that they be kept free from obstructions. When the servants of the defendant blocked up the passageway, they may not have anticipated that a fire would occur so soon; but they were responsible for any resulting damage which might be caused by their careless act. The result might have been a fall upon the stairway by someone seeking to pass. It might have resulted in damage in more than one unforeseen direction. But as it was, it so happened that, under the imperative necessity of escaping from the fire, the plaintiff sought to descend the stairway. Had it been unobstructed, he could readily have escaped in that way. But he says in his testimony that the boxes which had been placed in the way by the defendant's servants cut him off. Being in extreme peril, and acting upon what seemed to him the best judgment, he says that the only way of escape he then found open was through a window and down a rope, and then by a drop to the ground. In following this method he received the injuries for which he here seeks to recover. If the jury believe the testimony of the

plaintiff, it presents a succession of events which may properly be considered as unbroken. Certainly, if the sequence of events as they actually did occur had been suggested beforehand to the mind of a reasonably prudent man, he would have thought it quite possible for them to follow.

Our conclusion in this case is that, if the stairs were so obstructed that the plaintiff

could not reasonably make use of them, such obstruction may have fairly been held to be the proximate and effective cause of the injury suffered by the plaintiff. The assignment alleging error in the refusal to take off the nonsuit is sustained.

*The judgment is reversed, and a proce-
dendo is awarded.*

UNITED STATES CIRCUIT COURT OF APPEALS, THIRD CIRCUIT.

SUPREME COUNCIL AMERICAN LE-
GION OF HONOR, *Plff. in Err.*,

v.

Henry B. LIPPINCOTT to Use of George
L. Lippincott.

(67 C. C. A. 650, 134 Fed. 824.)

1. An election to treat the original contract as still in force, upon notification of reduction in the amounts of certificates in a mutual benefit society, adhered to for two years and five months, is not subject to change, so as to permit a certificate holder to treat the contract as rescinded, and sue for assessments paid.

2. Breach of the contract of a mutual benefit society by arbitrary reduction of the amounts of outstanding certificates is not a continuing one, so as to entitle a certificate holder to elect to treat the contract as rescinded at any time before the time set for performance.

(February 13, 1905.)

ERROR to the Circuit Court of the United States for the Eastern District of Pennsylvania to review a judgment in favor of plaintiff in an action brought to recover assessments alleged to have been wrongfully exacted upon a mutual benefit certificate. *Reversed.*

The facts are stated in the opinion.

Argued before Acheson, Dallas, and Gray, Circuit Judges.

Messrs. Murdoch Kendrick and Frank P. Pritchard, for plaintiff in error:

Plaintiff was not entitled to change his election.

Johnstone v. Milling, L. R. 16 Q. B. Div. 460; *Morgan v. McKee*, 77 Pa. 228; *Dingley v. Oler*, 117 U. S. 490-503, 29 L. ed. 984-988, 6 Sup. Ct. Rep. 850.

Mr. J. H. Brinton, for defendant in error:

Even though the payments were volun-

tary, the contracting parties were not upon equal terms, and for that reason the doctrine of anticipatory breach, as laid down in *Johnstone v. Milling*, L. R. 16 Q. B. Div. 460; *Hochster v. De La Tour*, 2 El. & Bl. 678, 22 L. J. Q. B. N. S. 455; and *Frost v. Knight*, L. R. 7 Exch. 114,—does not apply, because the doctrine there laid down is limited to contracts not even partially performed by either party.

Jessop v. Ivory, 158 Pa. 71, 27 Atl. 840.

The notice of an intention not to perform the contract, if not accepted by the other party as a present breach, remains only a matter of intention, and may be withdrawn at any time before the performance is in fact due.

Zuck v. McClure, 98 Pa. 541; *Ripley v. M'Clure*, 4 Exch. 345; *Leake*, Contr. 873.

Although, as a general rule, a payment exacted as a condition to the performance of a contract cannot be considered compulsory if the nonperformance of the contract would jeopardize the plaintiff's rights, he having partially performed, the payment under protest is compulsory.

Niedermeyer v. University of Missouri, 81 Mo. App. 654; *Westlake v. St. Louis*, 77 Mo. 47, 46 Am. Rep. 4; *Horner v. State*, 42 App. Div. 430, 59 N. Y. Supp. 96; *Buford v. Lonergan*, 6 Utah, 301, 22 Pac. 164; *Orkle v. Maxwell*, 3 Blatchf. 413, Fed. Cas. No. 3,231.

Acheson, Circuit Judge, delivered the opinion of the court:

It was decided by this court in *Supreme Council A. L. H. v. Black*, 59 C. C. A. 414, 123 Fed. 650, that, by reason of the adoption by the corporation of the by-law reducing the insurance certificate from \$5,000 to \$2,000, and putting the by-law into effect by making assessments on the reduced basis, and notifying the certificate holders, a certificate holder who had performed his part of the contract, and had not consented to the reduction, might elect to treat the contract as rescinded, and sue immediately to recover back all the assessments he had paid

NOTE.—As to right to rescind or abandon contract because of other party's default, see *Lake Shore & M. S. R. Co. v. Richards*, 30 L. R. A. 33, and note.
69 L. R. A.

under his certificate. We applied to the case the principle enunciated in *Hochster v. De La Tour*, 2 El. & Bl. 678; *Johnstone v. Milling*, L. R. 16 Q. B. Div. 460, and *Roehm v. Horst*, 178 U. S. 1, 13, 44 L. ed. 953, 958, 20 Sup. Ct. Rep. 780, that, when one party to a contract to be performed at a future time announces his intention not to perform it, the other party, if he chooses, may elect to act upon such announcement as a wrongful renunciation of the contract, and may thereupon treat the same as a breach of the contract, and bring suit at once for such breach. Black had given immediate notice that he regarded the by-law as a breach of the contract, and he promptly brought his action. In the subsequent case of *Supreme Council A. L. H. v. Daix*, 64 C. C. A. 435, 130 Fed. 101, we held that the certificate holder there suing had not lost his right to treat the contract as rescinded, and recover back the assessments he had paid, simply because of a delay of two years and three months in giving notice of his election to do so; he having done nothing in affirmance of the by-law or indicating a waiver of his right to treat the contract as rescinded, and having done no act tending to mislead the corporation; and it not appearing that the corporation had suffered any injury from the delay of the plaintiff in signifying his election to rescind. The present case differs from the two former ones (the *Cases of Black and Daix*) in this: That, immediately upon the adoption and putting into effect of the by-law, the plaintiff (Lippincott) made his election not to treat the contract under his \$5,000 certificate as at an end, or broken, but to keep the contract in full force, and to maintain unimpaired all his rights thereunder; and to that position he steadfastly adhered for a period of two years and five months. The court below, in its opinion, says: "The unquestioned facts show plainly that the plaintiff, by his words and conduct, declared his intention not to assent to the reduction of his certificate, but to hold on to the original agreement." To this latter end he protested against the attempted reduction, offered to pay assessments upon the full face of his certificate, and thereafter paid assessments based upon the reduced amount, but always under protest, until February 28, 1903, when he wrote to the local council: "I shall discontinue to pay the dues and assessments on the \$5,000 certificate issued to me, and will ask you to return me the amount paid by me on the same up to October 1, 1900, at which time, by the adoption of the resolution, you abrogated your contract with me." Now, undoubtedly the plaintiff had kept his contract alive, so that, if he had died between October 1, 1900, and February 28, 1903, his benefi-

ary (Mrs. Lippincott) could have recovered the amount of his insurance certificate, \$5,000. The protests which accompanied the plaintiff's payments of assessments were intended merely to preserve his contract rights under his \$5,000 certificate, and had no other effect.

This action was brought on March 18, 1903, for the recovery of the dues and assessments paid by the plaintiff under his certificate prior to October 1, 1900, the date when the reducing by-law of August, 1900, went into effect. Anticipatory breach of the contract is the ground of recovery relied on. Can the plaintiff recover, in view of his election, made in October, 1900, not to accept the defendant's action as an anticipatory breach, but to treat the contract as continuing in full force, his subsequent retention of membership in the order, and his payments of assessments down to February 28, 1903? This question can best be answered by referring to what was said in *Hochster v. De La Tour*, 2 El. & Bl. 678, *Johnstone v. Milling*, L. R. 16 Q. B. Div. 460, and *Roehm v. Horst*, 178 U. S. 1, 13, 44 L. ed. 953, 958, 20 Sup. Ct. Rep. 780, the leading cases on the subject of anticipatory breaches of contracts. We extract from these cases the following principles: Where one party to a contract to be performed in the future, before the time for performance arrives, refuses to perform, or declares his intention not to perform, he thereby, so far as he is concerned, declares his intention then and there to rescind the contract. Such renunciation, however, in and of itself does not work a rescission, for one party to a contract cannot, by himself, rescind it. But by making the wrongful renunciation he entitles the other party, if he pleases, to agree to the contract being put an end to, subject to the retention by him of his right to bring an action in respect to such wrongful rescission. L. R. 16 Q. B. Div. 467. A declaration by the promisor, before the time for performance has arrived, of his intention not to perform, is not in itself, and unless acted on by the promisee, a breach of the contract. Such declaration only becomes a wrongful act if the promisee elects to treat it as such. If he does so elect, it becomes a breach of contract, and he can recover upon it as much. Id. 473. In *Johnstone v. Milling*, L. R. 16 Q. B. Div. 460, 467, Lord Esher, Master of the Rolls, said: "The other party may adopt such renunciation of the contract by so acting upon it as, in effect, to declare that he, too, treats the contract as at an end, except for the purpose of bringing an action upon it for the damages sustained by him in consequence of such renunciation. He cannot, however, himself proceed with the contract on the

footing that it still exists for other purposes, and also treat such renunciation as an immediate breach. If he adopts the renunciation, the contract is at an end, except for the purposes of the action for such wrongful renunciation. If he does not wish to do so, he must wait for the arrival of the time when, in the ordinary course, a cause of action on the contract would arise. He must elect which course he will pursue."

Now, the plaintiff was not bound by the action of the corporation in adopting the by-law of 1900 and putting it into effect. His contract remained unaffected. But he acquired the right of electing either to treat the attempted reduction of his certificate as a breach of the contract and ground for making an end of it with an immediate right of action for the recovery of damages, or else to hold fast to his contract. The plaintiff chose the latter course. He elected to keep the contract alive, and did so. The court below did not doubt that the plaintiff had elected to keep the contract alive. In its opinion the court states the question here to be "the right of a member of the defendant order to rescind his contract after having once elected not to rescind." And the court held that the plaintiff was not precluded, even after the lapse of two years and five months, from making a second election to rescind the contract. To this view we cannot assent. In the circumstances we think it was not open to the plaintiff to make a second election, reversing his former one. *Clough v. London & N. W. R. Co. L. R. 7 Exch. 26, 34.* Speaking of the right of election to avoid a sale of personalty, the court there said: "And we further agree that the contract continues valid till the party defrauded has determined his election by avoiding it. And, as is stated in *Com. Dig. Election*, c. 2, if a man once determines his election it shall be determined forever; and, as is also stated in *Com. Dig. Election*, c. 1, the determination of a man's

election shall be made by express words or by act. And consequently we agree with what seems to be the opinion of all the judges below, that, if it can be shown that the London Pianoforte Company have at any time after knowledge of the fraud, either by express words or by unequivocal acts, affirmed the contract, their election has been determined forever."

The principle of the finality of an election once made is applicable, we think, to the present case.

We see no ground upon which the plaintiff can avoid the election he made in October, 1900. We cannot agree that it was "a hasty and ill-advised decision." It seems to us to have been intelligently and deliberately made upon full knowledge of all the facts. Moreover, the plaintiff rested content with his election for two years and five months. His election to keep the contract alive is not now open to reconsideration. Nor can we give our assent to the proposition urged by the defendant in error that the breach of contract was a continuing one, and therefore that the plaintiff could rescind the contract at any time up to the time set for performance. All the grounds warranting rescission existed and were complete at the time the plaintiff made his original election. The right of the plaintiff to abrogate the contract was gone forever when he elected not to rescind. His exercise of the right of election fixed the contractual relations of the parties. Those relations were not thereafter subject to change at the mere pleasure of the plaintiff.

The views we have above expressed require us to render the judgment following: *The judgment of the Circuit Court is reversed*, and the cause is remanded to that court, with direction to enter judgment in favor of the defendant *non obstante veredicto*.

OHIO SUPREME COURT.

B. A. TAYLOR, Auditor of Madison County, *et al.*, *Pliffs. in Err.*,

v.

Eugenia J. CRAWFORD *et al.*

(.....Ohio.....)

*Section 3 of an act entitled "An Act to

*Headnote by the COURT.

NOTE.—*Maintenance of drainage ditches.*

The general question as to the liability for the expense of drainage is considered in a note to *Heffner v. Case & Morgan Counties*, 58 L. R. A. 353. But after the drainage system has been installed there are necessarily some expenses attending its maintenance in a working condition, and some attention and care are also necessary to preserve its efficiency. The question then arises, Upon whom are these burdens cast? Primarily these matters are controlled

Provide for the Cleaning Out and Keeping in Repair of Public Ditches, Drains, and Water Courses, *et cet.*" (95 Ohio Laws, p. 155), passed April 15, 1902, is not invalid, as being in conflict with § 19 of article 1, or § 16 of article 1, or with any other provision of the Constitution of the state of Ohio.

(June 27, 1905.)

been installed there are necessarily some expenses attending its maintenance in a working condition, and some attention and care are also necessary to preserve its efficiency. The question then arises, Upon whom are these burdens cast? Primarily these matters are controlled

ERROR to the Circuit Court for Madison County to review a judgment reversing a judgment of the Court of Common Pleas in favor of defendants in a suit to enjoin proceedings for the cleansing of a draining ditch. *Reversed.*

Statement by **Price, J.:**

The plaintiffs below filed their petition praying for an injunction against the plaintiffs in error, who were proceeding to make an assessment on the lands of the plaintiffs and others to pay for the cleaning out of a certain ditch which had been established in 1886. The surveyor and auditor were acting under the provisions of § 3 of an act of the general assembly entitled "An Act to Provide for the Cleaning Out and Keeping in Repair of Public Ditches, Drains, and Water Courses, *et cetera*." (95 Ohio Laws, p.

by the provisions of statutes. It is not desirable to set these provisions out, because not only are they easy of access in the statute books, but consultation of the latest edition of the statute book will insure the securing of the provisions in force, which could not be assured in any other way. The construction which the courts have given to the statutes may, however, be helpful, not only in determining what the present law is, but also in understanding the meaning of terms in future statutes; and therefore a short review of the decisions will be attempted. The adoption of plans for the improvement of lands by concerted action under legislative authority for its drainage is of comparatively recent origin, so that the body of case law is somewhat limited, and many of the problems have not yet been solved.

Right of landowner to compel repair.

After a landowner has been assessed, sometimes for a large amount, for the construction of a drainage system on the theory that his property will be benefited by the improvement he is usually deeply interested in having the system maintained in a working condition; and the question arises, What right has he to compel the officials charged with the care of the improvement to perform their duty? The statutes usually contain an express provision upon this subject; but it has been held that a landowner who has been assessed for the construction and repair of a drainage ditch cannot compel the commissioners, by mandamus, to levy an assessment to repair a lateral which has become obstructed so that his land is not drained, where they have no funds on hand to devote to that purpose, and the statute authorizes them, under such circumstances, to petition the court for the making of an assessment; since, the matter being within their discretion, it cannot be controlled by mandamus, unless it shall be made to appear that their refusal is arbitrary and amounts to a fraud, or their motive is to accomplish their own personal or selfish ends. *Bromwell v. Flowers* (Ill.) 75 N. E. 467. The court, however, in that case, because of failure to state the contrary in the petition, assumed that the lateral ditches were in that district kept in repair by the landowners individually benefited thereby, and, assuming that to be true, 68 L. R. A.

155), passed April 15, 1902. Among other claims which are noticed in the opinion, it is alleged that said section conflicts with § 19 of article 1 of our state Constitution. The averments of the petition were met by an answer, and the case was heard in the court of common pleas on the evidence, and that court found for the defendants, the auditor and surveyor. On appeal the case was again heard in the circuit court, where a perpetual injunction was granted on the ground that said § 3 is unconstitutional. Error is prosecuted in this court to obtain a reversal of the judgment of the circuit court.

Messrs. C. R. Hornbeck and T. J. Duncan, for plaintiffs in error:

The assessing of property for the purpose of public improvement, such as the

it would be unjust to compel others to contribute towards the repair of the lateral through the petitioner's land.

A mandamus will not lie to compel a township trustee to remove obstructions from a drain, where the provisions of the statute making it his duty to repair and remove obstructions from ditches or drains theretofore obstructed are unconstitutional and void. *Tyler v. State*, 83 Ind. 563.

A landowner, having the right by law to enter upon the lands of another to remove obstructions inadvertently or negligently placed in a legally established ditch by such owner for temporary purposes which are easily removed, cannot stand by and await the ruin of his crops, and hold the other liable therefor, in the absence of evidence that the obstructions were wilfully placed therein for the purpose of creating obstructions. *Chambers v. Kyle*, 87 Ind. 83.

Action by officials.

The duty of looking after the repair should be, and usually is, imposed by statute upon the officials to whose care the improvement has been committed, either upon their own initiative or upon petition by interested property owners. The repair is usually regarded as a matter of routine duty, and does not require the complicated processes necessary for the original establishment of the ditch.

The law contemplates, in providing the easement of a drain, that it will require that it be kept in repair in order to preserve its usefulness, and does not, in requiring notice to adjoining owners when the ditch is originally opened, demand that notice of its repair or reopening shall be given in the same manner in order to validate assessment for such repair. *Yeomans v. Riddle*, 84 Iowa, 147, 50 N. W. 886.

The propriety of having an existing drain cleaned out does not necessarily need to be determined by commissioners or jurors, unless involving more than cleansing. Where a drain has once been legally made there is a presumption that, if necessary at all, it should be kept in reasonable order. *Barker v. Vernon Twp.* 63 Mich. 516. 30 N. W. 175.

A provision in a drainage law authorizing township trustees to repair and remove obstructions from public ditches is not unconstitutional

constructing or cleaning of ditches, or removing obstructions therefrom, is not repugnant to any provision of the Constitution.

Hill v. Higdon, 5 Ohio St. 243, 67 Am. Dec. 289; *Scovill v. Cleveland*, 1 Ohio St. 126; *Reeves v. Wood County*, 8 Ohio St. 333; *Thompson v. Wood County*, 11 Ohio St. 678; *Chamberlain v. Cleveland*, 34 Ohio St. 551; *Lima v. Lima Cemetery Asso.* 42 Ohio St. 128, 51 Am. Rep. 809.

It is not the province of a court to declare laws unconstitutional because they are unwise.

Cincinnati, W. & Z. R. Co. v. Clinton County, 1 Ohio St. 78; *Black, Constr. & Interpretation of Laws*, p. 93; *Curryer v. Merrill*, 25 Minn. 1, 33 Am. Rep. 450.

Nonresident owners cannot be counted either for or against the improvement.

because it vests in those officials a discretionary authority to determine when repairs are necessary without requiring notice to be given of the intention to order the repairs. *Weaver v. Templin*, 113 Ind. 298, 14 N. E. 600.

A provision in a drainage law authorizing township trustees to repair and remove obstructions from public ditches, and apportion and assess the cost thereof upon the lands which will be benefited according as, in their judgment, such benefits accrue, and requiring notice to be given of the assessment, and permitting any person aggrieved thereby to appeal, is constitutional and valid, although it limits the question to be tried on appeal to the cost of such repairs or removals and what amount thereof should be assessed on each tract of land affected. *Trimble v. McGee*, 112 Ind. 307, 14 N. E. 83; *Wisman v. McGee*, 112 Ind. 600, 14 N. E. 375.

In repairing, reopening, and deepening county drainage ditches the board of supervisors need not take the proceedings required by statute for the original construction of the ditch, where the statute provides a scheme for such repairs without taking such steps. *Yeomans v. Riddle*, 84 Iowa, 147, 50 N. W. 886.

The courts have no power to enjoin a county surveyor from repairing a public ditch by cleaning it out to its full dimensions, where he was served by a landowner interested with the statutory notice to make such repairs, and exercised the discretion committed to him by the law by determining that it was his duty to make such repairs, in the absence of a showing that he proposed to exceed his authority by doing something beyond the mere restoration of the ditch to its original dimensions. *Amoss v. Lassell*, 122 Ind. 36, 23 N. E. 525.

The land of a single owner, through which is constructed a ditch proposed to be cleaned and widened, is "adjacent" thereto within the meaning of a statute requiring, as a condition precedent to the exercising of the power to clean and widen, the filing of a petition by "one or more" persons owning lands adjacent to the ditch to be cleaned. *Kent v. Perkins*, 36 Ohio St. 639.

What is repair?

In order to come within the provisions of the 69 L. R. A.

Burgett v. Norris, 25 Ohio St. 368; *Hays v. Jones*, 27 Ohio St. 218; *Makemson v. Kauffman*, 35 Ohio St. 444; *Corry v. Gaynor*, 22 Ohio St. 584; *Cincinnati, M. & L. Traction Co. v. Felix*, 25 Ohio C. C. 393; *Snell v. Cincinnati Street R. Co.* 60 Ohio St. 256, 54 N. E. 270.

Messrs. Murray & Emery, for defendants in error:

A statute which attempts to give those resident landowners along the line of the ditch the right attempted to be given by § 3, and precludes nonresidents from exercising the same rights; and which also permits a resident landowner to impose the burden, as in this case, of a tax or assessment, amounting to a large sum upon him, —is an unjust and unfair discrimination between persons of the same class.

State v. Gardner, 58 Ohio St. 599, 41

statute authorizing and controlling the repair of ditches, the proceeding must be limited to a maintenance of the ditch in the condition in which the construction proceedings had left it. Repair proceedings cannot be used to complete work which had been left incomplete, nor to enlarge work which was inadequate as originally constructed.

The statutory power given county surveyors to keep ditches "in repair to the full dimension as to width and depth as required in the original specifications" must be confined strictly to keeping ditches in repair to those dimensions, and does not authorize the enlargement thereof beyond the original dimensions. *Fries v. Brier*, 111 Ind. 65, 11 N. E. 958.

A county surveyor has no power, under a statute authorizing him to repair public ditches to the full dimensions as required in the original specifications, to deepen or to construct a ditch wider and deeper than the original ditch was constructed, or to complete an incomplete one, or to correct what he deems to be faults in the original construction; nor can he justify his acts, in an action to set aside the assessment levied therefor, on the ground that part of the original proceeding was void, or collaterally attack that proceeding by proof that those who constructed the original ditch did not dig it as deep as the specifications required. *Homack v. Hobbs* (Ind.) 32 N. E. 307.

The statutory authority of township trustees to repair and remove obstructions from public ditches is limited to a restoration of the ditch as nearly as practicable to its original condition, and does not authorize the construction of a new ditch or the enlargement and improvement of an existing one, except in so far as such repairs or removals necessarily enlarge and improve it; and an assessment levied on land for the cost of such unauthorized work is invalid and unenforceable. *Weaver v. Templin*, 113 Ind. 298, 14 N. E. 600.

Deepening a drainage ditch by dredging for a distance of nearly 20 miles at an expense of nearly \$25,000 is not a repair of the ditch; and it is immaterial that a portion of the deepening is rendered necessary by the fact that the bottom of the open ditch has become filled with mud so as to be above the level of the laterals

L. R. A. 689, 65 Am. St. Rep. 785, 51 N. E. 136; *Palmer v. Tingle*, 55 Ohio St. 423, 45 N. E. 313; *Harmon v. State*, 66 Ohio St. 249, 58 L. R. A. 618, 64 N. E. 117; *State v. Gravett*, 65 Ohio St. 289, 55 L. R. A. 791, 87 Am. St. Rep. 605, 62 N. E. 325; *State ex rel. Schwartz v. Ferris*, 53 Ohio St. 314, 30 L. R. A. 218, 41 N. E. 579; *Hocking Valley Coal Co. v. Rosser*, 53 Ohio St. 12, 29 L. R. A. 386, 53 Am. St. Rep. 622, 41 N. E. 263; *Williams v. Donough*, 65 Ohio St. 499, 56 L. R. A. 766, 63 N. E. 84; *State ex rel. McKell v. Robins*, 71 Ohio St. 273, 73 N. E. 470.

No tax or assessment can be levied, except for a public purpose.

2 Dill. Mun. Corp. § 587; *Blue v. Wentz*, 54 Ohio St. 247, 43 N. E. 493; *Reeves v. Wood County*, 8 Ohio St. 333.

The act contemplates that the person who

which drain into it. *People ex rel. Munsterman v. McDougal*, 205 Ill. 636, 69 N. E. 95.

Under a petition to clean out a ditch, trustees have no power to make an order for a new ditch, or deepen or widen one already constructed. *Deuyer v. Shonert*, 1 Ohio C. C. 73.

An assessment on land for the cost of repairs to a public ditch cannot be sustained for excavating and repairing a ditch on a different line from that designated in the original specifications, where the surveyor had no authority to expend money for other purposes, or for constructing and excavating a ditch in another place from the line upon which it was originally located. *Taylor v. Brown*, 127 Ind. 293, 26 N. E. 822.

There can be no enlargement so as to take additional land without making additional compensation for the property so taken. *Owensboro v. Brocking*, 27 Ky. L. Rep. 1086, 87 S. W. 1036.

But a landowner cannot maintain a collateral suit to be relieved from an assessment for the repair of a public ditch on the ground that the township trustee performing the work exceeded his statutory authority by proceeding, under the guise of repairing, to widen and deepen the ditch beyond its original dimensions, although such a defense might have defeated the assessment,—at least to the extent of the excess of cost created by such unauthorized work,—by appealing from the assessment. *Dunkle v. Heron*, 115 Ind. 470, 18 N. E. 12.

But the fact that the ditch was never fully completed will not prevent a repair of the part that was finished.

The county surveyor, whose duty it is to repair public ditches, has jurisdiction to repair that part of a public ditch completed, although the entire ditch is not yet finished, where the ditch was established under a law not requiring the appointment of an officer to supervise the construction and report its completion, and who retains control thereof until completed. *Artman v. Wynkoop*, 132 Ind. 17, 31 N. E. 468.

A county surveyor who is not authorized to repair a public ditch until "after the construction of such work" will not be enjoined from repairing such a ditch on the ground that the same has never been constructed according

makes the affidavit shall be the only person who makes the finding of the necessity; and the affidavit itself is such a finding. It takes from the proper administrative officers the power to act in local improvements, and confers this power upon a private individual, without appeal or redress to the persons interested.

Harmon v. State, 66 Ohio St. 249, 58 L. R. A. 618, 64 N. E. 117; *State ex rel. Broerman v. Hamilton County*, 54 Ohio St. 333, 43 N. E. 587.

The legislature has not the power to confer upon the auditor the duties imposed by this act.

Page v. Allen, 58 Pa. 338, 98 Am. Dec. 272; *Hulse v. State*, 35 Ohio St. 421; *State ex rel. Broerman v. Hamilton County*, 54 Ohio St. 333, 43 N. E. 587.

to the original plans and specifications, in the absence of an averment that the ditch has never been accepted, where seven years have elapsed since its construction, after which lapse of time it will be presumed that the work was duly accepted as required by law, and that, in making the repairs, the surveyor is acting within his authority. *Bunnell v. Peet*, 123 Ind. 436, 24 N. E. 146.

An assessment on land for the repair of a public ditch by a county surveyor under a statute making it his duty to repair such ditches is not void because the ditch was never completed according to the original specifications, since the propriety of making such repairs is committed by the statute to the discretion of that official, and his decision is final. *Kirkpatrick v. Taylor*, 118 Ind. 329, 21 N. E. 20.

So the fact that the ditch was incidentally enlarged in the process of repair will not render the proceeding void *in toto* so that no assessment can be made for the work; but the assessment will be upheld so far as necessary to meet the cost of legitimate repairs.

An assessment for the repair of a public ditch is not void *in toto* because the county surveyor exceeded his statutory authority by making the ditch larger than the original specifications required, but is void only to the extent of the cost of the unauthorized work. *Romack v. Hobbs*, 13 Ind. App. 138, 41 N. E. 391.

An assessment for cleaning out and widening a drain is not invalid because the contractor employed to do the work in accordance with a diagram of the existing drain widened it beyond its original width. *Angell v. Cortright*, 111 Mich. 223, 69 N. W. 486.

The fact that a county surveyor exceeded his authority to repair a public ditch by enlarging it beyond its original dimensions will not relieve landowners from liability to pay for benefits received by the doing of that part of the work within his jurisdiction. *Scott v. Stringley*, 132 Ind. 378, 31 N. E. 953.

And, under proper proceedings, the ditch may be enlarged.

A citation in a proceeding to widen a ditch need not be in the exact language of the statute, where it contains the substance of its requirement, and the party upon whom it is served is

Price, J., delivered the opinion of the court:

The evidence heard in the circuit court has not been brought into the record by bill of exceptions, and that court made no finding of facts. Consequently we have nothing to review in reference to the evidence admitted on the issues joined by the pleadings. According to the judgment entry, the lower court granted a perpetual injunction against the county auditor and county surveyor on the sole ground that § 3 of an act of the general assembly passed on the 15th day of April, 1902, found in 95 Ohio Laws, p. 155, under which the officers were proceeding, is unconstitutional, and that is the only question for determination here. In this state of the record, we have nothing to do with many averments of the petition and their denial by the answer,

for they present issues of fact which are not before us. Among these are questions as to the fairness of the apportionment of the costs and expenses of cleaning out the ditch, and whether it was for a public purpose, or merely for the private benefit of certain named persons who asked for the improvement.

In taking up the question of constitutional law, a preliminary observation will assist in understanding our subject. The general provisions of our statutes for the location and construction of ditches, drains, and water courses, with some changes and variations, have been in operation for many years. It is declared by the pleadings that the ditch about to be cleaned out by virtue of the proceedings enjoined was established in the year 1886, and that it was constructed during that year. It now deserves the

not misled. *Wolpert v. Newcomb*, 106 Mich. 357, 64 N. W. 326.

One properly served with a citation in a proceeding to widen a ditch cannot raise the objection of a defective service upon others who have released the right of way, and thereby waived all irregularities. *Ibid.*

A township drain constructed as one continuous drain by the joint action of the township commissioners of the two townships constitutes one drain, and but a single proceeding is necessary for widening and deepening it. *Tinsman v. Monroe County Probate Judge*, 82 Mich. 562, 46 N. W. 780.

A landowner who is injured by the widening, deepening, and straightening of a ditch existing upon his property is not entitled to question the validity of the proceedings by writ of certiorari. *Wolpert v. Newcomb*, 106 Mich. 357, 64 N. W. 326.

Who to bear cost of repair.

The legislature may direct payment of the cost of maintaining the ditch out of the public funds, may require each landowner to keep a section of the ditch in repair, or may meet the cost by assessment upon property benefited.

The statutory duty imposed upon township trustees to keep drains and ditches in repair and free from obstructions, and pay for the same out of the general township funds, is not unconstitutional, but is a valid and effectual provision, notwithstanding a further provision in the statute, that, in order to reimburse that fund, he is authorized to apportion and assess the cost thereof upon the lands benefited, has been declared unconstitutional and void because no provision is made for a hearing by the landowners affected. *Ingerman v. Noblesville Twp.* 90 Ind. 393.

That part of an act making it the duty of county surveyors to keep public ditches in repair at public expense, which requires the issuing of warrants upon the county treasurer for the amount of such repairs, is a sufficient appropriation made by law within the meaning of the constitutional provision prohibiting the paying out of money from the county treasury except in pursuance of an appropriation made by law. *State ex rel. French v. Johnson*, 105 Ind. 463, 5 N. E. 553.
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The drains constructed in pursuance of a drainage law are included within a statute making it the duty of certain public officers to see that "all drains that may have been, or may hereafter be, constructed under and by virtue of any law in this state" are kept in repair by landowners to whom portions thereof have been allotted for that purpose, and to repair the same at their expense upon their failure so to do. *Cochran v. White*, 151 Ind. 435, 51 N. E. 723.

A township trustee, whose duty it is to see that public ditches are kept in repair so as to answer their purpose, may require a landowner to take up a tile drain on that portion thereof allotted to him to keep in repair, and relay the tiles so as to be level with the grade line established by the original specifications to correct that fault in the original construction, where the ditch failed to answer its purpose to drain all the land assessed therefor by reason of such fault, although the ditch was accepted as complete according to the specifications. *Ibid.*

Under an award of commissioners under an enclosure act requiring the owners of land over which a drain passed to cleanse and keep it of sufficient width and depth to carry off the water, such owners are not required to keep the drain of sufficient capacity to carry off water afterwards drained into it by the opening of a sewer or other drain. *Sharpe v. Hancock*, 7 Mann. & G. 354, 8 Scott, N. R. 46.

An allotment for the repair of a drainage ditch, made without giving the notice and providing an opportunity for remonstrances as required by statute, is void. *Hille v. Neale*, 32 Ind. App. 341, 69 N. E. 713.

Failure to give personal notice to some landowners of allotments of portions of a public ditch to be kept in repair by them, as required by law, does not invalidate the allotment as to others properly served. *Hendricks County v. Trotter*, 10 Ind. App. 626, 49 N. E. 976.

A failure to give personal notice to landowners of ditch allotments as required by statute, renders the allotments void; and a mere voluntary acquiescence therein for the time being cannot bind the landowners for the future. *Ibid.*; *Hille v. Neale*, 32 Ind. App. 341, 69 N. E. 713.

But the allotment of a portion of a ditch to

name of an old ditch, and, by reason of its location and construction under the laws then and now in operation, it is a public water course. It is expressly so declared by § 4500, Rev. Stat. 1892. In order to procure its original location and construction, it was incumbent upon the petitioners therefor, among other things, to state in their petition, and show at the hearing before the commissioners, that the proposed ditch would be conducive to the public health, convenience, or welfare, and it was necessary for the commissioners to find and record that important fact in order to give them jurisdiction to establish the ditch. Such a finding was essential because the improvement petitioned for contemplated the appropriation of private property, which

could only be done for a public use. We assume the proceedings which resulted in the location and construction of the original ditch were conducted as the law required, and that it was found and recorded by the county commissioners that the ditch, when constructed, would promote the public health, convenience, and welfare. For that public purpose lands could be, and no doubt were, appropriated, for which, under our Constitution, the owners were entitled to compensation and damages; and, if the award of the commissioners was not satisfactory, there was a right of appeal to the probate court, where the landowner could be heard before a constitutional jury as to such compensation and damages and other questions. The statutory provisions fur-

a landowner, to be by him kept in repair, is valid, although no personal notice is given him of the time and place to hear objections thereto, as required by statute, when he voluntarily appears and presents his objections. *Hendricks County v. Trotter*, 19 Ind. App. 626, 49 N. E. 976.

Where an attempted allotment for ditch repairs is void for failure to give the necessary notice, the proper officers may proceed to make a valid one, and need not proceed under the provisions of the statute governing the making of allotments when the first one is found to be inequitable. *Hille v. Neale*, 32 Ind. App. 341, 69 N. E. 713.

The duties imposed by law on county surveyors to reallocate county ditches to the various landowners for repair, and to inspect and accept completed allotments, although requiring the exercise of judgment and discretion, do not impose upon that officer a judicial function within the meaning of the constitutional prohibition against the imposing of judicial functions upon ministerial officers. *Ellis v. Steuben County*, 133 Ind. 91, 54 N. E. 382.

The duty of repairing a ditch is not cast upon the landowner by a provision that he shall keep it open through his land, which means no more than that he shall not fill it up, or allow it to be filled up. *Lille v. Gibson*, 91 Mo. App. 480.

An assessment on land for the cost of repairing the owner's allotment of a public ditch is invalid and unenforceable where no notice by copy of the making of the allotment was served upon the owner as required by law, rendering the allotment without jurisdiction and subject to collateral attack. *Beatty v. Pruden*, 13 Ind. App. 507, 41 N. E. 961.

A landowner failing to repair his share of a public ditch within the time specified in a statutory notice is liable for a tax imposed on account of the repairs being made by the trustee of the ditch, although the trustee agreed that the landowner might complete the repairs after the time limited by the notice had expired. *Davison v. Campbell*, 28 Ind. App. 688, 63 N. E. 779.

The drainage laws of Illinois authorize the drainage commissioners to raise money by assessment upon the lands within drainage districts for use, under the direction of the court, in repairing or maintaining ditches outside as well as inside the district, where such outside drains are necessary for the protection of the

lands, and the ample drainage of the same, within such districts. *Briggs v. Union Drainage Dist. No. 1*, 140 Ill. 53, 29 N. E. 721.

The assessment.

The court cannot make and levy an assessment for annual benefits upon lands in a drainage district, for keeping the improvements therein in repair, where the statute under which the district was organized requires such assessments to be made by a jury, and nowhere authorizes the court to do so without a jury,—especially where such assessment is made without notice to the landowners, and no opportunity is given to them to be heard in the matter. *Robeson v. People*, 161 Ill. 176, 43 N. E. 619.

A township trustee is not estopped from making an assessment on lands benefited by repairs to a public ditch because eighteen months elapsed from the completion of the work to the making of the assessment, in the absence of any statutory provision as to time, where the cost of such repairs has been paid out of the public treasury, and it does not appear that the work was not necessary, or that the trustee acted in bad faith, and the rights of parties have not been changed or those of third parties affected by the delay. *Gelger v. Bradley*, 117 Ind. 120, 19 N. E. 760.

Drainage commissioners of drainage districts organized under the Illinois farm drainage act have the right to use funds on hand to repair work already done, or more fully to protect the lands of the district; but if there are no funds on hand, they must first make a new tax levy before contracting additional indebtedness. They cannot make an assessment to meet a prior indebtedness. *First Nat. Bank v. Union Dist. No. 1*, 82 Ill. App. 626.

The authority of the county clerk to extend the drainage tax is the certificate of the commissioners, and, unless, a valid certificate is on file, he is powerless to extend the tax. And to render the tax valid the certificate of the commissioners requiring its levy must conform to the provisions of the statute, stating for what purposes the tax is to be levied. *People ex rel. Trobaugh v. Glenn*, 207 Ill. 50, 69 N. E. 568. The court says that, under the statute, the taxpayer has the right to be informed for what purposes his property is to be taxed, and that the statute provides that the amount raised for the payment of interest on indebtedness

nished the owner of lands taken for the ditch a ready and convenient remedy for the enforcement of the constitutional guaranties for the protection of his rights. No doubt the landowners who desired to do so availed themselves of all these provisions made in their behalf.

Another observation is likewise pertinent. Our ditch laws are the exercise of police power committed to the general assembly. This was held in *Sessions v. Crunkilton*, 20 Ohio St. 349. The proposition there stated is that the construction of drains by townships in cases where the public health, convenience, and welfare demand it, is within the meaning of "police powers" mentioned in § 7 of article 10 of our state Constitution. The means of promoting and con-

shall be kept separate from the balance of the amount raised.

Rights of landowner.

A statutory provision that notice of the time and place of letting contracts for the work of widening or extending a drain be served upon every person whose lands are affected by such assessment does not require such notice to be given in a proceeding to clean out a drain. *Lanning v. Palmer*, 117 Mich. 529, 76 N. W. 2.

Although notice of some kind is required preparatory to a final assessment of benefits on lands for the repair of a public ditch, it rests with the legislature to determine what it shall be, provided landowners are not thereby subjected to unreasonable inconvenience and embarrassment. *Weaver v. Templin*, 113 Ind. 298, 14 N. E. 600.

A provision in a drainage law authorizing county surveyors to repair public ditches and assess the cost thereof upon the lands adjudged by the court to have been benefited by the original construction in proportion to that assessment is not unconstitutional as the taking of property without due process of law because no notice is required to be given landowners of the intention to make repairs or assessments, where notice of assessment after it is made is provided for, and opportunity is given to appeal therefrom to a court having jurisdiction to determine whether the amount expended was in fact for repairs, and whether the repairs were made in good faith and according to law. *Johnson v. Lewis*, 115 Ind. 400, 18 N. E. 7.

A provision in the drainage law making it the duty of county surveyors to keep ditches in repair, and giving the power to assess the cost upon the lands adjudged benefited in the original proceedings establishing such ditches, is not unconstitutional as depriving such property owners of their property without due process of law, where provision is made for notice to them of the assessment, and for an appeal by any person aggrieved. *Fries v. Brier*, 111 Ind. 65, 11 N. E. 958.

A section in the statute authorizing township trustees to keep the drains in their townships in repair and free from obstructions to determine the necessity for such repairs and removals and the cost thereof, and to apportion and assess such cost upon the lands which, in their judgment, will be benefited thereby 69 L. R. A.

serving the public health and welfare provided by legislation are so provided in the exercise of the police powers existing in the general assembly. And § 3, now involved, prescribes one of the methods of promoting the public health, convenience, and welfare. It reads: "Provided, however, that when a ditch needs to be cleaned out, any resident owner of any tract of land which was assessed for the construction may make a sworn statement to the county auditor, in writing, setting forth such necessity. And when said written sworn statement is made within three years from the original construction, or for material improvement by deepening and widening said ditch, and as often thereafter as may be necessary to keep said ditch in good re-

in the proportion of such benefits, which assessments are a lien upon such land, by *ex parte* proceedings, without giving the owners of the lands affected an opportunity to be heard, and making no provision for appeal,—is unconstitutional and void as repugnant to the provision of the Bill of Rights that every person shall have remedy by due process of law for injury to his person, property, or reputation; also as violating the provision of the Federal Constitution prohibiting the depriving a person of life, liberty, or property without due process of law. *Campbell v. Dwiggins*, 83 Ind. 473.

Estoppel.

Landowners are not estopped to contest the validity of an assessment on their lands for the repair of a noncompleted public ditch by standing silently by with full knowledge, and allowing the work to be done without objection, where the assessment is absolutely void because the officer making the repairs had no jurisdiction of the ditch before its completion and acceptance. *Morrow v. Geeting* (Ind. App.) 37 N. E. 739.

One assessed for the deepening and widening of a ditch which the trustees had no authority to order, under a petition merely for the cleaning out of a ditch, is not estopped to object after the work is done. *Deuyer v. Shonert*, 1 Ohio, C. C. 73.

Irregularities.

One who petitioned for the cleaning out of a drain and acquiesced in the work, cannot avoid payment of the expense on the ground of mere irregularities in the proceedings. *Lanning v. Palmer*, 117 Mich. 529, 76 N. W. 2.

How far court may review and control proceedings.

The limitation of the questions to be tried upon appeal by a landowner from an assessment for the repair of a public ditch by a county surveyor, to a determination of the cost of the repair and what amount thereof should be assessed against the owner's land, does not, in view of the fact that it is only through the medium of such an appeal that aggrieved landowners may make objections to the proceedings prevent the examination, as preliminary and incidental to the trial on its merits, of questions

pair, said county auditor shall forthwith notify the county surveyor to examine the said ditch, who shall go without unnecessary delay, upon the line thereof, and make an estimate of the amount of money required therefor and fix the portion thereof that the owner of said tract of land and each corporation, county, or township assessed for the construction of the ditch, shall be assessed for such cleaning out; and such assessment shall be made according to the benefits; unless the necessity for the cleaning out arose from the act or neglect of some landowner or corporation, in which case such act or neglect shall be considered. Said county surveyor shall return his estimate and assessment to said auditor in writing, who shall appoint a day for hearing the same, and direct said county surveyor to give notice thereof to each owner of land and corporation affected thereby when said auditor may make such changes therein as he may deem right and proper; he shall enter upon a journal to be kept for that purpose the assessment as approved by him, and he shall place such assessment upon the duplicate against the land, upon which they are assessed, to be collected as other taxes; the work of cleaning out the ditch shall be advertised, sold, and let, and the contracts therefor performed, as provided in this chap-

ter; the contractor shall be paid, by warrant of the county auditor upon the county treasurer, out of the assessments so made, and paid upon the certificates of said county surveyor, that he has performed his contract; but if at the presentation of any certificate all the assessments have not been paid, payments shall be made thereon *pro rata*." This section was amended April 22, 1904, by changing the latter part to read as follows: "The contractor shall be paid by warrant of the county auditor upon the county treasurer, out of any funds in the treasury applicable to such purpose. When the whole contract is completed the entire price may be paid in the manner aforesaid." 97 Ohio Laws, p. 262.

Section 3 is one of many comprising an act entitled "An Act to Provide for the Cleaning Out and Keeping in Repair of Public Ditches, Drains, and Water Courses, and to Repeal an Act passed April 13, 1900," and certain other sections. 94 Ohio Laws, p. 142. The purpose of the entire act, as its title indicates, is to regulate cleaning out and keeping in repair the ditches which have been established by county commissioners or township trustees, embracing the removal of obstructions and restoration and repair of flood gates. Surely it is within the police power of the general assembly to

relating to the competency of the surveyor to make the assessment, and kindred questions. *Markley v. Rudy*, 115 Ind. 533, 18 N. E. 50.

Upon appeal by a landowner from an assessment for the repair of a public ditch by the county surveyor, under a statute limiting the questions to be tried on appeal to a determination of the cost of the repairs and what amount thereof should be assessed against the owner's land, it is proper to determine whether his land is subject to any assessment for such repairs; and, hence, the validity of such an assessment cannot be collaterally attacked on the ground that the land was not subject, under the statute, to any assessment. *Kirkpatrick v. Taylor*, 118 Ind. 329, 21 N. E. 20.

The question whether a county surveyor, acting within the scope of his authority in repairing a public ditch, adopted the best or cheapest plan for its performance, is not open to inquiry on appeal from an assessment made by him for the cost thereof; and, in the absence of statutory provision requiring him to advertise for bids, he may hire the work done by the day, if no fraud or collusion intervenes. *Scott v. Stringley*, 132 Ind. 378, 31 N. E. 953.

That provision in an act requiring county supervisors to keep public ditches in repair at public expense, and for an assessment on the lands affected in proportion to the original assessment thereon for the construction of the ditch, to reimburse the county treasury, which limits the questions to be tried upon appeal by an aggrieved landowner to a determination of the cost of the repairs and what amount of such cost should be assessed against such owners' land, is not in derogation of the constitutional rights of such owner to have his day in court. 69 L. R. A.

State ex rel. French v. Johnson, 105 Ind. 463, 5 N. E. 553.

The statement of the commissioners, in the certificate of levy, that a tax is for the purpose of repairing the drainage ditches, is not conclusive; but the courts may determine the question from the facts. *People ex rel. Munsterman v. McDougal*, 205 Ill. 636, 69 N. E. 95.

Equity will relieve a landowner from the payment of an assessment for the repair of a public ditch on the ground that the officer whose duty it was to make such repairs had exceeded his authority by enlarging the ditch beyond its original dimensions, and that the proceedings establishing a connecting ditch, which furnished an outlet for the repaired ditch, had been declared void, rendering the repaired ditch valueless and the repairs of no benefit, where such landowner had no knowledge, and was not charged by law with knowledge, of the worthlessness until after the expiration of the time to appeal from the assessment. *Millikan v. Wall*, 133 Ind. 51, 32 N. E. 828.

The court will not restrain the collection of an assessment on land for the repair of a ditch upon a ground for which adequate remedy is provided by appeal from the assessment. *Goff v. McGee*, 128 Ind. 394, 27 N. E. 754.

An injunction will not lie to restrain the collection of an assessment against a railroad right of way for the cost of repairing a public ditch by a county surveyor, who is invested with the statutory power to repair public ditches and to assess the cost thereof against the lands originally assessed for its construction, and from whose assessment the right of appeal is given, unless it is affirmatively shown that the acts of the surveyor are not merely errone-

designate certain officers of a county or township who may, in a prescribed mode, upon application and due notice to parties interested, restore our public drains and water courses to their original condition. Judicial authority is not essential, for all parties in interest were duly heard before the tribunal appointed by law when the original construction was ordered.

The petition charges that the section quoted violates § 19 of article 1 of the state Constitution, which, in part, reads: "Private property shall ever be held inviolate, but subservient to the public welfare, . . . and in all other cases where private property shall be taken for public use a compensation therefor shall first be made in money, or first secured by a deposit of money; and such compensation shall be assessed by a jury without deduction for benefits to any property of the owner." We are unable to see how the statute assailed conflicts with this fundamental law. The property occupied by the ditch was taken by its original construction when the parties along its line whose lands were taken had ample opportunity to obtain compensation; and if they applied for the same we must assume their applications were considered, and proper awards made. But the proceeding to clean out the original channel

under § 3 does not seek or attempt to appropriate any lands of the defendants in error. Its sole purpose is to restore the water course to its former condition of usefulness. There is nothing for which the landowners are entitled to any compensation, for they part with nothing. The petition also alleges that the section is unconstitutional, "for the reason that no discretion is given to any officer, board, or tribunal to determine or decide whether the improvement . . . is for the public health, convenience, and welfare, but makes the duties to be performed under said act mandatory upon said auditor and surveyor." Again we think the section is misconstrued. When the ditch was established originally, it was alleged by the petition and determined by the commissioners that the ditch was necessary and its construction would be conducive to the public health, convenience, and welfare. We say this because the law required the petition to so allege and the commissioners to so find before the ditch could be legally established. The questions settled by the original proceedings imply that to subserve the public good the ditch should remain open and free from obstruction. Hence, the questions concerning the public health, convenience, and welfare have been once settled, and need not be reasserted in the new proceeding.

ous, but absolutely void and without any authority. *Terre Haute & L. R. Co. v. Solce*, 128 Ind. 105, 27 N. E. 429.

A railroad company cannot enjoin the collection of an assessment upon its right of way for the cost of repairing a public ditch upon the ground that the ditch, as originally established and constructed, was not rightfully located upon its right of way, and that no right existed to go upon such land for the purpose of making repairs: as that question cannot be brought up in a collateral attack,—especially where the company acquiesced in the location and construction of the ditch on its right of way. *Davis v. Lake Shore & M. S. R. Co.* 114 Ind. 364, 16 N. E. 639.

Liability for nonrepair.

The owner of land across which a drain passes onto adjoining land is liable if, by reason of the poor repair of the portion of the drain which crosses his premises, any of the sewage escapes and flows onto the adjoining land, even though he did not know of the existence of the drain; it being his duty to keep the sewage which he was himself bound to receive from passing from his own premises to the adjoining premises otherwise than through the drain. *Humphries v. Cousins*, L. R. 2 C. P. Div. 239.

The occupier, and not the owner, of premises is *prima facie* liable for injuries to adjoining lands arising from a failure to cleanse and repair drains and sewers located on the premises. *Russell v. Shenton*, 3 Q. B. 449.

A covenantor for the use of a public drainage canal cannot escape from his obligations thereunder, because of the omission of the other

parties to repair the lower portion thereof; since his covenant points out the remedy for such misuser of their franchise. *Norfleet v. Cromwell*, 70 N. C. 634, 16 Am. Rep. 787.

One who contracts to construct part of a box drain which, after crossing the lands of his neighbor, enters his premises, is liable for damages arising from his failure to open an outlet below the drain to carry off the water, whereby work upon the drain is prevented. *Britten v. Dunning*, 55 Mich. 158, 20 N. W. 883.

Certification of cost.

The power conferred on county surveyors by a statute making it their duty to keep public ditches in repair, to certify the cost of such repairs as well as the amount of their own *per diem* to the county auditor, is not judicial, but merely a discretionary power, and such as the legislature has the power to confer upon administrative and ministerial officers. *State ex rel. French v. Johnson*, 105 Ind. 463, 5 N. E. 553.

Repeal of law.

A right to enforce the collection of the costs of repairs of a public ditch against lands, under the law existing at the time a contract therefor was entered into and part of the work done, is not lost by a repeal of that law, by virtue of a general law providing that repealed laws shall remain in force for the purpose of sustaining actions to enforce liabilities incurred thereunder, and also by the constitutional provision forbidding the passage of any law impairing the obligation of contracts. *Crawford v. Hedrick*, 9 Ind. App. 356, 36 N. E. 771.

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The petition also complains that, if the assessments made by the auditor become liens on the lands, and are enforced, the landowners will be deprived of their property without due process of law. While it is not cited by counsel or by the circuit court, we presume that § 16 of article 1 of our Bill of Rights was in contemplation when the proposition was made. It provides that "all courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law; and justice administered without denial or delay." Section 3 of the act involved provides that when the sworn statement of the resident landowner is filed with the auditor he shall notify the county surveyor to examine the ditch, and for that purpose to go upon its line, and make an estimate of the amount of money required for the cleaning out, and fix the portion that each landowner who was assessed for the original construction of the ditch should be assessed for the improvement, which new assessment must be made according to the benefits. The surveyor must return the result of his examination and his estimate to the auditor, who shall appoint a day for the hearing of the report, of which due notice shall be given. The auditor is authorized on the hearing to make such changes in the assessment as he deems just, and, when corrected and confirmed, the assessment is placed on the duplicate. The work shall be advertised and publicly let. Notwithstanding the assertion of the defendants in error, we think the surveyor, if he finds upon his examination that the ditch does not need cleaning out, is authorized and would be expected to so report to the auditor, and that his judgment is not so fettered as counsel imagine that he must report in favor of an assessment. If on the hearing before the auditor the latter should find that cleaning out is not necessary, he may so declare, and act accordingly by refusing to place any assessment upon the property along the ditch. The statute is not so one-sided as counsel contend when it is fairly construed with relation to the subject-matter. The petition for the injunction alleges that on the day of hearing "said auditor heard all proof offered by the parties affected by the proposed cleaning out of said ditch, and found that the same [the assessments] were in all respects fair and just according to the benefits." We are of opinion that the legislature can constitutionally confer upon the surveyor and auditor the powers prescribed in § 3, and, according to many authorities, the exercise of such powers in accordance with the act is due process of law. However, the hearing and findings by 69 L. R. A.

the auditor are not conclusive upon the interested parties. It is true there is no provision in the section for appeal or prosecuting error, and, if the rights of the parties are concluded by the findings of the auditor, the property of defendants in error might be taken without due course or due process of law. But they are not so concluded. For cases arising under the general ditch laws we have § 4491, Rev. Stat. 1892, but it may not cover the special proceedings before us. But § 5848, Rev. Stat. 1892, which is a part of our Code of Civil Procedure, does apply, and furnishes an ample remedy to vindicate any right the landowner may have to urge against the assessment. This section provides: "Courts of common pleas and superior courts shall have jurisdiction to enjoin the illegal levy of taxes and assessments, or the collection of either, and of actions to recover back such taxes or assessments as have been collected, without regard to the amount thereof." This section furnishes due course or due process of law. Under its provisions the courts of the state are open for the redress of any wrongs that may be done by taxation or assessments. The defendants in error have availed themselves of this remedy in the very case before us.

In *Alder v. Whitbeck*, 44 Ohio St. 571, 9 N. E. 680, Minshall, J., after discussing authorities and the section of the Constitution we are considering, and also the 14th Amendment of the Federal Constitution, says: "By these decisions such laws may be in harmony with that amendment [the 14th], though they do not provide for giving a party an opportunity to be present when the tax is assessed against him, and to be there heard, if they give him the right to be heard afterward in a suit to enjoin the collection, in which both the validity of the tax and the amount of it may be contested; and it is immaterial to this question that the party to the suit is required, as in other injunction cases, to give security when instituting the suit." The learned judge cites *McMillen v. Andreison*, 95 U. S. 37, 24 L. ed. 335; *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663; *Davidson v. New Orleans*, 96 U. S. 97, 24 L. ed. 616. To these we add *Kilbourn v. Thompson*, 103 U. S. 182, 26 L. ed. 384; *Kelly v. Pittsburgh*, 104 U. S. 79, 26 L. ed. 659. We cite *State ex rel. Poe v. Jones*, 51 Ohio St. 492-513, 37 N. E. 945. The latter case discusses and decides that § 5848 provides due course of law in cases of taxation and assessment.

In *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663, it appears that the legislature of California passed an act establishing a general system for reclaiming swamps

and overflowed, salt marsh, and tide lands in the state. The facts are fully stated in the opinion of the above case, and we do not repeat them here. Hagar, whose lands were about to be sold to pay his assessment for the drainage, contended that his property was being taken without due process of law, inasmuch as the assessment was made without opportunity to him to be heard respecting it: that it was made without notice to him; and that the reclaiming statute contained no provision for such notice or hearing, and it was therefore invalid. He claimed that notice and opportunity to be heard were essential to render any proceeding "due process of law," which may lead to the deprivation of life, liberty, or property. The opinion by Justice Field contains an able discussion of what constitutes "due process of law." On page 710, 111 U. S., page 572, 28 L. ed., page 668, 4 Sup. Ct. Rep., referring to the provision of the California statute for fixing the value of the lands by assessors appointed, in order to ascertain a just basis for assessment, the learned justice says: "The officers, in estimating the value, act judicially; and in most states provision is made for the correction of errors committed by them through boards of revision or equalization, sitting at designated periods provided by law to hear complaints respecting the justice of the assessments. The law in prescribing the time when such complaints will be heard gives all the notice required; and the proceeding by which the valuation is determined, though it may be followed, if the tax be not paid, by a sale of the delinquent's property is due process of law. In some states, instead of a board of revision or equalization, the assessment may be revised by proceedings in the courts, and be there corrected if erroneous, or set aside if invalid; or objections to the validity or amount of the assessment may be taken when the attempt is made to enforce it. In such cases all the opportunity is given to the taxpayer to be heard respecting the assessment which can be deemed essential to render the proceedings due process of law. In *Davidson v. New Orleans*, 96 U. S. 97, 24 L. ed. 616, this court decided this precise point." The entire opinion of Justice Field is valuable, and decisive of the question before us. Therefore we safely conclude that § 3 does not jeopardize the property rights of the landowners, and deprive them of due process of law. The section is intended as a summary method of restoring water courses, and the agents to accomplish it are certain county officers, whose functions are administrative in character, as is the case in very many other provisions for the assessment of property.

The judgment entry of the circuit court
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shows that § 3 was held to be unconstitutional, but it fails to point out the part of that instrument with which it is in conflict. Counsel for defendants in error attach to their brief a copy of the opinion rendered in the case which they say is reported in Ohio Law Bulletin of May 15, 1905 (*Crawford v. Taylor*, 27 Ohio C. C. 245). That court holds that § 3 is "unconstitutional because it unjustly discriminates between different applicants for such improvement with respect to costs." And near the close of the opinion it is said, in comparing § 3 with § 2 of the act, "This would appear to be unequal legislation, an unjust discrimination against the fair-minded citizen, and violative of the Bill of Rights." This attack on the law is very general, and therefore very indefinite. But a word about the comparison of the two sections is proper in this connection. Section 2 (p. 154) allows anyone who was assessed for the original construction of the ditch to apply to the commissioners for its cleaning out, and he is required to give bond for the payment of costs if the application is not granted. Section 3 authorizes any resident owner of land which was assessed for the construction of the ditch to make the sworn statement to the auditor of the necessity of the cleaning out, and he is not required to give bond. In comparison, why not say § 2 is invalid because it requires a bond while § 3 requires none? We presume that it is competent for the legislature to require such bonds in all cases, or not require them in any case. It may provide for bonds in certain proceedings and not require them in others. We know of no constitutional regulation or prohibition on the subject. It is altogether a matter of legislative discretion, and not a matter of constitutional law. To proceed under § 3 is a simple and less expensive method. Sections 1 and 19 of the same act provide for like summary action. Section 1 provides for the removal of obstructions, and § 19 (p. 161), for the repair and restoration of flood gates. In a proceeding to remove obstructions under § 1, no bond is required, while a proceeding under § 19 requires the giving of a bond. Both proceedings are of a summary nature, and the law is not invalid because a bond is required in one and not in the other.

It is also urged against the law that it discriminates as between resident and non-resident landowners. Under § 3 the resident landowner only is authorized to make the sworn statement, while under § 2 and other sections of the general ditch law landowners, without regard to residence, may petition for the improvement. This distinction is considered by the circuit court as another unconstitutional discrimination.

If this view is sound, it unsettles many old statutes of this state, many of which have been in operation for more than half a century, and which have at one time or another been before the courts for construction and judgment. For more than half a century county roads have been established on petition of freeholders resident of the vicinity of the proposed road. County line roads have been established on the petition of the inhabitants along the line. Roads have been vacated on the petition of twelve freeholders residing in that part of the county. The law requires the petitions to be so signed. Petitions for free turnpikes and roads under the one-mile assessment act must be signed by resident freeholders, and remonstrances against the latter must be signed by the same class. It is useless to cite other statutes for public improvements that contain like discrimination in favor of residents of the state. It is not invidious in the eyes of the Constitution to classify owners of property into residents and non-residents. The policy of the legislature that first cares for our own citizens is not vicious, and, if it accords to residents of Ohio rights and privileges not conferred upon residents of another state, the general assembly is simply performing a duty peculiarly within its authority. We therefore have divorce laws requiring the applicant for divorce to be a bona fide resident of Ohio one year next before filing his or her petition. If a suitor is a nonresident, he may be required to give security for costs; and if one who has been a resident removes from the county or state while his action is pending he may be required to give security for costs. So with regard to our exemption laws. They are for the benefit of a certain class of our own citizens, and for the purpose of exemptions our own citizens are classified. The list of illustrations might be extended if necessary. One more will be sufficient. It is found in our attachment laws. Nonresidence of the state is made a ground for attachment, and that, too, without bond, while bond is required if the writ is asked on other grounds. The discrimination against nonresidents by such legislation was the subject of judicial determination in *Central Loan & T. Co. v. Campbell Commission Co.* 173 U. S. 84, 43 L. ed. 623, 19 Sup. Ct. Rep. 346. The fifth section of the syllabus reads: "That the territorial statute [Oklahoma] authorizing the issue of a writ of attachment against the property of a nonresident defendant is not repugnant to the 14th Amendment to the Constitution."

The language of Justice White, rendering the opinion, so well meets every contention made in this branch of our case, 69 L. R. A.

that we freely quote from it as follows: "The only remaining contention to be considered is the claim that the territorial statute authorizing the issue of an attachment against the property of a nonresident defendant in the case of an alleged fraudulent disposition of property is repugnant to the 14th Amendment to the Constitution of the United States, and in conflict with the civil rights act. The law of the territory, it is said, in case of an attachment, for the cause stated, against a resident of the territory, requires the giving of a bond by the plaintiff in attachment as a condition for the issue of the writ, whilst it has been construed to make no such requirement in the case of an attachment against a nonresident. This, it is argued, is a discrimination against a nonresident, does not afford due process of law, and denies the equal protection of the laws. The elementary doctrine is not denied that, for the purposes of the remedy by attachment, the legislative authority of a state or territory may classify residents in one class and non-residents in another; but it is insisted that, where nonresidents' are not capable of separate identification from residents by any facts or circumstances other than that they are nonresidents,—that is, when the fact of nonresidence is their only distinguishing feature,—the laws of a state or territory cannot treat them to their prejudice upon that fact as a basis of classification.' When the exception thus stated is put in juxtaposition with the concession that there is such a difference between the residents of a state or territory and nonresidents as to justify their being placed into distinct classes for the purpose of the process of attachment, it becomes at once clear that the exception to the rule which the argument attempts to make is but a denial, by indirection, of the legislative power to classify which it is avowed the exception does not question. The argument, in substance, is that, where a bond is required as a prerequisite to the issue of an attachment against a resident, an unlawful discrimination is produced by permitting process of attachment against a nonresident without giving a like bond. But the difference between exacting a bond in the one case and not in the other is nothing like as great as that which arises from allowing processes of attachment against a nonresident and not permitting such process against a resident in any case. That the distinction between a resident and a nonresident is so broad as to authorize a classification in accordance with the suggestion just made is conceded, and, if it were not, is obvious. The reasoning, then, is that, although the difference between the

two classes is adequate to support the allowance of the remedy in one case and its absolute denial in the other, yet, that the distinction between the two is not wide enough to justify allowing the remedy in both cases, but accompanying it in one instance by a more onerous prerequisite than is exacted in the other. The power, however, to grant in the one and deny in the other of necessity embraces the right, if it be allowed in both, to impose upon the one a condition not required in the other, for the lesser is necessarily contained in the greater power. The misconception consists in conceding, on the one hand, the power to classify residents and nonresidents for the purpose of the writ of attachment, and then from this concession to argue that the power does not exist, unless there be

something in the cause of action for which the attachment is allowed to be issued which justifies the classification. As, however, the classification depends upon residence and nonresidence, and not upon the cause of action, the attempted distinction is without merit." It seems that the court was unanimous in the above opinion, and it deserves both our respect and confidence. The statute in question may be unwise and ill-designed, but its amendment or repeal is for the lawmaking power, and not for the courts.

The judgment of the Circuit Court is reversed, injunction dissolved, and the petition, with its amendments, is dismissed.

Davis, Ch. J., and Crew and Summers, JJ., concur.

MASSACHUSETTS SUPREME JUDICIAL COURT.

COMMONWEALTH of Massachusetts
v.

BOSTON ADVERTISING COMPANY.

(188 Mass. 348.)

Forbidding the use of land near a park or park way for advertising purposes amounts to a taking of it for public use, for which compensation must be made.

(June 20, 1905.)

REPORT by the Superior Court for Suffolk County for the opinion of the Supreme Judicial Court after verdict in plaintiff's favor in a proceeding against defendant for violation of the rules and regulations of the park commission against the maintenance of advertising signs. *Judgment for defendant.*

The facts are stated in the opinion.

Mr. Joseph H. Soliday, for defendant:

Depriving an owner of property of any profitable use of that property is a "taking" or "appropriation," and clearly within the constitutional prohibition.

Old Colony & F. River R. Co. v. Plymouth County, 14 Gray, 155; *Edwards v. Bruorton*, 184 Mass. 529, 69 N. E. 328;

NOTE.—For a case in this series holding that the restriction of the height of buildings adjacent to a park, when made for the benefit of the public by promoting the beauty and attractiveness of the park, justifies the expenditure of public money to pay compensation for property rights thereby injured, see *Knowlton v. Williams*, 47 L. R. A. 314.

As to validity of regulation of use of bill-
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Forster v. Scott, 136 N. Y. 583, 18 L. R. A. 543, 32 N. E. 976; *Atty. Gen. v. Williams (Knowlton v. Williams)* 174 Mass. 476, 47 L. R. A. 314, 55 N. E. 77; *People v. Green*, 85 App. Div. 400, 83 N. Y. Supp. 460; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; *People ex rel. Manhattan Sav. Inst. v. Otis*, 90 N. Y. 48; *Sawyer v. Davis*, 136 Mass. 239, 49 Am. Rep. 27; *Train v. Boston Disinfecting Co.* 144 Mass. 523, 59 Am. Rep. 113, 11 N. E. 929.

Mr. M. J. Sughrue, for the Commonwealth:

Penal statutes, though to be construed strictly as a general rule, yet are to receive such a construction as will conform to the intention of the legislature.

Com. v. Loring, 8 Pick. 370.

The plain intent of the act in question is to prevent or control the intrusion of obnoxious signs upon the sight of the public engaged in the enjoyment of the natural beauties of a park. It is a question of law for the court whether any given sign is "near" within the meaning of the statute.

Fall River Iron Works Co. v. Old Colony & F. River R. Co. 5 Allen, 221; *Boston & P. R. Corp. v. Midland R. Co.* 1 Gray, 340.

Under the power to regulate, the require-

boards for advertising purposes, see, in this series, *Crawford v. Topeka*, 20 L. R. A. 692, and *Chicago v. Gunning System*, 70 L. R. A. —

As to forbidding circulation of advertising matter in streets, see *People v. Armstrong*, 2 L. R. A. 721.

As to prohibiting casting of circulars, hand bills, etc., into vestibules of dwellings, see *Philadelphia v. Brabender*, 58 L. R. A. 220.

ment to obtain a permit or license is free from legal objections.

Com. v. Plaisted, 148 Mass. 375, 2 L. R. A. 142, 12 Am. St. Rep. 566, 19 N. E. 224; *Com. v. Ellis*, 158 Mass. 555, 33 N. E. 651; *Re Vandine*, 6 Pick. 187, 17 Am. Dec. 351; *Re Nightingale*, 11 Pick. 168.

The rule regulates the use of the property, which is a proper exercise of police power.

Com. v. Roberts, 155 Mass. 231, 16 L. R. A. 400, 26 N. E. 522; *Rideout v. Knox*, 148 Mass. 368, 2 L. R. A. 81, 12 Am. St. Rep. 560, 19 N. E. 390.

Public parks are created and maintained at great public expense to contribute to the health and pleasure of the community; and any rule reasonably tending to promote public health, or to beautify public grounds, is a reasonable exercise of the power delegated to a board of park commissioners.

Rochester v. West, 164 N. Y. 510, 53 L. R. A. 548, 79 Am. St. Rep. 659, 58 N. E. 673; *Com. v. McCafferty*, 145 Mass. 384, 14 N. E. 451; *Re Wilshire*, 103 Fed. 620; *Gunning System v. Buffalo*, 75 App. Div. 31, 77 N. Y. Supp. 987.

Any use of private property which materially interferes with the public comfort, except in those cases where the reasonable requirements of the owner afford him justification or excuse, is a nuisance.

Davis v. Sawyer, 133 Mass. 289, 43 Am. Rep. 519; *Com. v. Harris*, 101 Mass. 29; *Com. v. Perry*, 139 Mass. 198, 29 N. E. 656.

An advertisement upon private land anywhere may be a public nuisance.

The legislature may very appropriately recognize and deal with the effect upon people in general of unrestrained scenic advertising, and take measures for its proper repression.

Train v. Boston Disinfecting Co. 144 Mass. 523, 59 Am. Rep. 113, 11 N. E. 929; *Langmaid v. Reed*, 159 Mass. 400, 34 N. E. 593; *Newton v. Joyce*, 166 Mass. 83, 55 Am. St. Rep. 385, 44 N. E. 116.

Persons whose property is affected by such restrictions have no right to compensation, because one of the incidents to property is a condition that it shall not be so used as unreasonably to impair the interest of the community.

Com. v. Gilbert, 160 Mass. 157, 22 L. R. A. 439, 35 N. E. 454; *Ex parte Casinello*, 62 Cal. 538; *Re Flaherty*, 105 Cal. 558, 27 L. R. A. 529, 38 Pac. 981; *Moses v. United States*, 16 App. D. C. 428, 50 L. R. A. 532; *Com. v. Parks*, 155 Mass. 531, 30 N. E. 174; *Com. v. Colton*, 8 Gray, 488.

There is no vested right in individuals to be exempt from police regulations.

Re Wilshire, 103 Fed. 620; *Rochester v. West*, 164 N. Y. 510, 53 L. R. A. 548, 79 69 L. R. A.

Am. St. Rep. 659, 58 N. E. 673; *Gunning System v. Buffalo*, 75 App. Div. 31, 77 N. Y. Supp. 987; *Atty. Gen. v. Williams (Knowlton v. Williams)* 174 Mass. 476, 47 L. R. A. 314, 55 N. E. 77.

The legislature may delegate to board power to make rules, and provide that they may be enforced by suitable penalties.

Broadbent v. Revere, 182 Mass. 598, 66 N. E. 607; *Opinion of Justices*, 138 Mass. 601.

A person who has a contract for advertising, which this enactment makes illegal, has no more sacred right to be immune from such regulations than the one who owns the property upon which the contract was to be performed.

Salem v. Maynes, 123 Mass. 372; *Hughes v. Wamsutta Mills*, 11 Allen, 201; *Com. v. Overby*, 80 Ky. 208, 44 Am. Rep. 471; *Baily v. De Crespigny*, L. R. 4 Q. B. 180.

Barker, J., delivered the opinion of the court:

The complaint upon which the defendant was found guilty was for a violation of the rules and regulations made by the metropolitan park commission under Stat. 1903, chap. 158, p. 121. The act charged was maintaining a business sign on land near enough to the Revere Beach Park Way to render the words of the sign plainly visible to the naked eye of persons in the park way. It appears that the sign was an advertisement of a household utensil. The signboard was 40 feet in width and 7½ feet high with black letters on an orange ground. The capital letters were 3 feet 3½ inches high and 2 feet 10 inches wide. It is not contended that the sign was indecent or immoral, or of a nature to frighten man or beast, or in any way to cause bodily injury by falling or being blown against persons or vehicles using the way. The defendant is in the advertising business. It had purchased from the owner of the land the right to maintain the sign until October 1, 1905, and had been paid to keep up the advertisement until December 30, 1904. Its contract with the owner of the land began on October 29, 1903, and its contract to maintain the sign was made in September, 1903. The park way was established in 1899. The rule or regulation charged to have been broken by maintaining the sign was established on August 20, 1903. The same sign had been in the same location before the establishment of the park way, and ever since. The rule or regulation forbids the erection, maintaining, or display upon any land or the outside of any building of any commercial or business sign, poster, or advertisement within such distance of any public park or park way in care of the commission

as shall render the words, figures, or devices of the sign, poster, or advertisement plainly visible to the naked eye within the park or park way, without the written permission of the commission; save that the rule is not to be construed to prevent the owner or occupant of land, building, or tenement from displaying or maintaining thereon one sign or advertisement for business or commercial purposes, in size not larger than 15 inches by 20 feet, and relating exclusively to the property on which it may be placed, or to the business thereon conducted, or to the person conducting the same. The statute provides that the commission, and also the officers having charge of public parks and park ways, "may make such reasonable rules and regulations respecting the display of signs, posters, or advertisements in or near to and visible from public parks and park ways intrusted to their care, as they may deem necessary for preserving the objects for which such parks and park ways are established and maintained." Stat. 1903, chap. 158, § 1, p. 121. The counsel for the prosecution asserts that public parks and park ways are created and maintained to contribute to the health and pleasure of the community. It has been said that they "are established for the use and enjoyment of the people while seeking pleasure and recreation as well as at other times." No doubt the principal and controlling object for which public parks and park ways are established is that of pleasure. They are distinctively and chiefly pleasure grounds. So far as they incidentally serve to promote health by affording the means of being in the open air and the sunlight, or of taking healthful exercise, the presence or absence of signs upon the neighboring lands is immaterial. We think, therefore, that the well-being of the ordinary person who uses a public park or park way can never be so far affected by the visibility of signs, posters, or advertisements placed on other ground as to injure his health. No doubt their presence there may hide from him fine views, or may turn into a disagreeable ensemble what otherwise would be a pleasing outlook, or the sign or poster or advertisement may be itself ugly, or, if not so, may be displeasing because of incongruity. At most, the presence of signs, posters, and advertisements upon lands or buildings near a public park or park way is an offense against good taste, and in that way alone detracts from the pleasure only of the frequenters of such places. We agree that the promotion of the pleasure of the people is a public purpose, for which public money may be used and taxes laid, even if the pleasure is secured merely by delighting one of the senses. *Higginson v. Nahant*, 11 60 L. R. A.

Allen, 530; *Hubbard v. Taunton*, 140 Mass. 467, 5 N. E. 157; *Atty. Gen. v. Williams (Knourlton v. Williams)* 174 Mass. 470, 479, 480, 47 L. R. A. 314, 55 N. E. 77. The question here is not of the power of the state to expend money, or to lay taxes to promote esthetic ends, or to regulate the use of property with a view to promote such ends. It is of the right of the state by such regulations to deprive the owner of property of a natural use of that property without giving compensation for the resulting loss to the owner. Probably no one would care at present to deny that without compensation "the possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order, and morals of the community." *Field, J., in Crowley v. Christensen*, 137 U. S. 86, 89, 34 L. ed. 620, 622, 11 Sup. Ct. Rep. 13. Beyond the purposes named, there are many others of a public nature, the promotion of which may involve the taking or damaging of the property of individuals, and as to which there well may be differences of opinion as to whether the state must afford compensation if such loss or damage is inflicted. One of them is the education of youth. Probably all will agree that, judged by any fair standard, the promotion of education stands upon a higher plane than the promotion of esthetic culture or enjoyment, and would the better justify the imposition of a burden without compensation. But no one would contend that the state could authorize the taking of land for a schoolhouse without providing compensation for the owner. In a very recent case this court, in dealing with a statute requiring street railway companies to transport school children at reduced rates of fare, has held that, if it appeared that the enforcement of the act would cause expense which the carrier must bear or put upon other patrons, we should be obliged to hold that there was a taking of property without due process of law. *Com. v. Interstate Consol. Street R. Co.* 187 Mass. 436, 73 N. E. 530. If the police power, technically so called, will not justify a taking of property without compensation to promote the education of youth, it cannot justify such a taking for the promotion of merely esthetic purposes. Therefore, if the rules of the commission amount to a taking of property, as no compensation is provided, they cannot be held valid. The plain and intended purpose of the rule is to prohibit the use of land near public parks and park ways for advertising. This has come to be an ordinary and remunerative use of lands near largely traveled streets, park ways, public

parks, railroads, and other places frequented in numbers by the public. It is as natural a use of such lands as is the use of store fronts and show windows for the display of goods kept for sale, or for other modes of advertising. It resembles the placing of advertising pages on each side of the literary portion of a periodical, or the placing in street cars or railway stations of advertisements disconnected with the business of transportation. All these at present are usual, common, and profitable uses of property of which everyone sees daily numerous instances. In the opinion of a majority of the court the rules or regulations established by the commission so interfere with the use of property as to amount to a taking of property for public use, and, as no compensation is provided for, the rules are void, because obnoxious to the provisions of our Constitution. Declaration of Rights, art. 10. They are not reasonable within the meaning of Stat. 1903, chap. 158, § 1, p. 121. We do not hold that no valid rules as to signs, posters, or advertisements on land near to public parks or park ways can be made under Stat. 1903, chap. 158, p. 121. Rules intended to prohibit advertisements of indecent or immoral tendencies, or signs dangerous to the physical safety of the public, no doubt would be reasonable within the meaning of the statute, and valid. We think the case of *Rochester v. West*, 164 N. Y. 510, 53 L. R. A. 548, 79 Am. St. Rep. 659, 58 N. E. 673, was decided, and can rest only on this ground. See *Gunning System v. Buffalo*, 75 App. Div. 31, 77 N. Y. Supp. 987; *People v. Green*, 85 App. Div. 400, 83 N. Y. Supp. 460.

Verdict set aside. Judgment to be entered for the defendant.

Hannah A. WADE, Appt.,

v.

Katherine MILLER.

(188 Mass. 6.)

The characteristic noises and odors

NOTE.—For a case in this series holding that the noise made by hogs kept for the purpose of slaughter is not such a nuisance as to justify the destruction of a slaughter-house business, see *Baillentine v. Webb*, 13 L. R. A. 321.

As to right to damages or injunction because of discomfort caused by noises generally, see *Gainesville, H. & W. R. Co. v. Hall*, 9 L. R. A. 298; *Wylie v. Elwood*, 9 L. R. A. 726; *Powell v. Bentley & G. Furniture Co.* 12 L. R. A. 53, and *note*; *Jones v. Erie & W. Valley R. Co.* 17 L. R. A. 758; *Austin v. Augusta Terminal R. Co.* 47 L. R. A. 755; *Chicago G. W. R. Co. v. First M. E. Church*, 50 L. R. A. 488; *Hill v. 60 L. R. A.*

issuing from a chicken house and yard which are maintained in a cleanly manner and cared for so as not injuriously to affect the health of any normal person in the neighborhood are not a nuisance, although they may make neighboring property uncomfortable as a residence for invalids.

(April 4, 1905.)

A PPEAL by plaintiff from a judgment of the Superior Court for Plymouth County in favor of the defendant in an action brought to enjoin the maintenance of an alleged nuisance. *Affirmed.*

The facts are stated in the opinion.

Mr. Daniel T. Devoll for appellant.

Mr. C. A. McLellan for appellee.

Braley, J., delivered the opinion of the court:

This is a bill in equity to enjoin the defendant from maintaining an alleged nuisance, that, by reason of its nature and proximity, impaired the rental value of the plaintiff's property. The case was referred to a master, to whose report no exceptions were taken, and upon whose findings of fact a decree was entered in the superior court confirming the report and dismissing the bill, from which the plaintiff appealed to this court.

From the report it appears that the parties own and occupy contiguous estates situated in the principal village of the town of Bridgewater. There were two dwelling houses on the plaintiff's land, one of which she occupied, and rented the other, that was nearest to the homestead of the defendant, who maintained two henhouses, and yard connected therewith, in which a number of hens and not more than two roosters were kept. The plaintiff's claim is that the odor from the houses and yard occasionally became so pungent that, combined with the cackling of hens and crowing of roosters, the house occupied by her tenant was rendered uncomfortable as a place of residence. It is found that the tenant and members of his family—especially his wife, who was a nervous invalid—complained that they were disturbed and annoyed by the odor and

McBurney Oil & Fertilizer Co. 52 L. R. A. 398; *Louisville & N. Terminal Co. v. Jacobs*, 61 L. R. A. 188; *Froelicher v. Oswald Iron Works*, 64 L. R. A. 228; and *Redd v. Edna Cotton Mills*, 67 L. R. A. 983.

For odors or gases as nuisance generally, see *Bohan v. Port Jervis Gaslight Co.* 9 L. R. A. 711, and *note*; *Susquehanna Fertilizer Co. v. Malone*, 9 L. R. A. 737; *Robb v. Carnegie Bros. & Co.* 14 L. R. A. 329; *Fogarty v. Junction City Pressed Brick Co.* 18 L. R. A. 756; *Boston Ferule Co. v. Hills*, 20 L. R. A. 844; *Frost v. Berkeley Phosphate Co.* 26 L. R. A. 693; and *Swift v. Broyles*, 58 L. R. A. 390.

noise thus caused, though the plaintiff herself, living in a house within a distance of 45 feet therefrom, was not disagreeably affected to an appreciable extent.

Where the question of a private nuisance is raised, the result produced by it upon persons of ordinary health and sensitiveness, rather than upon those afflicted with disease or abnormal physical conditions, is to be taken as the criterion.

In the lawful use of property, how far an annoyance may be caused to other persons, without becoming a nuisance, becomes a question of degree. For what may amount to a serious injury to health or the enjoyment of property in one locality, by reason of density of population, or the residential character of the neighborhood affected, or the nature of the specific act, may in another place, and under different surroundings, be deemed proper and unobjectionable. But in any case, if it is sought to prevent by injunction the further continuance of any legitimate business or employment which it is claimed constitutes a nuisance, a real, and not a fanciful, injury to person or property must be shown. *Davis v. Sawyer*, 133 Mass. 289, 290, 291, 43 Am. Rep. 519; *Com. v. Perry*, 139 Mass. 198, 29 N. E. 656; *Com. v. Packard*, 185 Mass. 64, 66, 69 N. E. 1067.

The defendant had a right to the lawful use and enjoyment of her premises, and this would include the keeping of hens in houses, and a yard used for that purpose, which are shown by the report to have been maintained in a cleanly condition, and cared for in such a manner as not to injuriously affect the health of any normal person living in that neighborhood. Although, the odor arising from the henhouses and yard, which at times was accompanied by the characteristic cry made by their occupants, may have been unpleasant, it does not appear by the report to have been physically uncomfortable or unbearable. Indeed, the findings of fact fail to show that the conditions existing on the premises of the defendant were abnormal, or differed substantially from those usually found in the country, where the ordinary incidents arising from keeping barnyard fowls are not considered extraordinary or peculiarly irritating, even to sensitive persons. *Rogers v. Elliott*, 146 Mass. 349, 353, 4 Am. St. Rep. 316, 15 N. E. 768; *Downing v. Elliott*, 182 Mass. 28, 29, 64 N. E. 201.

Decree affirmed.
69 L. R. A.

BUSELL TRIMMER COMPANY

v.

Charles F. COBURN.

(188 Mass. 254.)

1. A covenant by a purchaser of the business and effects of a corporation, the sale of which is intended to terminate its existence, to indemnify it from and against the contracts and engagements to which the said vendor appears to be now liable, and also all claims and demands on account of the same contracts and engagements, does not cover a claim by the president-manager of the corporation to salary for the time subsequently accruing, where it was founded merely on the fact that he had been elected president, and there was no contract that the services and salary should continue for any specified time.
2. Electing one president of a corporation, and appointing him manager, do not entitle him to a salary for any specified time.
3. To entitle an employee to damages against his employer for breach of the contract by disposing of all his property so that no more services could be rendered, he must show that he has not been able to earn an equal amount elsewhere.
4. A judgment against a debtor is not binding on one who has contracted to save him harmless from the debt, unless he has been notified to come in and defend.

(May 19, 1905.)

EXCEPTIONS by plaintiff to rulings of the Superior Court for Suffolk County, made during the trial of an action brought to recover the amount alleged to be due under an indemnity contract. *Overruled.*

The stockholders of the plaintiff company desired to close up its business and liquidate the company, and authorized a majority of the directors to do so. The majority directors arranged for a transfer of all the assets of the company to defendant, and he executed a contract the material parts of which appear in the opinion.

Mr. Richard D. Ware, for plaintiff:

Payment of a judgment by default or consent is sufficient to warrant a recovery under an indemnity contract.

Oremer v. Stephenson, 15 Md. 211; *Given v. Driggs*, 1 Caines, 450; *Train v. Gold*, 5 Pick. 380.

The judgment was presumptive evidence

NOTE.—As to liability of consolidated corporation for debts of predecessor, see, in this series, *Louisville, N. A. & C. R. Co. v. Boney*, 3 L. R. A. 435, and *note*; *Chicago & I. Coal B. Co. v. Hall*, 23 L. R. A. 231, and *note*.

of the company's liability, and should have been admitted.

Smith v. Burton, 94 Va. 158, 26 S. E. 412.

The use of the word "claims" gives the contract the broadest scope; and an indemnity contract against "claims" embraces any claims, whether valid or otherwise, which may subject the party indemnified to costs, delay, or expense.

Home Ins. Co. v. Watson, 59 N. Y. 390; *Niagara Falls Paper Co. v. Lee*, 20 App. Div. 217, 47 N. Y. Supp. 1; *Wood v. Lindley*, 12 Ind. App. 258, 40 N. E. 283.

Mr. W. C. Cogswell, for defendant:

No evidence has been introduced sufficient to establish a contract between Knight and plaintiff for a year's service.

Tatterson v. Suffolk Mfg. Co. 106 Mass. 156; *Sears v. Kings County Elev. R. Co.* 152 Mass. 151, 9 L. R. A. 117, 25 N. E. 98; *Davis v. Ames Mfg. Co.* 177 Mass. 54, 58 N. E. 280.

The testimony offered and excluded was strictly *res inter alios*, and was not admissible against this defendant on the measure of damages.

Haskins v. Warren, 115 Mass. 514; *Fowle v. Child*, 104 Mass. 210, 49 Am. St. Rep. 451, 41 N. E. 291; *Fitchburg R. Co. v. Freeman*, 12 Gray, 401, 74 Am. Dec. 600; *Parker v. Kenyon*, 112 Mass. 264; *Cutter v. Gillette*, 163 Mass. 95, 39 N. E. 1010; *Olds v. Mapes-Reeve Constr. Co.* 177 Mass. 41, 58 N. E. 478.

The sale to Coburn did not affect the corporate existence of plaintiff, the tenure of office or duties of its officers, or the powers and right of the company to continue in business. Assuming that the election of Knight as president and manager would warrant a finding of a contract for a year, such contract was personal in its nature, involving powers and duties not capable of assignment or controllable by an assignee.

Boston Ice Co. v. Potter, 123 Mass. 28, 25 Am. Rep. 9; *Arkansas Valley Smelting Co. v. Beldin Min. Co.* 127 U. S. 379, 32 L. ed. 246, 8 Sup. Ct. Rep. 1308; *Robson v. Drummond*, 2 Barn. & Ad. 303; *British Waggon Co. v. Lea*, L. R. 5 Q. B. Div. 149.

Lathrop, J., delivered the opinion of the court:

The contract in question is dated August 4, 1900. In it the plaintiff is called the "vendor," and the defendant the "purchaser." By the terms of the contract the vendor assigned to the purchaser "all of the machinery, stock in trade, fixtures, and effects pertaining to its business, and also all the books and other debts now due and owing to the said vendor, and also all contracts, benefits, and advantages which have

been entered into by the said vendor, or to which it is or can be entitled." The purchaser covenanted with the vendor "that he will at all times hereafter save harmless, and keep indemnified, the said vendor from and against all losses, costs, expenses, and damages which may be incurred by reason of any action which shall or may be brought or instituted against the said purchaser, . . . for, or in respect of, the said machinery, stock in trade, effects, and premises, or for or in respect of the recovery of the several sums of money which by its books appear to be due and owing from the said vendor in respect of the said trade or business; and also from and against the contracts and engagements to which the said vendor appears to be now liable; and also all interest, costs, expenses, losses, claims, and demands on account of the same debts, contracts, and engagements respectively or otherwise in relation to the premises."

It appeared in evidence that at the time of the signing of the contract Knight was president of the company, and had been connected with it about fifteen years as manager and president. On June 4, 1900, the directors of the plaintiff company elected its officers for the ensuing year, and among them Knight, as president and manager. There was evidence also that Knight sold the manufactures of the company, handled the money, paid the men, looked after the factory, and attended to the entire business; and, further, that at the time of the transfer Knight was receiving a salary of \$2,000 a year. The plaintiff offered to show that upon November 20, 1900, Knight brought an action against the plaintiff for salary alleged to have accrued to him after the transfer, for the months of August, September, October, and part of November, at the rate of \$110.67 per month. The company did not defend the action, and Knight recovered judgment, which judgment was paid by the company. The plaintiff further offered to show that in March, 1901, a further sum was paid by the company to Knight in satisfaction of a claim he made against the company for the balance of the year for which he contended that his contract continued. The judge excluded this evidence of payments, and the plaintiff excepted.

We are of opinion that the ruling was right. The contract before us transferred to the defendant the machinery, stock in trade, fixtures, and book debts. It does not appear that Knight rendered any service to the defendant, or that he was expected to do so. Nothing was due to him from the plaintiff when the transfer was made. The contention of the plaintiff is that the liability of the defendant arises under the last clause of the contract, "and also all interest,

costs, expenses, losses, claims, and demands on account of the same debts, contracts, and engagements." The president of a corporation, as an officer, is not *ipso facto* entitled to a salary or to a compensation, and, so far as any inference is to be drawn in regard to it, the inference is that the salary was paid to him as manager, and not as president. The plaintiff disposed of all of its property at the date of the contract, and after that, so far as appears, had nothing to manage. There is nothing to show that the plaintiff was not at liberty to sell its property and wind up its business at any time. Electing a man to an office is not ordinarily to make a contract with him for a stated time. There is nothing to show that the corporation agreed with Knight to continue to carry on business through a year, or to retain him under a salary as manager after it ceased to have anything to manage. The evidence did not go far enough.

There is also another ground which is conclusive against the plaintiff. Even if the plaintiff made a contract with Knight, which it broke by the sale of its property,

so that it would be liable to him for such breach, the measure of damages would not be the salary promised, but would be the difference between the salary and what he could have earned in some other occupation. See 1 Sedgw. Damages, 8th ed. §§ 206-208; Mayne, Damages, 7th ed. 244, 245. The plaintiff put in no evidence on this point, and there is nothing to show that Knight did not earn more in some other occupation.

The judgment in the action brought by Knight against the plaintiff was not binding on the defendant, in the absence of a notice to come in and defend. No such notice having been given, it stood merely as a payment; and to make it material the plaintiff had to prove that it was rightly made. Until the plaintiff proved that Knight tried to get other employment and entirely failed, there was no proof that either payment made to Knight of his full salary was rightfully made, and payment of such salary without such proof was immaterial as against the defendant, and was rightly excluded.

Exceptions overruled.

ARKANSAS SUPREME COURT.

S. G. DREYFUS *et al.*, *Appts.*,

v.

S. J. ROBERTS.

(.....Ark.....)

The payment of less than is due will discharge the debt when an agreement to that effect is fully executed, and the discharge is evidenced by a written receipt for the lesser sum in full satisfaction of the greater one.

(*Battle and McCulloch, JJ., dissent.*)

(May 13, 1905.)

APPPEAL by defendants from a judgment of the Circuit Court for Lafayette County in plaintiff's favor in an action brought to quash an execution. *Affirmed.*

The facts are stated in the opinion.

Messrs. Scott & Head and Searcy & Parks, for appellants:

Where the debt is certain and due, payment of a less sum, is not satisfaction.

Bunge v. Koop, 48 N. Y. 224, 8 Am. Rep. 546; *Bliss v. Shwarts*, 65 N. Y. 444; *Ness v. Minnesota & C. Co.* 87 Minn. 413, 92 N. W. 333; *Goodwin v. Follett*, 25 Vt. 386; *Harriman v. Harriman*, 12 Gray, 341; *Curtiss v. Martin*, 20 Ill. 557; *Jones v. Ricketts*, 7 Md. 108; *Murphy v. Kastner*, 50 N. J.

Eq. 214, 24 Atl. 564; *Eve v. Mosely*, 2 Strobb. L. 203; *Ryan v. Ward*, 48 N. Y. 204, 8 Am. Rep. 539; *Deland v. Hiett*, 27 Cal. 611, 87 Am. Dec. 102; *Weber v. Couch*, 134 Mass. 26, 45 Am. Rep. 274.

The giving of a receipt in full does not in any way affect the rule.

St. Louis, Ft. S. & W. R. Co. v. Davis, 35 Kan. 464, 11 Pac. 421; *Walan v. Kerby*, 99 Mass. 1; *Brooks v. White*, 2 Met. 283, 37 Am. Dec. 95; *Riley v. Kershaw*, 52 Mo. 224; *Murphy v. Kastner*, 50 N. J. Eq. 214, 24 Atl. 564; *Fuller v. Kemp*, 138 N. Y. 231, 20 L. R. A. 785, 33 N. E. 1034; *Chicago, M. & St. P. R. Co. v. Clark*, 35 C. C. A. 120, 92 Fed. 988; *Reynolds v. Reynolds*, 55 Ark. 374, 18 S. W. 377; *Hunter v. Moul*, 98 Pa. 13, 42 Am. Rep. 610; *Darnall v. Morehouse*, 36 How. Pr. 511; *Bunge v. Koop*, 48 N. Y. 225, 8 Am. Rep. 546.

Mr. Robert L. Rogers, Attorney General, for appellee.

Hill, Ch. J., delivered the opinion of the court:

In 1896 Dreyfus & Company obtained a judgment against Roberts for \$1,021 and interest. In 1900 Dreyfus turned the debt evidenced by this judgment to a collec-

NOTE.—For other cases in this series as to accord and satisfaction by part payment of debt, see *McKenzie v. Harrison*, 8 L. R. A. 257; *Jaffray v. Davis*, 11 L. R. A. 710, and cases in note thereto; *Fuller v. Kemp*, 20 L. R. A. 785, 69 L. R. A.

and note; *Tanner v. Merrill*, 31 L. R. A. 171; *Clayton v. Clark*, 37 L. R. A. 771; *Chicora Fertilizer Co. v. Dunan*, 50 L. R. A. 401; *Harrison v. Henderson*, 62 L. R. A. 760; *Engbretson v. Selberling*, 64 L. R. A. 75.

tion agency for collection, with authority to compromise. The collection agency proposed to Roberts to accept \$200 in cash, if at once remitted, in full discharge of the whole debt. Roberts was living in Lafayette county, Arkansas. He was unable to raise the money, and applied to his mother to assist him. She did not have the money, but had credit, and borrowed \$200 from a gentleman in Texarkana, who drew a check on a bank in Texarkana, Texas. This check, after proper indorsements, was accepted by the collection agency in Chicago as a full acquittance of the debt, and it executed a receipt in full, and promised to have the judgment record satisfied; but, instead of this being done, Dreyfus caused execution to issue on the judgment. This action started in chancery, and was transferred to the circuit court as a proceeding to quash the execution on the ground that the judgment had been paid.

The receipt in this case was as follows:

Dear Sir:—

We have your communication with enclosure as stated [which was the \$200 check] and you may consider this a receipt and satisfaction in full of the account of S. G. Dreyfus & Co. vs. yourself for \$1,621.00. We will immediately have judgment satisfied as per your request.

Very truly yours,

Sprague's Collecting Agency,
per Frank M. Utt,
General Attorney.

In 1602 Lord Coke, speaking for the court of common pleas, said: "Pinnel brought an action of debt on a bond against Cole, of £16 for the payment of £8 10s. the 11th day of November, 1600. The defendant pleaded, that he, at the instance of the plaintiff, before the said day, scil., 1 Octob. Anno 44, *Apud W. solvit querenti* £5 2s. 2d., *quas quidem* £5 2s. 2d., the plaintiff accepted in full satisfaction of the £8 10s. And it was resolved by the whole court, that the payment of a lesser sum on the day in satisfaction of a greater cannot be any satisfaction for the whole, because it appears to the judges that by no possibility, a lesser sum can be a satisfaction to the plaintiff for a greater sum. But the gift of a horse, hawk, or robe, etc., in satisfaction is good; for it shall be intended that a horse, hawk, or robe, etc., might be more beneficial to the plaintiff than the money, in respect of some circumstance, or otherwise the plaintiff would not have accepted of it in satisfaction. But when the whole sum is due, by no intentment the acceptance of parcel can be satisfaction to the plaintiff. But in the case at bar it was re-

solved that the payment and acceptance of parcel before the day in satisfaction of the whole, would be a good satisfaction in regard of circumstance of time; for peradventure parcel of it before the day would be more beneficial to him than the whole at the day, and the value of the satisfaction is not material." *Pinnel's Case*, 5 Coke, 117a. It will be noted that the doctrine that the acceptance of a lesser sum for the whole on or after due is not valid satisfaction of the whole, was *obiter dictum* in this case; but this *dictum* of this great lawyer and jurist established the doctrine at common law that there must be some other consideration, however trivial, than cash, to make a payment of a lesser sum binding as a satisfaction of the whole, notwithstanding the solemn agreement of the parties to that effect. Sir Frederick Pollock thus states the case: "It is enough to say that English common law stands committed to the absurd paradox that a debt of £100 may be perfectly well discharged by the creditor's acceptance of a peppercorn at the same time and place at which the £100 are payable, or of 10 shillings at an earlier day or at another place; but that nothing less than a release under seal will make his acceptance of £99 in money at the same time and place a good discharge, although modern decisions have confined this absurdity within the narrowest possible limits." Pollock's *Principles of Contract*, 1st Am. from 2d Eng. ed. 165. In 1884 the Lord Chancellor, the Earl of Selborne, delivering the opinion of the judges in the House of Lords, said: "It might be, and, indeed, I think it would be, an improvement in our law, if a release or acquittance of the whole debt, on payment of any sum which the creditor might be content to receive by way of accord and satisfaction (though less than the whole), were held to be, generally, binding, though not under seal." *Foakes v. Beer*, L. R. 9 App. Cas. 605. Thus it is seen that after three hundred years' experience in England, the highest court of the realm says the law would be improved by not following Lord Coke's *dictum* in the *Pinnel Case*. The *Pinnel Case* came to the Colonies, and then the Union, as part and parcel of the common law, and has generally been adhered to, though with growing reluctance and generally with criticism. In view of the expressions of the courts on the subject, it may be safely conjectured that, if presented as an original proposition to the American judiciary, it would find little, if any, support. The editors of a current encyclopædia of the law say of the rule in question: "This doctrine has been freely criticized in most of the courts which have had occasion

to consider it." 1 Cyc. Law & Proc. p. 321. Notwithstanding these criticisms, except when changed by statutes the courts most generally adhere to it. *Id.* p. 319, and cases in notes; 1 Am. & Enc. Law, 2d ed. p. 413, and notes. While adhering to the rule, the courts will not extend it "beyond its precise import," and will not inquire into the adequacy of the supporting consideration. *Hastings v. Lovejoy*, 140 Mass. 261, 54 Am. Rep. 462, 2 N. E. 776. The court of appeals of New York, in following the rule, said: "This rule has been criticized as unsound and unjust in cases where the lesser sum is accepted in full satisfaction of the greater. [Citing cases.]" *McKenzie v. Harrison*, 120 N. Y. 260, 8 L. R. A. 257, 17 Am. St. Rep. 638, 24 N. E. 458. That same distinguished court said later: "The steadfast adhesion to this doctrine by the courts, in spite of the current of condemnation by the individual judges of the court, and in the face of the demands and conveniences of a much greater business, and more extensive mercantile dealings and operations, demonstrates the force of the doctrine of *stare decisis*. But the doctrine of *stare decisis* is further illustrated by the course of judicial decisions upon this subject, for while the courts still hold to the doctrine of the *Pinnel Case*, 5 Coke, 117a, and *Cumber v. Wane*, 1 Strange, 426, they have seemed to seize with avidity upon any consideration to support the agreement to accept the lesser sum in satisfaction of the larger, or, in other words, to extract, if possible, from the circumstances of each case a consideration for the new agreement, and to substitute the new agreement in place of the old, and thus to form a defense to the action brought upon the old agreement." *Jaffray v. Davis*, 124 N. Y. 164, 11 L. R. A. 710, 26 N. E. 351. The court in the above case reviews many decisions where the accord was supported on various grounds, and some are interesting and amusing. The payment at York of a lesser sum than was due at Westminster is good. The payment in a check for a less sum is good. The giving of a negotiable note for the lesser sum, of either the debtor or some other party, is good. If the note or evidence of the debt be surrendered, it is good. If any security, however trivial, is taken, it is good. In short, "if there be any benefit, or even any legal possibility of benefit, to the creditor, thrown in, that additional weight will turn the scale, and render the consideration sufficient to support the agreement." *Ibid.* Numerous other instances may be found where accepting chattels, goods, lands, or anything else of less value than the debt, if it be other than what the article represents,—money,—will be good. See notes 1

Am. & Eng. Enc. Law, 2d ed. pp. 414–419. In brief, the law is, following those decisions to their end, that an executed settlement of great or small amounts for lesser sums is good when lagnappe is given, not on account of the payment of the money and the agreement of the parties, but because of the lagnappe being given.

It was universally held at common law that a release under seal, either with or without partial payment, was a good accord and satisfaction, and took the case out of the rule. *Jaffray v. Davis*, 124 N. Y. 164, 11 L. R. A. 710, 26 N. E. 351, 1 Am. & Eng. Enc. Law, 2d ed. p. 415; 1 Cyc. Law & Proc. p. 323. The seal had magic to import a consideration. Hence a release to which a piece of sealing wax was attached was good, while the same release without the piece of wax was worthless. The distinction between sealed and unsealed instruments is almost universally abolished, and yet the conservatism of the courts has seemingly restrained them from giving now the same effect to a written release of the whole debt, which such release would have had, as a sealed instrument. Connecticut and Vermont have given that effect to a receipt. "The general principle laid down with regard to receipts in full has long been the settled law of this state, whatever it may be elsewhere. The receipt in this case, unless impeached for fraud or mistake, was valid, and discharged the whole debt, though given for a payment that was in itself but a part of the entire debt." *Aborn v. Rathbone*, 54 Conn. 444, 8 Atl. 677. The rule in Vermont seems to be that a receipt for a lesser sum purporting to discharge the whole sum is *prima facie* a discharge of it, and is subject to attack only for fraud, mistake, and the like grounds. *Holbrook v. Blodget*, 5 Vt. 520; *Stephens v. Thompson*, 28 Vt. 77; *Ashley v. Hendec*, 56 Vt. 209; *Guyette v. Bolton*, 46 Vt. 228. In Mississippi the court has gone much farther than this, and has completely cut away from the rule in *Pinnel's Case*; and of it, in *Clayton v. Clark*, 74 Miss. 499, 37 L. R. A. 771, 60 Am. St. Rep. 521, 21 So. 565, 22 So. 189, Chief Justice Woods, speaking for the court, said: "The absurdity and unreasonableness of the rule seem to be generally conceded, but there also seems to remain a wavering, shadowy belief in the fact, falsely so called, that the agreement to accept, and the actual acceptance of, a lesser sum in the full satisfaction of a larger sum is without any consideration to support it; that is, that the new agreement confers no benefit upon the creditor. However it may have seemed three hundred years ago in England, when trade and commerce had not yet burst their swad-

dling bands, at this day and in this country, where almost every man is in some way or other engaged in trade or commerce, it is as ridiculous as it is untrue to say that the payment of a lesser part of an originally greater debt, cash in hand, without vexation, cost, and delay, or the hazards of litigation in an effort to collect all, is not often, nay, generally, greatly to the benefit of the creditor. Why shall not money, the thing sought to be secured by new notes of third parties,—notes whose payment in money is designed to be secured by mortgage, and even negotiable notes of the debtor himself—why shall not the actual payment of money, cash in hand, be held to be as good consideration for a new agreement—as beneficial to the creditor—as any mere promises to pay the same amount, by whomsoever made and howsoever secured? And why may not men make and substitute a new contract and agreement for an old one, even if the old contract calls for a money payment? And why may one accept a horse worth \$100 in full satisfaction of a promissory note for \$1000, and be bound thereby, and yet not be legally bound by his agreement to accept \$999, and his actual acceptance of it, in full satisfaction of the \$1000 note? No reason can be assigned, except that just adverted to, and this rests upon a mistake in fact. And a rule of law which declares that under no circumstances, however favorable and beneficial to the creditor, or however hard and full of sacrifice to the debtor, can the payment of a less sum of money at the time and place stipulated in the original obligation, or afterwards, for a greater sum, though accepted by the creditor in full satisfaction of the whole debt, ever amount in law to satisfaction of the original debt, is absurd, irrational, unsupported by reason, and not founded in authority, as has been declared by courts of the highest respectability and of last resort, even when yielding reluctant assent to it. We decline to adopt or to follow it."

The first appearance of the rule in *Pinnel's Case* in Arkansas was in *Pope v. Tunstall*, 2 Ark. 209. The court adhered to the doctrine, but pointed out numerous exceptions to it,—if the accord was at a different place; the payment in a chattel; payment of less sum by a third person; mutual promises entering into the agreement, etc. The court quoted this criticism: "That there was more nicety than good sense in some of the cases on this subject; that accords are favored in law, and therefore ought not to be too rigorously expounded." In *Caraness v. Ross*, 33 Ark. 572, the rule originating in *Pinnel's Case* was quoted from text writers, followed, and applied. 49 L. R. A.

In *Reynolds v. Reynolds*, 55 Ark. 369, 18 S. W. 377, a statement of the rule by Lord Ellenborough in *Fitch v. Sutton*, 5 East, 230, is quoted and followed. In *Gordon v. Moore*, 44 Ark. 349, 51 Am. Rep. 606, there was, while recognizing the old rule, a practical breaking away from it. Moore executed a release in consideration of \$450 of a judgment for \$2,993.20, and authorized the clerk to enter satisfaction. The release recited, "Witness my hand and seal," but bore no seal, and was executed in 1882, after the distinction between sealed and unsealed instruments was abolished. Const. 1874, § 1. Judge Eakin said: "It would be hard and unreasonable if a creditor pressed for money might not say to an embarrassed or reluctant debtor, 'Pay me a part, and I will release the balance.' He is cut off from doing that in many cases by the rule as it now stands, but the rule is a hard one, based upon purely technical reasoning. It is hedged in with numerous exceptions." The result reached was thus stated: "We conclude, therefore, that an agreement by a creditor to accept a smaller sum in satisfaction of a debt, carried into execution by receipt of the money, and the execution of a formal and positive instrument of release, with all other acts essential to an absolute relinquishment of his right, is a valid and irrevocable act." Thus it is seen *Gordon v. Moore* recognized and sustained a written release not under seal, and practically placed this court in line with Connecticut and Vermont, which accord such effect to a receipt in full. In *Heaslet v. Spratlin*, 54 Ark. 185, 15 S. W. 461, a parol release sustained alone by the evidence of the party claiming it was held not to be an accord and satisfaction; the court merely referring to *Gordon v. Moore*. The question then becomes important to determine what constitutes a release. Mr. Beach says: "The proper words of a release are remise, release, quitclaim, and acquit. Any expressions, however, which denote the intention of the one party to discharge the other are sufficient." 1 Beach, Modern Law of Contracts, § 460. The receipt in full of a given sum in full satisfaction of a larger one certainly conveys the intention to discharge the party of the debt thus expressly stated to be discharged, as "remise, release, quitclaim, and acquit." The release in *Gordon v. Moore* did not use these technical terms, but "release said Childress from any and all liability," on the judgment, and authorized its satisfaction. Mr. Daniels says: "A release is technically an instrument under seal, the seal importing a consideration. But the release of a party to a bill or note by any agreement, upon a valuable consideration, is as effectual as if made under seal."

2 Dan. Neg. Inst. §1290. The consideration fictitiously imported to the release by the wax affixed to the name no longer exists, but this court enforced a release without it, thereby recognizing that a written release was valid without the seal. When a receipt and a release in this respect amount to exactly the same thing, evidencing a discharge of one party of the other, it is useless to preserve a distinction without a difference. Business and commercial affairs adjust themselves along practical, and not technical, lines. The court might well place its decision under the facts in this case on some of the numerous exceptions to the doctrine of the *Pinnel Case*, but it prefers to call a halt in refusing away a rule "which has been more honored in the breach than the observance." It is therefore held that when an agreement is fully executed to discharge a debt by the payment of a smaller sum, and such discharge is evidenced as it usually is, in practical business affairs, by a written receipt for the lesser sum in full satisfaction of the greater sum, it is "a valid and irrevocable act."

This case does not present the question whether a parol release fully proved by clear and satisfactory evidence, carried into execution by receiving the payment, would be valid, and a discussion of it would be merely multiplying *obiter dictum*.

The judgment is affirmed.

Battle and McCulloch, JJ., dissent.

W. R. CANNON, *Appt.*,

v.

G. R. MATHEWS.

(....Ark....)

Replevin lies for growing strawberry plants, although they are attached to the soil, since they are fruits of industry, and must be treated as chattels.

(May 6, 1905.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Crawford County in favor of defendant in an action brought to recover possession of certain strawberry plants. *Reversed.*

The facts are stated in the opinion.

Messrs. Samuel R. Chew, Henry L. Fitzhugh, and J. Wyth Walker, for appellant:

Growing crops are regarded as personalty

NOTE.—As to classification of growing fruit as real or personal property, see also, in this series, *Sparrow v. Pond*, 16 L. R. A. 103, and *note*.

For crops as personal property for the purpose of levy and sale, see *Polley v. Johnson*, 73 L. R. A. 258, and *note*.
69 L. R. A.

for the purpose of seizure and sale upon attachment or execution, and may be encumbered by chattel mortgage. The crops may be orally sold separate and apart from the land, and the purchaser of said crops may maintain replevin therefor.

8 Am. & Eng. Enc. Law, 2d ed. p. 303, note 5; *Cobbey, Replevin*, § 73; *Matlock v. Fry*, 15 Ind. 483; *Frank v. Harrington*, 36 Barb. 415; *Miller v. Baker*, 1 Met. 27; *Hendrickson v. Ivins*, 1 N. J. Eq. 562; *Baker v. Jordan*, 3 Ohio St. 438; *Backenstoss v. Stahler*, 33 Pa. 251, 75 Am. Dec. 592; 3 Parsons, Contr. 9th ed. p. 31; *Dunne v. Ferguson*, Hayes. Exch. 540; 1 Warvelle, Vendors, §§ 163-165; *Hensley v. Brodie*, 16 Ark. 511.

McCulloch, J., delivered the opinion of the court:

The question involved in this appeal is whether growing strawberry plants, attached to the soil, can be the subject of replevin. Appellant, who was plaintiff below, sued in replevin for the strawberry plants growing on the land of appellee; claiming the plants under an alleged parol contract for the purchase of same. Defendant answered, denying that he had agreed to sell the plants in controversy to appellant. At the trial below there was testimony tending to show that appellee had verbally agreed to sell to appellant all the strawberry plants on a certain tract of land, and that after appellant had removed a part of them a controversy arose between them as to the number of plants appellee had agreed to sell, and this suit was brought in consequence of the disagreement. The court held that the suit could not be maintained, and directed the jury to return a verdict in favor of the defendant, which was done.

Replevin is strictly a possessory action for the recovery of personal property, and, in order to recover, the plaintiff must be the legal owner and entitled to the possession at the time of the commencement of the action. *Cobbey, Replevin*, §§ 27, 73. So the right of recovery in this case must turn upon the question whether the strawberry plants sued for are to be treated as chattels, or part of the land upon which they were growing. Many distinctions abound in the books as to the rules in determining the character of property in fruits of the soil, attached thereto,—whether they are to be considered chattel interests or as a part of the realty,—the distinction most frequently referred to being that between such as are natural products of the soil, *fructus naturales*, and *fructus industriales*, though this distinction is rejected by many courts, and others adopted. The pioneer English decision on the subject

seems to have been one by Chief Justice Treby, at nisi prius, reported by Lord Raymond in *Littlewood v. Smith*, 1 Ld. Raym. 182, in which it was said that timber growing upon land might be sold by parol, "because it is but a bare chattel;" the court rejecting all distinction between natural and industrial products. This statement is by Mr. Baron Ilullock, in *Scorell v. Bozall*, 1 Younge & J. 396, pronounced to be mere dictum; but the doctrine is later fully approved by English judges. In the case of *Marshall v. Green*, L. R. 1 C. P. Div. 35, the distinction between *fructus naturales* and *fructus industriales*, as a test of the application of the statute of frauds, was rejected, and the rule announced by Treby, Ch. J., fully approved. In Browne on Statute of Frauds, § 254*b*, the author, in discussing the above-cited case and the tests therein referred to, says: "Those tests had, it is true, the sanction of previous decisions, but neither of them had proved satisfactory or been uniformly followed. The doctrine which laid down one rule for the sale of *fructus naturales*, and another for the sale of *fructus industriales*, is objectionable, because founded narrowly upon consideration of the ownership of the crop, not at all upon consideration of the condition of the sale." The same learned author says (§ 257*a*): "Where such an agreement [for sale of growing products of the soil] makes part of the transaction, it seems clear that an interest in land is contracted for and agreed to be given. But where, as in *Marshall v. Green*, there is no agreement that the goods shall remain on the vendor's land,—the vendee's right to come in and take away what he has bought not depending upon any contract or agreement, but being a mere incident of his purchase, arising by implication of law, and not subject to revocation by the owner of the land,—the contract is for the sale, not of land, but of goods, and this independently of the nature of the growth sold." Prof. Greenleaf says: "Though all that grows on the soil, whether spontaneously or by culture, ordinarily passes with the land, yet trees, grass, crops, and other things fixed to the soil, and so part of the realty, may be the subject of a separate sale, in the prospect of severance, and in that case will be regarded as personal chattels, if so treated by the parties. The cases on this much-vexed subject are extremely contradictory, but the principle now most generally recognized seems to be this: That, in contracts for the sale of things annexed to and growing upon the freehold, if the vendee is to have a right to the soil for a time for the purpose of farther growth and profit of that which is the subject of sale, it is an interest in land, within the meaning of the 4th 60 L. R. A.

section of the statute of frauds, and must be proved by writing; but where the thing is sold in prospect of separation from the soil immediately, or within reasonable and convenient time, without any stipulation for the beneficial use of the soil, but with a mere license to enter and take it away, it is to be regarded as substantially a sale of goods, only, and so not within that section of the statute. . . . The question thus turning upon the intention of the parties and the nature of the contract, it would seem to be of no importance whether the thing sold is to be severed from the soil by the vendor or the vendee, whether it is to be paid for by particular admeasurement or in the gross, or whether the subject of sale consists of trees and other spontaneous products, or of *fructus industriales*." 1 Greenleaf's Cruise, Real Prop. p. 55, note 1. The doctrine announced has been declared by many of the courts of this country. *Cutler v. Pope*, 13 Me. 377; *Cain v. McGuire*, 13 B. Mon. 340; *Smith v. Bryan*, 5 Md. 151. 59 Am. Dec. 104; *Bostwick v. Leach*, 3 Day. 476; *McClintock's Appeal*, 71 Pa. 365; *Sterling v. Baldwin*, 42 Vt. 306. Courts of other states adhere to the distinction between natural products and fruits of industry, and hold that an oral sale of the latter is held sufficient, but of the former insufficient, to pass title before severance. *Fullicovich v. Skinner*, 77 Cal. 239, 19 Pac. 424; *Armstrong v. Lawson*, 73 Ind. 498; *Smock v. Smock*, 37 Mo. App. 56; *Hirth v. Graham*, 50 Ohio St. 57, 19 L. R. A. 721, 40 Am. St. Rep. 641, 33 N. E. 90; *Slocum v. Seymour*, 36 N. J. L. 138, 13 Am. Rep. 432; *Carson v. Brouder*, 2 Lea, 701; *Hove v. Batchelder*, 49 N. H. 204; 2 Schouler, Pers. Prop. § 452; 1 Warvelle, Vendors, § 163. This court held, in *Kendall v. J. I. Porter Lumber Co.* 69 Ark. 442, 64 S. W. 220, that a deed conveying growing trees, and authorizing the grantee to remove them from the soil within a definite time, was a conveyance of an interest in the soil, within the purview of the registration laws.

Without undertaking to discriminate between the line of authorities herein cited, we hold that the property sued for in this case falls clearly within the classification of fruits of industry, and not natural products. According to either of the lines of authorities cited, it must be treated as personal property, and the subject of replevin. *Cobbe v. Replevin*, § 73; *Shinn, Replevin*, §§ 226, 227; *Wells, Replevin*, §§ 74, 75; *Matlock v. Fry*, 15 Ind. 483; *Garth v. Caldwell*, 72 Mo. 622.

The court erred in directing a verdict for defendant.

Reversed and remanded for a new trial

WISCONSIN SUPREME COURT.

I. A. RICHARDSON *et al.*, Trustees of La Crosse County Insane Asylum, *Respts.*,

v.

Frank STUESSER, *Appt.*

(.....Wis.....)

*1. The incorporation of §§ 1500 to 1505, both inclusive, Rev. Stat. 1898, into § 604c thereof, so as to be applicable to the insane, affects all such, the support of whom is not properly a public charge, and provides procedure to be followed in compelling those privately liable for such support to do so.

2. In harmony with § 1502, Rev. Stat. 1898, as to the poor, the trustees of a county asylum for the insane should proceed by petition to the county judge to establish the liability of anyone for the support of an insane person at such asylum, who refuses to perform his duty in that regard, and the amount which he should pay, and the time of payment determined, in harmony with § 1504; and they may cause the order of the county judge in that regard to be enforced by contempt proceedings, or by action.

3. An action to enforce such an order must be commenced in the name of the county in some court having jurisdiction of such civil actions. The county court does not possess such jurisdiction in the absence of special authorization.

4. The common-law liability of a husband to support his wife does not extend to supporting her outside the matrimonial home, reasonably chosen by him, unless he refuses to do so there, or she resides away therefrom by his consent.

5. Such common-law liability cannot be extended by implication from the written law as to the support of other persons. It can only be extended by a statute plainly so intended.

6. Where a wife, as a charity to her and protection to others, is by due process of law taken from the matrimonial home and confined in an asylum for the insane, and the husband submits, or even takes the initiatory proceedings to secure for her the benefit of the public charity, there is no element of refusal by him to support her at the matrimonial home, or consent by him to her absence therefrom, within the common-law rule rendering him liable for her support outside of such home.

7. There being no express statute in this state extending the common-law liability of the husband to support his

*Headnotes by MARSHALL, J.

NOTE.—As to validity of statute authorizing suit against certain relatives of insane person for support by county, see, in this series, Baldwin v. Douglas, 20 L. R. A. 850.

As to statute charging estate of insane persons who have no heirs with expenses incurred by county for their support and treatment, see Bon Homme County v. Berndt, 50 L. R. A. 351.

69 L. R. A.

wife in a case where she has been removed from his home by due process of law, and maintained at an asylum for the insane, he is not liable in such circumstances.

(May 2, 1905.)

APPEAL by defendant from a judgment of the Circuit Court for La Crosse County in favor of plaintiffs in an action brought to require defendant to pay for the care of his wife in the La Crosse County Insane Asylum. *Reversed.*

Statement by Marshall, J.:

Appellant's wife in due form of law was committed to the La Crosse County Asylum for the Chronic Insane. Upon the ground that he was of sufficient ability to maintain her at such asylum, but refused to do so, the trustees thereof petitioned the county court of such county for an order requiring him to pay \$3 per week therefor from and after September 1, 1903, so long as she remained therein. Such proceedings were duly had as to such petition that appellant was required to plead thereto, which he did by demurring to the jurisdiction of the county court over the subject-matter and to the sufficiency of facts stated to show liability, and by putting in issue the facts alleged as to his ability to comply with the demand of the petitioners. The demurrer was overruled, and the prayer of the petitioners granted. Appellant appealed to the circuit court for La Crosse county. A trial was had in such court, resulting in findings that defendant's wife had been, since December 10, 1901, an inmate of the asylum as stated in the petition, she having been in due form of law committed thereto; that he had complied with the demands of the trustees of the asylum as to furnishing clothing for her, but refused to contribute anything for her board and care; that she was not a pauper nor a public charge; that he was possessed of property, and was otherwise of sufficient ability to pay reasonably for her maintenance at such asylum, and was legally bound to do so; and that the sum of \$2 per week was reasonable therefor. Judgment was thereupon rendered requiring defendant to pay the trustees of such asylum \$2 per week from December 22, 1903, so long as his wife

As to liability of estate to reimburse county for support of person as pauper, see McNairy County v. McColn, 41 L. R. A. 862.

As to liability to pay for support of relative generally, see Albany v. McNamara, 6 L. R. A. 212; Rowell v. Vershire, 8 L. R. A. 708; McCook County v. Kammos, 31 L. R. A. 461; People use of Peoria County v. Hill, 38 L. R. A. 634.

should remain an inmate thereof, and awarding to them costs to the amount of \$32.84. This appeal was taken therefrom.

Messrs. Paul W. Mahoney and Morris & Hartwell, for appellant:

Section 1502 of the Revised Statutes specifically mentions who are liable for the care of the poor, and in the order in which they are liable; but, among the different persons mentioned, we do not find the name of the husband or wife. *Expressio unius est exclusio alterius*.

Broom, *Legal Maxims*, 607; *Pearson v. Lord*, 6 Mass. 84; *Lesure v. Norris*, 11 Cush. 328; *Com. v. Berkshire L. Ins. Co.* 98 Mass. 29; *Erie v. Erie Canal Co.* 59 Pa. 178; *Pullan v. Cincinnati & C. Air-Line R. Co.* 4 Biss. 35, Fed. Cas. No. 11,461.

A husband is not a relative of his wife as contemplated here.

Brookfield v. Allen, 6 Allen, 585.

The law of this state, § 604d, provides that the state of Wisconsin will pay to every county taking care of its own chronic insane \$1.50 per week for each patient so confined. The evidence shows that the county of La Crosse received every year from the state of Wisconsin \$1.50 per week for the care of Mrs. Stuesser. For ten years prior to the commencement of this proceeding, the La Crosse County Insane Asylum made a net profit to the county of La Crosse.

The county of La Crosse, as a political organization, has not paid one cent towards the support of Mrs. Stuesser. The evidence shows that she was and is a source of profit, rather than a burden.

Under the common law, a husband is liable for the support of his wife while a member of his family, or when she is absent from him through his fault. But in no case is a husband liable for the support of his wife when she is absent from him without his consent or without his fault.

Sturtevant v. Starin, 19 Wis. 268; *Brown v. Worden*, 39 Wis. 432.

A husband is not liable for the support of his wife while confined in an insane asylum, because she is placed there for the protection of the public.

Baldwin v. Douglas County, 37 Neb. 283, 20 L. R. A. 850, 55 N. W. 875; *Richardson County v. Frederick*, 24 Neb. 596, 39 N. W. 621; *Richardson County v. Smith*, 25 Neb. 767, 41 N. W. 774; *Farmington v. Jones*, 36 N. H. 271.

Mr. Otto Bosshard, for respondents:

The statutes of Wisconsin confer upon asylum trustees and county authorities the power and right to compel relief and support of persons confined in the insane hospitals and county asylums of this state, 69 L. R. A.

and prescribe the procedure to be followed.

Wis. Stat. 1898, § § 600, 604c, 604g; Laws 1901, chap. 63.

The husband of an insane wife confined in a county asylum is legally liable for her support and maintenance to the county while so confined, and the remedies and procedure provided for in §§ 1500-1505, inclusive, will lie against him.

Sturbridge v. Franklin, 160 Mass. 149, 35 N. E. 669; *Hanover v. Turner*, 14 Mass. 227, 7 Am. Dec. 203; *New Bedford v. Chace*, 5 Gray, 28; *Charlestown v. Groveland*, 15 Gray, 15; *Goodale v. Lawrence*, 88 N. Y. 513, 42 Am. Rep. 259; *Brookfield v. Allen*, 6 Allen, 585; *Bangor v. Wiscasset*, 71 Me. 535; *Davis v. St. Vincent's Inst. for Insane*, 9 C. C. A. 501, 15 U. S. App. 432, 61 Fed. 277; *Oneida County v. Bartholomew*, 82 Hun, 80, 31 N. Y. Supp. 106; *Woodward v. Worcester*, 15 Gray, 19, note.

Financial ability, and not the payment of taxes, should be the test of the husband's liability.

Orono v. Peavey, 66 Me. 60; *Bangor v. Wiscasset*, 71 Me. 539.

Marshall, J., delivered the opinion of the court:

Several provisions of the statutes seem to have been called to the attention of the trial court to sustain the proceeding, which are relied on now to support the judgment. Each of them will be briefly referred to.

Considerable significance is claimed for § 604g, Rev. Stat. 1898. That makes the property of an insane person, who is kept in any state or county hospital, or by any county otherwise, at its expense, liable for his support, and provides a remedy for the enforcement of such liability. It throws no light on the right of the controversy here, since such controversy does not involve any claim of liability for the support of appellant's wife out of her property.

Section 600, Rev. Stat. 1898, is referred to as having some significance. It authorizes a district attorney, under the direction of his county board, in the name of his county, to "sue for and collect from the property of any patient maintained at" a state hospital for the insane at the cost of the county, or from any person legally bound to support such patient, the amount charged by the state to such county therefor. Plainly this matter is not within that field. No liability of the county is claimed to have been created by reason of the support of appellant's wife at such hospital: neither was this proceeding brought by the district attorney, nor was it an action within the meaning of the statute, nor was its commencement directed by the county board. The county judge, in the absence of special

authorization, has no jurisdiction of an action under such section, or the circuit court capacity to take jurisdiction by appeal from the county judge's order, except to dismiss the proceeding. *Klaise v. State*, 27 Wis. 462; *Butler v. Wagner*, 35 Wis. 54; *Miller v. Crawford County*, 106 Wis. 210, 82 N. W. 175; *Stoltman v. Lake* (Wis.) 102 N. W. 920; *Birdsall v. Kewaunee County* (Wis.) 103 N. W. 1.

Next we are referred to § 604e, Rev. Stat. 1898, negating any liability of the state to any county by reason of the support by such county of any person at its county asylum for the insane, who is not a public charge, and making the "provisions of §§ 1500 and 1505, both inclusive," applicable to the support of insane persons. Turning to such sections, we find they refer to the relief and support of the poor. They declare that the father, mother, and children, being of sufficient ability to care for any poor person "who is unable to support himself, shall be liable for such support," and provide the method of procedure to enforce such liability; the moving parties being the town supervisors, the jurisdiction invocable that of the county court, and the manner thereof being by petition as in this case. It is argued that the effect of incorporating such section into the one relating to the insane is to provide a remedy only for enforcing liabilities for the support by relatives of insane poor persons at county asylums and those of the particular class mentioned. It seems that would be too narrow a construction of the incorporating language. The express prohibition in § 604e of any credit from the state in favor of a county for the support of an insane person at a county asylum, the support of whom is not properly a public charge, coupled with writing into it, so to speak, §§ 1500 to 1505, suggests pretty plainly, if not conclusively, that as to a person duly committed to a county asylum, of the class mentioned, the proceedings to enforce the private liability must be under such sections, so far as they are applicable thereto. That would include the jurisdiction to be invoked, the manner of invoking it, as by petition, and the procedure outlined in respect to the matter.

We are referred to chapter 245, p. 407, Laws 1899, as authorizing the commencement of proceedings in the name of the trustees. That makes the trustees of a county asylum for the chronic insane *ex officio* trustees of the county poor with power "to commence and prosecute in the name of the county any proper action or actions to enforce and collect any account, claim, or demand that may arise or accrue to the county in their administration of the business affairs of such asylum," they to account to 60 L. R. A.

the county board of supervisors for all moneys so received or collected. The maintenance, under the direction of the trustees of a county asylum for the insane, of a person thereat, who shall have been properly committed thereto, whose support is not properly a public charge, would create a basis for a liability "in their administration of the business of" operating the asylum against the person or property liable for such support, but not a fixed liability constituting an "account, claim, or demand," within the meaning of the statute. That term suggests the existence of a liability fixed in amount and payable.

Section 1502, Rev. Stat. 1898, as to poor persons, provides for a proceeding in the name of the town supervisors of the nature of the one resorted to here for the purpose of determining whether the person proceeded against is liable to the municipality, and, if so, the amount of such liability, and when payment should be made. That having been made a part of § 604e, as to the insane, it would seem that the proceedings to fix the amount of the liability of any person for the support of an insane person at a county asylum should be commenced, as it was here, in the name of the trustees. The term "proper action," as used in the law of 1899, evidently refers to an ordinary action under the Code, which, without some special authorization therefor, cannot be commenced before a county judge. Such term does not refer to a special proceeding of the sort resorted to here. Moreover, it does not authorize any proceedings other than in the name of the county.

Section 1504, as to the poor, provides for the enforcement of the county judge's order by contempt proceedings, and the following section provides for such enforcement by an action in the name of the town. In the absence of any other guide, the fair inference would be that the same method of enforcement would be proper as to an order requiring a person to contribute to the county for the support of an insane person, the action to be brought in the name of the county; but the law of 1899 furnishes a definite guide, in that it provides that the action shall be so brought.

So the conclusion is reached that, if appellant's wife, while she was at the county asylum for the insane under a proper commitment thereto, was not a proper public charge, because he was by law liable for her support, the proceedings resorted to for the purpose of having such liability, the amount thereof, and the time for its satisfaction adjudicated, were proper. So the county court had jurisdiction of the subject-matter of the proceedings, and on that point there is no infirmity in the judgment.

We are not aware of any statute varying the common-law liability of a husband to support his wife. Counsel for respondent does not suggest any which expressly does so, but argues that our statutory policy is that only such insane persons shall be cared for at public expense in state or county hospitals as have no property that can be devoted thereto, and no relatives legally bound therefor. This is true, but does not settle the question here at issue. No extension of the husband's common-law liability for the support of his wife can be predicated on mere legislative policy shown by the liability created by statute, or expressly recognized thereby as to other persons. New rights in derogation of the common law must rest upon unmistakable statutory provisions. The common law is not subject to change by mere implication. A statute to accomplish such a change "must be clear, unambiguous, and peremptory." Sedgw. Stat. & Const. Law, p. 318; *Meek v. Pierce*, 19 Wis. 300; *Orton v. Noonan*, 29 Wis. 541; *Pelican v. Rock Falls*, 81 Wis. 428-438, 51 N. W. 871, 52 N. W. 1049. So we are led to inquire whether, by the common law, a husband is liable to support his wife under the circumstances of this case. If not, then § 604e has no application to the matter in hand.

The liability of a husband for the support of his wife by common-law rules only requires him to do so in the matrimonial home, selected by him,—acting reasonably,—unless she is compelled to seek or accept support elsewhere because of his wilful neglect or refusal to perform his duty or her living apart from him by his consent. Generally speaking, the duty of the husband for the maintenance of his wife does not extend to the support of her while she is away from his home. *Sturtevant v. Starin*, 19 Wis. 268; *Warner v. Heiden*, 28 Wis. 517, 9 Am. Rep. 515; *Bach v. Parmely*, 35 Wis. 238; *Brown v. Worden*, 39 Wis. 432; *Morgenroth v. Spencer*, (1905; Wis.) 102 N. W. 1086.

It would seem that when a wife, by due process of law, as a charity to her and protection to others, is taken from the society of her husband without fault of his, and confined in an asylum for treatment or safety, or both, there is no refusal by him to support her in his home, even if he is an actor as regards setting the legal machinery in motion for the purpose of affording her the benefit of the public charity and guardianship; nor is there in such a case any consent by the husband to the wife's absence from his home within the meaning of the common-law rule, clothing her with his credit for the purpose of her support. There 69 L. R. A.

is no very great amount of authority on this question. The following are, in our judgment, the most important of the adjudicated cases throwing light on the subject. It will be seen by a careful examination of them that they are substantially all one way, though not entirely in harmony. *Delaware County v. McDonald*, 46 Iowa, 170; *Noble County v. Schmoke*, 51 Ind. 416; *Switzerland County v. Hildebrand*, 1 Ind. 555; *Marshall County v. Burkey*, 1 Ind. App. 565, 27 N. E. 1108; *Davis v. St. Vincent's Inst. for Insane*, 9 C. C. A. 501, 15 U. S. App. 432, 61 Fed. 277; *Watt v. Smith*, 89 Cal. 602, 26 Pac. 1071; *Wray v. Wray*, 33 Ala. 187; *Monroe County v. Budlong*, 51 Barb. 493; *Goodale v. Lawrence*, 88 N. Y. 513, 42 Am. Rep. 259, Overruling *Goodale v. Brockner*, 25 Hun, 621; *Bangor v. Wiscasset*, 71 Me. 535; *Senft v. Carpenter*, 18 R. I. 545, 28 Atl. 963; *Howard v. Whetstone Twp.* 10 Ohio, 365; *Springfield Twp. v. Demott*, 13 Ohio, 104; *Baldwin v. Douglas County*, 37 Neb. 283, 20 L. R. A. 850, 55 N. W. 875.

The Iowa, Nebraska, and Indiana cases are to the effect that there is no common-law liability of the husband in cases of this kind. In the New York, Rhode Island, Alabama, and Federal cases liability was adjudged; but in each instance there was an abandonment of the insane wife, and the decision was placed on that ground. The California decision was based on a statutory liability. We venture to say that no court which has considered and decided the question upon its being the turning one, as in the case in hand, or its being sufficiently involved to challenge careful attention to the matter, has held that there is any common-law liability of the husband in circumstances similar to those in this case. The basic idea of the common-law rule is that, in the special instances where the wife is permitted to use the credit of her husband for her relief and support, she is his agent *ex necessitate legis* or *ex necessitate rei*, failure of duty on his part being the cause of the need. There is no room whatever for that idea where the charity of the law intervenes without fault on the part of the husband for the care and protection of the unfortunate wife, and public safety supersedes him as regards authority and capacity to care for her in his home. Our conclusion is that, till the legislature makes some express provision to the contrary, no recovery can be had of the husband in a case of this sort. Therefore, the judgment appealed from must be reversed.

The judgment appealed from is reversed, and the cause remanded with directions to render judgment in favor of the appellant.

WISCONSIN SUPREME COURT.

Nellie MAGINNIS, *Appt.*,
v.
KNICKERBOCKER ICE COMPANY *et al.*,
Respts.

(112 Wis. 885.)

*1. If a person conveys land to another, stipulating that the title shall revert to him upon a failure of such other to fulfil certain conditions specified, a breach of the condition occurs, and such person makes re-entry of the property or does something equivalent thereto for the purpose of reclaiming the same pursuant to the terms of the grant, in the absence of any equity preventing the legal effect of such facts the title to such property will thereby become vested in

such person as absolutely as it was before such conveyance was made.

2. In the circumstances stated, the grantor, having reclaimed the property, may invoke judicial remedies in respect thereto, pleading his title in general terms the same as if no disturbance thereof had occurred by reason of the grant upon condition.

3. If a person conveys property to another, coupled with a condition the breach of which will, if taken advantage of, cause the title to revert to him, the condition being to secure the payment of money, or the performance of an obligation the breach of which can be fairly measured in money by some established rule, the particular thing to be done, or the particular time of the doing thereof, not being made essential and of the very essence of the contract, under some circumstances a court of

*Headnotes by MARSHALL, J.

NOTE—Equitable relief against forfeiture of estate.

- I. General rules, 833.
- II. Conditions precedent, 836.
- III. Forfeiture will be relieved when compensation can be made.
 - a. In general, 839.
 - b. Forfeiture to secure payment of money.
 1. General rule, 839.
 2. Grant or devise on condition of support, 841.
 3. Grant or devise on condition of payment of money, 842.
 4. Nonpayment of rent, 844.
 5. Nonrenewal of lease, 846.
 6. Nonpayment of taxes, 848.
 7. Failure to remove encumbrance, 849.
- IV. Fraud, accident, mistake, 849.
- V. Effect of conduct of obligee, 851.
- VI. Collateral covenants.
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- VII. Conditions against marriage, 858.
- VIII. After forfeiture declared, 865.
- IX. Statutory forfeiture, 866.
- X. Statutory jurisdiction, 866.

I. General rules.

MAGINNIS v. KNICKERBOCKER ICE Co. and GORDON v. RICHARDSON both constitute valuable contributions to the law upon this difficult and unsettled subject, in pointing out the fact that no relief can be granted from a forfeiture of an estate for failure to perform a condition unless there is some rule by which the damages for the failure can be accurately measured in money; and the former in emphasizing the additional principle that the default must not be wilful or inexcusable.

The courts have struggled with the question for a long series of years, and have apparently laid down some general principles to be administered in awarding or withholding re-

lief; but, upon close inspection, it may be doubtful if many principles are applicable to conditions other than those to which they were applied. It has been stated that the matter depends largely upon the discretion of the chancellor, and that seems to be the rule which has the most general application.

Although refusal to permit the enforcement of a forfeiture occurs sometimes upon equitable principles in actions at law, and the principles which induce courts of equity to afford their assistance to prevent the forfeiture of an estate are frequently applied in actions for the specific performance of a contract to relieve plaintiff from the consequences of his failure to comply fully with all its conditions, the discussions in those cases lead outside the scope of this note, and they will be omitted herefrom, except in a few instances where the discussion is especially valuable. Moreover, the rule which permits relief in case the condition is to secure prompt payment of money is applied frequently to control mortgage foreclosures. But since, in such cases, the rule is applied as well to vest an estate as to prevent its forfeiture, and the matter of mortgage foreclosures is a matter by itself, the rules of which are fairly well known, the cases dealing with that matter are not included here.

When the attempt is made to lay down rules which shall be of general application, great difficulty is encountered. Many judges have tried it only to learn that a slight change of circumstances rendered the supposed general rule wholly inapplicable. All courts of equity agree that equity abhors a forfeiture, and will never give its aid to enforce one, but will, on the contrary, give relief therefrom whenever such relief is in harmony with equitable principles. This almost of necessity makes of universal application a statement found in a case decided under a Canadian statute, that the question of granting relief is one within the judicial discretion of the court. *Coventry v. McLean*, 22 Ont. Rep. 1.

Equity has jurisdiction to relieve against forfeitures, but not to enforce them. *South Carolina & G. R. Co. v. Augusta Southern R. Co.* 107 Ga. 164, 33 S. E. 36.

In *Pittsburg & C. R. Co. v. Mt. Pleasant & B. F. R. Co.* 76 Pa. 481. in which the forfeiture

equity, by an arbitrary rule of construction peculiar to that jurisdiction, may say the parties did not intend the full effect of their language, but purposed to have the condition stand as security for the performance of the obligation or the payment of an equivalent in money.

4. By the arbitrary rule referred to, contracts may be judicially made to read contrary to the literal or reasonable meaning of the language thereof, measured by ordinary rules for judicial construction, and then enforced according to the intention of the parties as judicially declared.
5. The rule of construction above indicated applies to prevent a forfeiture where the circumstances are such as to fall within the jurisdiction of equity, and the person seeking the benefit thereof is not guilty of having wilfully or inexcusably violated his obligation.

6. The beneficiary of a condition in the conveyance of property, for the breach of which the title thereto may revert to him, may lose the benefit thereof by conduct rendering it inequitable for him to insist upon the forfeiture as stipulated.

7. Mere silence is not sufficient to waive a forfeiture; but silence on one side and conduct in good faith relying thereon on the other, whereby such other is placed in such a situation that he will be greatly damaged if the apparent attitude of his conditional grantor be changed effectively, will bind such grantor as a waiver of the benefit of the condition.

8. Mere silence will not operate as a waiver of the benefit of a condition in case of an intentional breach thereof, though the conditional grantee incur expense which would operate to his prejudice if the

of a railroad lease for nonpayment of rent, and for failure to keep the track in repair and maintain an adequate amount of rolling stock, was involved, the court, without passing upon the question of relief from the forfeiture in the particular instance, because the question was not properly presented, said to relieve against forfeiture is one of the oldest and best established functions of a court of equity.

It is stated in *Sanders v. Pope*, 12 Ves. Jr. 282, that the jurisdiction of equity to relieve against the exercise of a legal right rests only upon this principle,—that one party is taking advantage of a forfeiture; and, as his exercise of the legal right would produce a hardship, and great loss and injury, on the one hand, arising from going to the full extent of the right, while, on the other, the party may have the full benefit of the contract as originally framed, the court will interfere where a clear mode of compensation can be discovered.

In *Dunklee v. Adams*, 20 Vt. 415, 50 Am. Dec. 44, it is stated that equity will relieve where compensation for the breach can be made. It is impracticable to lay down any definite rule or principle by which it is to be determined whether compensation can be made in any given case. It necessarily depends, when the breach is not for the nonpayment of money, upon the discretion of the chancellor, whose power in that respect cannot well be otherwise than arbitrary. The soundness of the early doctrine granting relief against forfeiture incurred by nonperformance of collateral acts has been more recently denied in England, and it now appears to be the established doctrine that relief will be granted only where the breach of the condition is for the nonpayment of money; and it is granted in such cases on the principle that the allowance of interest for the delay forms a certain rule of compensation, and is equivalent to payment at the day.

As will appear, however, it is not enough to show that compensation can be made; the plaintiff must, in addition, show that he is equitably entitled to relief.

Thus, in *Broadbuss v. Ward*, 8 Mo. 217, which was an action to compel specific performance of an agreement to convey a lot of land on which complainant had agreed to erect a dwelling house, which he had failed to do, the court said the case is one in which relief from the consequences of the breach of covenant was

sought in equity; and stated that, if ever there was a case in which equity would refuse to relieve against a forfeiture, this ought to be one, because complainant had left the state, and had never attempted in any way to comply with his agreement until the property had greatly increased in value because of the efforts of other parties.

The suggested limitation as to collateral acts has not been fully adopted.

Where the condition of a grant of state land forfeited for nonpayment of taxes, requiring payment for improvements upon the property, was not complied with, the court said equity will never lend its aid to destroy an estate for breach of a condition subsequent, but will relieve against the consequences whenever the case admits of a certain compensation in damages, as where the condition is to pay money. It regards conditions as mere remedies to enforce the fulfillment of obligations, and will not allow them to be perverted from their purposes by one side or the other. *Worthen v. Ratcliffe*, 42 Ark. 330.

In *Rose v. Rose*, 1 Amb. 332, the court, in considering the question of relieving against the enforcement of the full amount of a debt which the creditor had agreed should be reduced a certain amount, in case the rents of certain property should be applied to its payment, after the collection and appropriation to his own use of rents by the owner of the estate, said, equity will relieve against almost all penalties whatsoever. Against forfeitures or copyholds. But they are all such cases where the court can do it with safety to the other party; for, if it cannot put him into as good condition as if the agreement had been performed, the court will not relieve.

In *Wells v. Smith*, 2 Edw. Ch. 78, which was a suit for specific performance of a contract to convey real estate in which the purchase price was not tendered at the specified time, the court discusses the question of the right of the court to relieve the complainant of the consequence of his breach of contract. The court holds that it has no power to relieve for the nonperformance of a condition precedent; but says that the principle whereon the court is to act in relation to conditions subsequent is widely different. In cases of this sort, if a breach or nonperformance appears, the effect of which is to work a forfeiture or devert an es-

grantor were thereafter permitted to insist upon the forfeiture.

9. The establishment of a railroad as a purely private enterprise cannot be legitimately aided by the power of eminent domain.

10. The doctrine that, if a railroad company takes possession of land for a public way, the owner thereof not objecting, the latter will be presumed to have consented thereto, and impliedly agreed to accept a just compensation therefor, and consented to rely upon the statutory method of obtaining the same, has no application to a case where the rights of the parties are defined by a written instrument.

11. If a railway corporation takes possession of land for a private purpose, its right to do so resting in a grant by the owner thereof, and it subsequently loses that

right by forfeiture to such owner, it cannot thereafter defy such owner, and continue to enjoy his property, because it might successfully proceed in good faith to acquire it for a public purpose.

(Cassoday, Ch. J., dissents.)

(December 17, 1901.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Racine County in favor of defendants in a suit to restrain a continuous nuisance. *Reversed.*

Statement by **Marshall, J.:**

Action to restrain a continuous nuisance.

The complaint states, in substance, that plaintiff was the owner in fee simple and

that, the court, acting upon the principle of compensation to the party for the injury sustained by the breach, will interpose and prevent the forfeiture. The court will only give relief where compensation can be made in damages. There may even be cases of condition subsequent unperformed, in which the court will not relieve from forfeiture on account of the difficulty of ascertaining with any degree of certainty the amount or adequacy of compensation to be allowed.

The statement that the court will not interfere in case the breach is of condition precedent has met with favor, but, as will be seen hereafter, it is not of universal application.

In *Noyes v. Anderson*, 124 N. Y. 175, 21 Am. St. Rep. 657, 26 N. E. 316, which involved the question of relief from a forfeiture of a contract right of a mortgagor, the court makes the following statement with respect to the power of equity to relieve from forfeiture of estates: The doctrine was applied to relieve a mortgagor from the forfeiture to which he was subjected. It is also not only available to cases of leases where forfeiture of the term and entry are provided for as the consequences of nonpayment of rent on the day it becomes due, but is extended to other cases, and more especially to those (although not necessarily confined to them) where the default resulting in forfeiture is in payment of money, as in such case adequate compensation can be made. This relief will not be afforded in cases where the default and forfeiture have been occasioned by the wilful neglect of the party seeking it. Nor will it ordinarily be given where the breach is of a condition precedent, although the rule may not be without exception.

In *Oil Creek R. Co. v. Atlantic & G. W. R. Co.* 57 Pa. 65, which was a suit for specific performance of a contract, the court says that a court of equity will not in general relieve against a forfeiture, unless it be in case of nonpayment of rent where an exact and just compensation can be made by decreeing the landlord the arrears of his rent with interest and costs.

That rule, however, as has already been seen, is too broadly stated.

The rule that equity will not interfere in there is a remedy at law is applicable in this class of cases as in others. Therefore, if an attempt to forfeit a lease is a nullity, the lessee has a complete remedy at law, and equity will

not entertain a bill on his behalf for relief. *Graham v. Carondelet*, 33 Mo. 262.

But the statutory right of a tenant to set up an equitable defense which he may have to an action to dispossess him for breach of covenants does not deprive equity of jurisdiction of a suit for equitable relief from a forfeiture, unless the right to set up the defense in an action at law is absolute, and not dependent upon the discretion of the court. *Giles v. Austin*, 62 N. Y. 486, 46 How. Pr. 269.

And to secure the aid of a court of equity, an equitable right must be relied on. Therefore, to give equity jurisdiction to relieve from a forfeiture for nonpayment of rent, there must have been a forfeiture, and its jurisdiction is therefore defeated if forfeiture is denied and proof is offered to show that no forfeiture has occurred. *Warne v. Wagenor* (N. J. Eq.) 15 Atl. 307.

Moreover, equity will never relieve a covenantor from a forfeiture except under the strong expectation that the covenant will be faithfully performed thereafter. And the insolvency of the party, furnishing a presumption of his inability to perform his covenant, is a proper ground for refusing relief. *Dunklee v. Adams*, 20 Vt. 415, 50 Am. Dec. 44.

Furthermore, the intention of the parties may be expressed in the contract in such a manner as to be conclusive either in favor of or against relief.

Thus, even though the contract contains a provision for forfeiture in case of a failure to perform strictly in point of time, nevertheless a court of equity will examine the whole contract in the light of surrounding circumstances, and ascertain whether it was the real intention of the parties that the party in default should lose the right secured to him by the contract. *Steele v. Branch*, 40 Cal. 3.

So the principles upon which equity will relieve a lessee from the consequences of non-performance of covenants in a lease have no application where the mode of determining the rights of the lessee is expressly provided for by the contract, and the right which he is seeking to enforce to an extension of the lease, or payment for buildings placed on the leased property, is expressly dependent upon the performance of conditions precedent, such as the payment of all assessments against the property, which have not been performed. There is

in possession of certain lands described, situated in Racine county, Wisconsin; that defendants constructed a spur railroad track thereon, leading from the main track of the Chicago, Milwaukee, & St. Paul Railway Company southeasterly of said land, in a northwesterly direction to the boundary line thereof, and intends to enter upon and permanently occupy said premises for said spur track, and to operate railway freight trains over the same without permission of plaintiff or having first acquired the right to do so. The defendant Knickerbocker Ice Company answered, denying the allegations of the complaint as to the title and possession of the premises in dispute, and alleging title and right of possession in itself, and that such possession was exclusive except that

the defendant railway company possessed a license to maintain a railway track over the same for the purpose of reaching ice industries operated by said ice company; that the railway track had been maintained and operated continuously for more than three years before the commencement of the action, by said railway company, as a part of its public railway system. The railway company answered substantially the same as the ice company.

On the trial plaintiff admitted that the railway track had been maintained and operated for more than three years before the commencement of the action, but claimed that it was so maintained and operated solely for use of the defendant ice company. The following facts were established by the

no ground upon which a court of equity should intervene to relieve the lessee from the consequences of a failure or neglect to perform. *People's Bank v. Mitchell*, 73 N. Y. 406.

So if, upon the face of the contract and from the surrounding circumstances, it clearly appears to have been the distinct understanding and agreement of the parties that, if the stipulated act was not performed within the specified time, all rights under the contract should be forfeited; and, if default is made in the performance within the time,—a court of equity will give no relief unless a strict performance is either waived, or is excused upon some general ground of equitable cognizance. *Steele v. Branch*, 40 Cal. 3.

But a stipulation to the effect that, in case of a default, a party shall lose his rights under the contract, is often inserted by way of penalty, merely with a view to induce a more prompt performance, and not with the intention that a failure strictly to perform, in point of time, shall work an absolute forfeiture. When such appears to have been the intention of the parties, if the party in default afterwards tenders a performance promptly and with reasonable diligence; and if the other party has suffered no damage by the delay; and particularly if the property has not materially enhanced in value during the time of the delay,—a court of equity will not enforce the forfeiture, but will decree a specific performance, notwithstanding the default, provided it appears that the party in default has acted in good faith, and gives some reasonable excuse for the delay. *Ibid*.

And in *Brink v. Steadman*, 70 Ill. 241, which was an action to compel specific performance of a contract to convey real estate, the court says, if parties under no disability choose to contract for a forfeiture, however hard it may seem. In the absence of any fraud or improper practices on the part of the vendor, the law can afford the vendee no relief.

II. Conditions precedent.

Many expressions will be found in the cases to the effect that no relief can be granted in case the breach is of a condition precedent; and, upon first glance, this result would seem to follow from necessity, for, if the condition is precedent, and has not been complied with, no estate has vested which is the subject of

forfeiture within the relief of equity. But a closer view will disclose that in many instances, although the estate has not in fact vested, yet a right has been acquired under a contract which has been looked upon by the parties as the equivalent of an estate; and the court will seize upon such interest and establish it, although the result is to relieve from a forfeiture for breach of a condition precedent. This is common practice in actions for specific performance of contracts, and has been applied in cases of conditional grants and devises.

In *City Bank v. Smith*, 3 Gill & J. 265, it is said that, although equity will in many cases interpose to prevent the devastating of an estate, it will not relieve against the non-performance of a condition precedent to the vesting of an estate by giving an estate that never vested; it will not vest any estate that, by reason of the nonperformance of a condition precedent, would not vest at law.

So, in order to have the principle of equitable relief apply, the effect of the breach of condition must be to divest the estate, and not to destroy the right to acquire an estate. In the latter case equity has no power to interpose and aid the defaulting party. *Robinson v. Cropsey*, 2 Edw. Ch. 138.

So, if title under a grant of public land is not to vest until certain acts have been performed by the grantee, equity will not interfere to protect him in possession, if he fails to comply with the terms of the contract. *People ex rel. Love v. Center*, 66 Cal. 551, 5 Pac. 263, 6 Pac. 481. The court says it is true a court of equity does not favor forfeiture. It will not aid in divesting an estate. It may interfere to prevent the divesting of an estate. But here there is no question of forfeiture. By the terms of the agreement the whole of the work required was a condition precedent, and a court of equity will not, by its decree, give an estate which has never vested.

There is a wide distinction between a condition precedent, where no title has vested and none is to vest until the condition is performed, and a condition subsequent, operating by way of defeasance. In the former case equity can give no relief. The failure to perform is an inevitable bar. No right can ever vest. The result is very different where the condition is subsequent. There equity will interpose and relieve against the forfeiture upon the principle of compensation, where that

evidence: December 15, 1893, Frederick Uhen, under whom both plaintiff and defendants claim title, conveyed to Thomas Boyle the 33-foot strip of land across a portion of section 34, town 3, range 19, described in the complaint, out of a tract of land owned by him, for a right of way for a railway track leading from the main track of the Chicago, Milwaukee, & St. Paul Railway to certain ice houses owned by the grantee and his associates. The conveyance was made upon conditions expressed therein as follows: "Provided that said second party inclose said premises herein conveyed with a good, legal, and sufficient fence, and forever maintain the same, and provide a suitable crossing in said strip at a point to be designated by the first parties, and

to maintain gates in the fences at such crossing, and to build and maintain suitable culverts at the points where ditches now cross said premises, then this deed shall remain of full force and effect; but if at any time said grantee shall suffer the above conditions to be broken, then said described premises shall revert back to said first parties, their heirs or assigns." Thereafter Boyle leased to the defendant railway company the center 17 feet of said strip of land, and contracted with such company to construct a spur track thereon for the exclusive use of himself and his associates in the operation of their ice industry. A track was constructed accordingly, Boyle and his associates preparing the roadbed and the railway company furnishing the ties and rails

principle can be applied, giving damages, if damages should be given, and the proper amount can be ascertained. *Davis v. Gray*, 16 Wall. 203, 21 L. ed. 447.

Where a person cannot be compensated in damages it is against conscience to relieve. Precedent conditions must be literally performed, and equity will never vest an estate when, by means of a condition precedent, it will not vest at law; but, since conditions subsequent are to divest an estate there, it is otherwise where there can be compensation in damages. *Clark v. Lucy*, 2 Eq. Cas. Abr. 213, pl. 4.

In *Popham v. Bampfelfeld*, 1 Vern. 83, the lord chancellor, by way of argument, says conditions precedent must be literally performed. Equity will never vest an estate where, by reason of conditions precedent, it would not vest at law. But of conditions subsequent, which are to divest an estate, there it is otherwise; yet of conditions subsequent there is this difference to be observed,—when the court can in any case compensate a party in damages for nonprecise performance of the contract, there it is just and equitable to relieve, but where the party cannot be compensated in damages, it will be against conscience to relieve.

And the same doctrine is announced on rehearing in 1 Vern. 167.

Upon examination of the concrete cases, however, it will be observed that the relief was refused, not so much because the condition was precedent, as because it would be inequitable to grant the relief.

Thus, in *Powell v. Pellett*, 2 Eq. Cas. Abr. 209, pl. 3, a father undertook to pay plaintiff a certain amount within two years on condition that the plaintiff marry his daughter and settle a certain amount upon her. The marriage took place, and the daughter died within the two years, and plaintiff brought suit to enforce the payment. The settlement not having been made, the court held that it was in plaintiff's power to have entitled himself to the payment when he pleased by settling the jointure, and, not having done so, he was not entitled to the aid of equity upon the ground that the act which he undertook to perform was prevented by an act of God.

And a similar ruling was made, with only slight changes in the facts, in *Feversham v. Watson*, 2 Eq. Cas. Abr. 210, Freem. Ch. 35. 69 L. R. A.

So where an agreement for a daughter's portion on her marriage was made on condition that the husband should, within two years, settle upon her a certain jointure, and she died within the two years without the jointure having been settled, it was held that the husband could not be relieved from breach of the condition. *Vermuden v. Read*, 1 Vern. 69.

So in *Wood v. Ingram*, 2 Eq. Cas. Abr. 211, pl. 3, a woman having lands of inheritance married and agreed to settle these lands upon increase of her jointure from £250 to £450. Her husband died before the agreement was carried out, and she remarried, and, upon bill to compel performance of the agreement to increase the jointure, the lord keeper held that, not having complied with the condition, she could not be relieved in equity.

So where an estate was granted to a lady in case, within three years after the death of testator, she should marry a certain person named, and upon her failure to do so then over, Lord Holt held that equity would not relieve a breach of the condition, since it was a condition precedent, the nature of which is such that no relief can be had upon failure to perform it. He says: Shall equity give her the estate although married to another person? This is not within the words or equity of the will, but in express contradiction to both of them. If the estate indeed be upon a condition subsequent, equity may interpose where the substance is performed, though not in every matter literally performed; but, where it is in no point performed, it can never help. *Bertie v. Faulkland*, 3 Ch. Cas. 129, 1 Eq. Cas. Abr. 110, pl. 10, Freem. Ch. 220.

In the report in Holt, 230, he is reported as saying that, in cases of conditions subsequent that are to defeat an estate, these are not favored at law. And, if the condition becomes impossible by the act of God, the estate should not be defeated or forfeited; and a court of equity may relieve and prevent the divesting of the estate, but cannot relieve to give an estate that never vested.

In the report in 12 Mod. 182, Lord Holt is reported as saying that the nature of a condition precedent is this,—that it must be performed before ever the estate can vest, and, if the performance of the condition become impossible by the act of God, yet the estate shall not accrue; so if it become impossible by any other inevitable accident. The relief in

and putting the same in place. While such work was in progress, Uhen made complaint to Boyle and others engaged therein, because no provision was being made for putting in culverts. No attention was paid to his complaints other than to suggest to him that culverts were not necessary. Ditches were made on either side of the strip, and the cross drainage ditches, agreed to be preserved by culverts under the track, were connected with such side ditches so that the water would flow through them off from plaintiff's land. There was delay in putting in the farm crossing, but it was finally put in and accepted. Soon after the construction of the spur track the rights of Boyle in the land, by mesne conveyances, became vested in the defendant ice company. The

condition in respect to fencing the land was never performed. Uhen made complaint as to that on several occasions, at one time giving notice that the title conveyed by him could be reclaimed because of neglect to build the fence. During the summer of 1899, upon Uhen complaining about the failure to build the fence, he was promised that the premises should be inclosed after harvest time of that year. He acquiesced in that. In November, thereafter, plaintiff became the owner of the land, by conveyance from Uhen, out of which he conveyed the premises in controversy. Thereafter, with knowledge of and without protest from Uhen, the defendants fenced that part of such premises leased to the railway company. Thereafter, on January 4, 1900, Uhen went upon the strip

equity has always been in case of breach of subsequent conditions which determine the estate. And the lord chancellor suggests that, if the remainder-man had done any unfair act to hinder the marriage, he being to have advantage by it, equity might have relieved.

In the report in 2 Vern. 333, Lord Chief Justice Treby says that the case was not one of forfeiture, but the case of a gift to two persons in case they should do a certain thing which they were at liberty to do or not at their pleasure, and that the fact that the lady was willing did not entitle her to the estate. Neither was there any latitude left for her to choose another man. It is not a case in compensation.

In 1 Salk. 231, it is stated that this decree was reversed on appeal by the House of Lords.

Equity will not relieve a railroad company which has obtained permission to use tide lands for a depot on condition that it fill them up from the result of the breach of the condition, merely on the ground that it had not the means of complying with the condition. *New York & N. E. R. Co. v. Providence*, 16 R. I. 746, 19 Atl. 759. And the court further held that the right of the railroad company to continue to occupy the land cannot be decreed by the court upon making compensation to the city for the cost of the filling after many years' default, saying: We fail to see how, after a default of thirty years, we can reinstate a right to occupy land upon a money payment when the right originally depended upon something different, and thus oust the city and its tenants of possession and improvements.

Where, by resolutions of public commissioners, lands for the manufacture of salt are set apart to applicant, and it is provided that the occupant shall have four years in which to complete the works; but that the location shall be void unless the works shall have been commenced and one tenth of the capital expended within a year,—the designation of the time is a condition precedent, upon noncompliance with which all estate of the occupant ceases; and equity will not relieve him from the forfeiture. *Parmelee v. Oswego & S. R. Co.* 7 Barb. 618, Affirmed in 6 N. Y. 74.

And in application of the idea that no relief can be had for breach of a condition precedent the Texas court of civil appeals held that, where vendees of real estate are let into possession under a contract by which the title

is to be conveyed to them when one half the purchase money is paid, the payment of the purchase money is a condition precedent to the vesting of any equity; and equity will not interfere to relieve them from a forfeiture for failure to comply with the condition. *Pell v. Chandos* (Tex. Civ. App.) 27 S. W. 48.

Of course, if the vendees made no offer to comply, they had no rights under the contract; but, if the default was merely failure to make the payments within a specified time, there is no doubt that equity might relieve if compensation could be made to the vendor.

In *Gates v. Parmly*, 93 Wis. 294, 66 N. W. 253, 67 N. W. 739, which was in the nature of an action to compel specific performance of a contract to purchase real estate, and to be relieved from the forfeiture for breach of a condition precedent, the court says equity will relieve against a forfeiture, even where it is in the form of a condition precedent, where it is obtained merely as a security for the payment of money or the performance of any act where failure to perform it may be compensated in money.

But in *Donnelly v. Eastes*, 94 Wis. 390, 69 N. W. 157, the court asserted that it had no power to relieve from a forfeiture for breach of a condition precedent, performance of which was necessary to vest the estate. The court says that, if one agrees that full performance of all obligations on his part shall be requisite to the enjoyment by him of any benefit under the contract, he is presumed to know the legal effect of assuming such an obligation, to have done it for a consideration, and must abide the consequences of it, and not expect, by the aid of a court of equity, to shift the burden on to others which he has voluntarily agreed to bear himself.

Where a compensation can be made in case of breach of a condition precedent, equity will relieve. For where it is the clear intent of a person that the estate shall go to another, and it is limited in case he performs a condition, if the performance is prevented by act of God, or other accident, it is highly equitable. If an adequate recompense can be made to him for whose benefit the condition was designed, that relief shall be given whereby the whole intent of the party may take effect. But where that matter lies not in compensation, relief has never been given. *Harvey v. Aston*, 2 Comyns, Rep. 726, Reversing *Cas. t. Talb.* 212.

of land for the purpose of reclaiming title thereto for nonperformance of the conditions of the deed. He then declared in the presence of several persons the purpose of his entry, and constructed fences across the ends of the strip so as to exclude all comers therefrom. He then conveyed the land to plaintiff, who thereafter removed the side fences of the 17-foot strip, making the entire 33-foot strip a part of her inclosure. The railroad company did not construct, operate, or intend the spur track for public use, but established it for the exclusive use of the owners of the ice industry served by it.

At the close of the trial the plaintiff's attorneys requested the court to find facts in accordance with the foregoing, presenting

written findings to that effect, which request was refused. A decision was rendered for defendants, the findings of fact being to the effect that the spur track was constructed and operated for public purposes; that the defendant ice company was the owner and entitled to the possession of the premises in dispute; that the railway track was owned and operated by the Chicago, Milwaukee & St. Paul Railway Company, and was on the premises by license of the ice company; that plaintiff was not entitled to any compensation from the defendants for the land, or for the use thereof, and had not suffered and would not suffer any injury by reason of any acts of the defendants or either of them.

So where a man directed that claims which he had against the husband of his niece should be released on condition that, within two months from testator's decease, the husband should release all claims in or to the property which his wife should receive under testator's will, it was claimed that the execution of the release was a condition precedent, failure to comply with which would destroy his rights under the will. But the court says, where the property is given over on failure to comply with a condition precedent, equity will not relieve. The rule is otherwise where there is no bequest over, and the parties can be placed in the same situation as if the condition had been strictly complied with. *Hollinrake v. Lister*, 1 Russ. Ch. 500.

In *Taylor v. Popham*, 1 Bro. Ch. 168, an annuity was granted to testator's son on condition that he should, within three months, release all demands against testator's estate. He refused to sign a release tendered, and brought suit for an account, and the court said that this raised the question whether he had forfeited the annuity, and that this led to the common-law rule as to conditions precedent. If the court can put the parties in the same situation as if the condition had been performed, it will never suffer a forfeiture to attach. And, since the release could yet be signed, the forfeiture was saved.

One cannot secure relief from the failure to perform conditions precedent, unless it is evident that the stipulation as to forfeiture is in the nature of security. *Nelson v. Stephens*, 107 Ws. 129, 82 N. W. 163.

See also cases in subd. III. b, 2, 3, *infra*.

III. Forfeiture will be relieved when compensation can be made.

a. In general.

The first matter which is usually considered when an application is made for relief from a forfeiture is the possibility of making compensation in case relief is granted. In case compensation is possible, the court will favor the suit, while, if it is not, no favor will be shown. The mere fact that compensation can be made is not always sufficient to secure relief, because the plaintiff may not show himself to be worthy of equitable relief, or there may be matters of estoppel or other counter equities to be considered.

69 L. R. A.

Where there was a breach of a provision in the deed that the grantee should pay to the grantor a certain amount on a specified day in each year, the court held that, where compensation could be made in money, courts of equity would relieve against forfeitures, and compel the party to accept a reasonable compensation in money. *Gallagher v. Herbert*, 117 Ill. 160, 7 N. E. 511.

So where a mother devised lands to her executors to pay a certain amount to her son, provided that, if his father did not release the goods in a certain house, then the devise should be void and go to the executors; and the father refused to make the release, whereupon the son came into equity for relief,—the father then offered to give the release, but the executors claimed a forfeiture. The lord chancellor gave the relief, saying that it was a standing rule of the court that a forfeiture should not bind where a thing may be done afterwards, and compensation be made for it. *Cage v. Russel*, 2 Vent. 352.

On the other hand, if compensation cannot be made, that is an end of the case.

So in *Clark v. Barnard*, 108 U. S. 436, 27 L. ed. 780, 2 Sup. Ct. Rep. 878, which involved relief against a forfeiture or penalty under a bond, and not the forfeiture of an estate, the court said that courts of equity will not interfere in cases of forfeiture for the breach of covenants and conditions where there cannot be any just compensation decreed for the breach.

And in *Hukill v. Guffey*, 37 W. Va. 425, 16 S. E. 544, the court, although holding that the question was not before it because the question of forfeiture was *res judicata*, said that equity will not relieve against forfeiture for breach of covenants in a lease where compensation cannot be made. This applies to covenants for repairing, insuring, and doing other specific acts.

b. Forfeiture to secure payment of money.

1. General rule.

If a forfeiture of an estate is provided for merely to enforce the prompt payment of money, equity will regard it as in some sense simply a provision *in terrorem*, and, if interest will compensate for the want of prompt payment, it will permit the payment to be made when

Messrs. Louis H. Rohr and John B. Simmons, for appellant:

The conditions in the deed to Boyle regarding the building and maintenance of fences, a farm crossing, and culverts for the farm ditches were true "conditions subsequent."

1 Jones, Real Prop. § 638; *Gallagher v. Herbert*, 117 Ill. 160, 7 N. E. 511; *Hoyt v. Ketcham*, 54 Conn. 60, 5 Atl. 606; *Blanchard v. Detroit, L. & L. M. R. Co.* 31 Mich. 43, 18 Am. Rep. 142.

The addition of a clause of re-entry makes it unmistakable that a condition was intended.

1 Jones, Real Prop. § 638; *Cornelius v. Den*, 26 N. J. L. 376; *Ellis v. Kyger*, 90 Mo. 600, 3 S. W. 23; *Pepin County v. Prindle*,

relief is asked, and the forfeiture thereby saved.

Equity may relieve against a forfeiture for nonpayment of money within a time fixed, if the amount is tendered together with interest. *Beecher v. Beecher*, 43 Conn. 556.

Equity will relieve against forfeiture of a leasehold where it has been incurred by neglecting to pay a certain sum of money the interest on which can be calculated with certainty, and the landlord thereby compensated for the inconvenience he may sustain by the tenant's withholding payment. *Bacon v. Western Furniture Co. Wilson Super. Ct. (Ind.)* 567.

In *Ritchie v. Kansas, N. & D. R. Co.* 55 Kan. 36, 39 Pac. 718, which was an action to recover land conveyed to a railroad company for failure to maintain a depot on it, the court adopts the following statement of the law: Wherever a forfeiture is inserted merely to secure the payment of money or the performance of some act or the enjoyment of some right or benefit, equity regards such payment, performance, or enjoyment as the real or principal intent of the instrument, and the forfeiture merely as an accessory, and will therefore relieve the obligor from the forfeiture whenever the actual damages sustained by the other party can be adequately compensated.

So an agreement between purchasers of real estate that, upon the failure of one to pay his share of the purchase price, his interest in the land shall vest in the other, is a provision for a forfeiture against which equity will relieve. *Asher v. Pendleton*, 6 Gratt. 628.

So, where a contract for sale of land provides that default in making deferred payments at the day specified shall work a forfeiture of the estate, giving the vendor the right to repossess himself of the estate, the provision will be regarded as in the nature of a penalty, from which equity will relieve. *Re Dagenham (Thames) Dock Co. L. R. 8 Ch. 1022.*

Where a mortgage is held to leave a conditional title in the mortgagor until breach of condition, courts of equity look upon provisions for forfeiture for nonpayment of the amounts due as in the nature of a penalty, and give relief accordingly. This is done by allowing the mortgagor to redeem the land on equitable terms at any time before the right to do so is barred by foreclosure. These courts, looking at the substance of the transaction rather than its form, and with a view to giving effect

61 Wis. 309, 21 N. W. 254; *Horner v. Chicago, M. & St. P. R. Co.* 38 Wis. 165.

By the terms of the deed it is to remain in force provided the grantee does the thing stipulated for; but, if not, the land is to revert. The absence of an express covenant to perform has been held to furnish proof that a condition subsequent is intended.

1 Jones, Real Prop. § 639; *Brown v. Chicago & N. W. R. Co. (Iowa)* 82 N. W. 1003; *Richter v. Richter*, 111 Ind. 456, 12 N. E. 698; *Blanchard v. Detroit, L. & L. M. R. Co.* 31 Mich. 43, 18 Am. Rep. 142; *Gilchrist v. Foxen*, 95 Wis. 438, 70 N. W. 585.

Acceptance of a deed and possession of land thereunder bind the grantee to the conditions contained therein.

Bishop v. Douglass, 25 Wis. 696; *Leach*

to the real intentions of the parties, hold that the mortgage was a mere security for the payment of the debt; that the mortgagor was the real beneficial owner of the land, subject to the encumbrance of the mortgage; that the interest of the mortgagee was simply a lien and encumbrance on the land, rather than an estate in it. Equity courts, in allowing a redemption after a forfeiture of the main estate, uniformly require the mortgagee to reconvey to the mortgagor. *Barrett v. Hinckley*, 124 Ill. 32, 7 Am. St. Rep. 331, 14 N. E. 863.

In *Sanborn v. Woodman*, 5 Cush. 36, which involved the power of a court of law to stay proceedings upon a writ of entry to recover possession of property because of breach of condition to indemnify the grantor against liability upon a mortgage, the court says that, where the forfeiture is designed to secure the payment of a sum of money, a court of equity will grant relief on payment of the money secured, with interest.

In *Atkins v. Chilson*, 11 Met. 112, the court, in considering the question whether or not a court of law had power to stay a writ of entry for alleged forfeiture of a lease, said: That a court of equity would grant relief in a case like this is not questioned, and cannot be denied. The true foundation of equitable relief in cases of forfeiture is limited to such cases as admit of compensation according to the original intent of the parties. In all cases where the forfeiture is designed to secure the payment of a certain sum of money, a court of equity will grant relief on payment of the money secured, with interest.

But in *Hancock v. Carlton*, 6 Gray, 39, it is stated that how far and under what circumstances courts of equity will give relief in cases of forfeiture by reason of nonperformance of conditions subsequent seems to be a vexed question in the English courts. Certainly the broad ground of giving relief in all cases where a forfeiture has been occasioned by a nonpayment of money at the stipulated time, upon an offer to pay the same and the accruing interest, has not been fully sanctioned. And the statement of Story on Equity, § 1323, is cited to the effect that the present English doctrine is that in all cases of forfeiture for the breach of any covenant other than a covenant to pay rent no relief will be granted in equity, unless upon the ground of

v. *Rains*, 149 Ind. 152, 48 N. E. 858; 6 Am. & Eng. Enc. Law, p. 505, subs. 4.

Mere breach of the condition does not determine the estate, notwithstanding the deed expressly provides for reverter to the grantor, but it will continue until defeated by re-entry or some equivalent act.

1 Jones. Real Prop. §§ 708, 712; 1 Sharswood & B. Real Prop. 143; *Little Falls Water-Power Co. v. Mahan*, 69 Minn. 253, 72 N. W. 69; *Cross v. Carson*, 8 Blackf. 138, 44 Am. Dec. 754; *Ellis v. Kyger*, 90 Mo. 600, 3 S. W. 23.

The usual way of taking advantage of a condition subsequent is by an entry made for that purpose.

2 Washb. Real Prop. 14; 1 Jones, Real Prop. §§ 712, 715, 716; 1 Sharswood & B.

accident, mistake, fraud, or surprise, where the breach is capable of compensation.

As appears from the discussion in subd. IV., *infra*, this question as to what part fraud, accident, or mistake plays in the granting or withholding of relief is a vexed one; but, from the cases collected in this main division, it clearly appears that, so far at least as the American courts are concerned, where the forfeiture is provided merely to secure the payment of money, relief will be granted although neither of those special grounds of equity intervention is shown.

2. Grant or devise on condition of support.

Within the rule that equity will relieve if compensation can be made, are the cases in which property is granted or devised on condition that support be furnished to the grantor or some other person during life. In most such cases the condition is inserted merely to secure the prompt payment of money, and, except in cases of peculiar hardship, equity will not permit a forfeiture merely for failure to make the payments promptly.

Where a deed in escrow is to be delivered to the grantee upon his performance of a condition as to support of the grantor, equity will relieve from a breach of the condition, although it is a condition precedent, if it is equitable, under the circumstances, that relief shall be granted. *Chipman v. Thompson*, Walk. Ch. (Mich.) 405.

Where land was conveyed on condition of the payment of quarterly instalments to the grantor, the court held that failure to pay did not work an absolute forfeiture, but that the failure must be taken advantage of by the grantor; but added that the circumstances are such that a court of equity would have relieved against the forfeiture, even if the condition had been absolute. *Berryman v. Schumaker*, 67 Tex. 314, 3 S. W. 46.

A deed upon condition to maintain the grantor, involving a forfeiture upon failure to perform, was held, in *Spaulling v. Hallenbeck*, 39 Barb. 79, to be intended as a security in the nature of a penalty for the performance. The court said it was a condition subsequent, and, upon failure to fulfil its requirements, the grantor had a right to re-enter upon the premises. If the grantee refused to comply with these conditions he forfeited his estate. It was 60 L. R. A.

Real Prop. 143; *Cross v. Carson*, 8 Blackf. 138, 44 Am. Dec. 742; *Bowen v. Bowen*, 18 Conn. 535; *Hubbard v. Hubbard*, 97 Mass. 188, 93 Am. Dec. 75; *Frost v. Butler*, 7 Me. 225, 22 Am. Dec. 199; *Gilchrist v. Foxen*, 95 Wis. 428, 70 N. W. 585; *Horney v. Chicago, M. & St. P. R. Co.* 38 Wis. 165.

The present action was brought to protect plaintiff's possession after re-entry by her grantor, and after conveyance and delivery of possession by him to her. She did not and never intended to bring an action in equity to declare or enforce a forfeiture.

Not only is it well settled that a forfeiture cannot be enforced in that form of action (*Lave v. Hyde*, 39 Wis. 345; *Mills v. Evansville Seminary*, 47 Wis. 362, 2 N. W. 550; *Clark v. Drake*, 3 Pinney [Wis.]

the penalty which he consented to accept as a condition of the grant. In all such cases equity will relieve.

In *Shade v. Oldroyd*, 39 Kan. 313, 18 Pac. 198, a conveyance had been made in consideration of the yearly payment of a certain sum to the grantor during life, upon condition that a failure to pay at the time and in the manner specified would forfeit all right and interest in the premises. Payments were not made when due, and forfeiture was declared, and ejectment was brought to recover possession of the property. There was judgment for defendants, and the court, without discussing the question how the defense could be made in that form of action, affirms the judgment, stating that this was a case in which a strict forfeiture could not be insisted upon, the condition being one for the payment of money only, and all preceding payments having been made without much regard to the precise time of their maturity. The court, in the headnote, says that equity will not enforce such a forfeiture on slight grounds; but, since the action was at law for possession of the property, and not in equity for a forfeiture, it is difficult to see on what theory the court acted.

In *Bethlehem v. Annls*, 40 N. H. 34, 77 Am. Dec. 700, it is intimated that relief may be afforded by equity for breach of a condition to furnish life support, upon the ordinary principles by which parties are relieved from other penalties.

In *Donnelly v. Eastes*, 94 Wis. 390, 69 N. W. 157, a conveyance of a farm in consideration of support of the grantor during life was held to create a condition subsequent; and the court held that, even if the title had reverted, under the terms of the deed, upon breach of the condition, the court was not powerless to relieve from the consequences thereof.

In *Messersmith v. Messersmith*, 22 Mo. 369, the court held that, where a son to whom his mother had deeded land on condition that he support her for life died before she did, but there was property enough to comply with the condition, equity would relieve from the forfeiture. The court says the ground of equitable interference is that we ought to presume the object of entering into the contract was its fulfilment, and not an infliction of injury on one side, nor the acquisition of a collateral advantage on the other; that, when this object is frustrated, the intention of the parties will

228; 1 Jones, Real Prop. § 731; 2 Story, Eq. Jur. § 1319), but it is equally well settled that only the grantor can take advantage of a condition subsequent, and that until re-entry he has no interest in the land which he can convey; so that Mrs. Maginnis's right depends entirely upon the title having reverted by act of her grantor before the conveyance to her.

2 Devlin, Deeds, § 969; Martindale, Conv. § 124; 1 Jones, Real Prop. §§ 708, 723, 725; *Hoyt v. Ketcham*, 54 Conn. 60, 5 Atl. 603; *Upton v. Corrigan*, 151 N. Y. 143, 37 L. R. A. 794, 45 N. E. 359; *Ruch v. Rock Island*, 97 U. S. 693, 24 L. ed. 1101; *Boone v. Clark*, 129 Ill. 406, 5 L. R. A. 276, 21 N. E. 850; *Dcn ex dem. Southard v. Central R. Co.* 26 N. J. L. 21.

There being no time specified in the deed

be best carried out by substituting an equivalent in its stead, and not by enforcing a recovery which is excessive in value and different in nature; and relief, we believe, is never denied where the breach is accidental and without fault, and admits of compensation.

In *Austin v. Raymond*, 9 Vt. 420, a father granted his farm to his son, taking back a mortgage to secure support. The son gave a second mortgage upon the property, became insolvent, and left the country. The father thereupon attempted to enforce a forfeiture of the farm for breach of the condition of the mortgage, but the court held that, in favor of the second mortgagee, it would allow him to make compensation for the support, and retain his interest in the property.

But in *Dunklee v. Adams*, 20 Vt. 415, 50 Am. Dec. 44, the court held that relief will not be granted in equity against forfeiture for breach of a condition requiring the grantee to furnish personal care and attention to the grantor. In such case the time of the performance is of the very essence of the contract. It is impossible to put the covenantee in the precise situation he would have been in if the condition had been performed. The court distinguishes *Austin v. Raymond*, 9 Vt. 420, on the ground that that was not a bill for relief against a forfeiture.

In *Henry v. Tupper*, 29 Vt. 358, the court considered that the question had not been settled by either the *Austin* or *Dunklee* case, and proceeded to examine it *de novo*. The question in that case arose upon a deed with a defeasance clause by which it was to become void in case the grantor, *inter alia*, furnished support to the grantee. The court said that in such cases relief should be afforded with more reserve and circumspection than in ordinary cases of collateral duties. And, although we are not prepared to say that it must appear that in all cases the failure arises from surprise, or accident, or mistake, we certainly should not grant relief when the omission was wilful and wanton, or attended with suffering or serious inconvenience to the obligee, or there is any good ground to apprehend a recurrence of the failure to perform. The court says there are cases where the default is of so gross a nature that not to afford relief will be to make the court almost partaker in the

for performance of the conditions, the rule prevails that they must be performed within a reasonable time.

1 Jones, Real Prop. § 682; 6 Am. & Eng. Enc. Law, p. 505; *Ellis v. Kyger*, 90 Mo. 600, 3 S. W. 23.

Demand of performance is unnecessary, except where the act to be performed depends upon some previous or contemporaneous act to be done by the grantor.

1 Smith, Lead. Cas. 8th ed. 132; 1 Sharswood & B. Real Prop. § 144; *Langley v. Chapin*, 134 Mass. 82; *Plumb v. Tubbs*, 41 N. Y. 442; *Liebrand v. Otto*, 56 Cal. 242; *Whitton v. Whitton*, 38 N. H. 127, 75 Am. Dec. 163; *Ellis v. Elkhart Car Works Co.* 97 Ind. 247; *Royal v. Aultman & T. Co.* 116 Ind. 424, 2 L. R. A. 526, 19 N. E. 202.

A condition subsequent is not waived by

offense. But, on the other hand, there are cases where, through mere inadvertence, a technical breach may have occurred, by reason of which an estate of great value is likely to be forfeited, where the collateral service was not of a great value and its absence is not attended with serious inconvenience to the obligee. Not to afford relief in such case would be a discredit to the enlightened jurisprudence of the English nation, and those American states which have attempted to follow the same model.

So equity will not relieve against breach of a condition in a deed to support the grantor and his wife during life, where the breach consists of profane abuse and heartless neglect. *Howell v. Jewett*, 69 Me. 293.

3. Grant or devise on condition of payment of money.

Such conditions are usually treated as mere securities, and the forfeiture is saved if compensation is made.

Where land was devised on condition that the devisee should pay a certain sum to the heir at law in yearly payments, the heir entered for nonpayment of one of the instalments, and claimed that equity ought not to relieve, since to do so would be in dishonor of the heir. But it was held that the entry was only to enforce payment, and that equity could give interest for the sum from the time payment was due, and would relieve. *Grimston v. Bruce*, 1 Salk. 156, 2 Vern. 594.

Where land was conveyed in trust upon condition that, if the grantor's son raised a portion for his younger children within six months after the death of the grantor, the property was to be conveyed to him; and the son neglected to raise the portion, and died.—In a controversy between his grantees and parties claiming a forfeiture, the court held that it looked upon the condition precedent as in the nature of a penalty, and would regard the intent of the trust so that, upon compliance with the condition, relief would be given to the grantees of the son. *Wallis v. Crimes*, 1 Ch. Cas. 89.

Where land was devised to testator's son, charged with an annual rent to testator's widow during life, and with the payment of a valuation to be put on it after the widow's death

mere indulgence or silent acquiescence in grantee's failure to perform, unless there is shown some element of estoppel.

1 Jones, Real Prop. § 705; 2 Devlin, Deeds, § 959; 6 Am. & Eng. Enc. Law, p. 508; *Royal v. Aultman & T. Co.* 116 Ind. 424, 2 L. R. A. 526; 19 N. E. 202; *Pepin County v. Prindle*, 61 Wis. 301, 21 N. W. 254; *Rowell v. Jewett*, 71 Me. 408; *Upington v. Corrigan*, 151 N. Y. 143, 37 L. R. A. 794, 45 N. E. 359.

When made re-entry upon these premises in due legal form. Such act of re-entry invested him with the full legal title to the premises.

Jones, Real Prop. § 716; *Brickett v. Spofford*, 14 Gray, 514; *Hancock v. Carlton*, 6 Gray, 60; *Bowen v. Bowen*, 18 Conn. 535; *O'Brien v. Doe*, 6 Ala. 787; *Dugan v.*

Thomas, 79 Me. 221, 9 Atl. 354; *Barker v. Cobb*, 36 N. H. 344; *Gilchrist v. Fozen*, 95 Wis. 428, 70 N. W. 585.

And, having such title, he could convey the premises to another.

Horner v. Chicago, M. & St. P. R. Co. 38 Wis. 165; *Langley v. Chapin*, 134 Mass. 82.

It is not in general necessary that damage should ensue to a grantor in order that he may avail himself of the breach of a condition subsequent.

Gray v. Blanchard, 8 Pick. 289; *Pepin County v. Prindle*, 61 Wis. 309, 21 N. W. 254; 2 Washb. Real Prop. § 17, p. 19; *Clapp v. Wilder*, 176 Mass. 332, 50 L. R. A. 123, 57 N. E. 602.

Conditions subsequent are as binding upon railroad corporations as upon natural persons.

and paid by the devisee for the benefit of the residuary estate, and the devisee died without having paid the valuation, whereupon the residuary devisees sought to obtain possession of the land, the court said if the provision was a condition equity would relieve the devisee from a forfeiture by his performance of the condition by paying the money, with interest, from the date of the valuation. *Hart v. Ho-miller*, 20 Pa. 248.

Where an estate was devised on condition that a certain sum should be paid to each of the daughters of the grantor, and the devisee refused to pay the money for three years, and then came in and tendered payment, the chancellor held that, although, in strictness of law, the estate was forfeited on nonpayment of the money, yet, this was but a security for money, which having been tendered, there was no damage, and so the forfeiture was saved. *Wheeler v. Whithall*. Freem. Ch. 9, 2 Eq. Cas. Abr. 360.

In *Hayard v. Angell*, 1 Vern. 223, where the question was whether the death of one of the daughters before signing the release defeated a provision of a portion for testator's three daughters if they should release certain lands to his heir, the lord keeper said that, in all cases where the matter lies in compensation by the condition precedent or subsequent, he thought there ought to be relief.

Upon devise of testator's real estate to his kinsmen upon payment of a certain sum to each of testator's daughters within a specified time, the money was not paid, and the heirs at law entered; but equity relieved the devisee notwithstanding the devise was in disherison of the heir. *Barnardiston v. Fane*, 2 Vern. 366.

Where land was devised in trust for the use of testator's daughter for life with remainder to her children, provided she pay a certain sum to testator's executors within a specified time; and there was a failure to pay,—the court granted relief to the remainder-men on the ground that it was clearly a devise on condition subsequent, in which compensation could be made. *Carpenter v. Westcott*. 4 K. I. 225.

Where real estate is devised on condition that money be paid by the devisee to another within a specified time, equity will relieve a forfeiture for failure to comply with the condition within

the time, since compensation can be made. *Walker v. Wheeler*, 2 Conn. 299.

And that case was followed in *Bowen v. Bowen*, 20 Conn. 127.

So where a deed was given upon condition that it should be void upon failure of the grantee to pay a bond within a certain time, which was permitted to elapse without making the payment, it was held that equity had jurisdiction of a suit to redeem. *Rogan v. Walker*, 1 Wis. 527. The court applied the rule that equity will relieve against a condition subsequent whenever compensation can be made.

So, where an estate devised on condition of the payment of certain debts of the testator in relief of the surety is sold for the payment of such debts, the surplus will be decreed to the devisees, and not to testator's heirs, for the reason that equity will relieve against the forfeiture, full compensation having been made. *Thompson v. Whipple*, 5 R. I. 144.

Where land was devised upon condition that testator's debts and legacies should be paid by the devisee within two months after the death of testator's wife; and the heir entered for breach of the condition in the failure to pay certain legacies within the time; whereupon the assignee of the devisee sought relief in equity,—the reporter states that the court, upon view of precedents in cases of like nature, was clear of opinion to give relief to the plaintiffs notwithstanding the forfeiture. *Underwood v. Swain*, 1 Rep. in Ch. 161.

In *Bland v. Middleton*, 2 Ch. Cas. 1, testator devised his land to his daughter, but provided that in case his son should pay her a certain amount by a day named he should have the land. The money was not paid, and the daughter sold the land. There is nothing in the report of the case to show the nature of the action, but it is stated that it was decreed against the vendee, he paying the money. That would seem to imply that the action was against him for specific performance, and that the condition was held to be no defense. However, the report continues: "He took it but in the nature of a security;" although it was objected that "this is a contingent devise to the son on payment," which would indicate that the controversy was between the son and the grantee. The reporter appends a query as to the correct-

Horner v. Chicago, M. & St. P. R. Co. 38 Wis. 165; *Schlesinger v. Kansas City & S. R. Co.* 152 U. S. 444, 38 L. ed. 507, 14 Sup. Ct. Rep. 647; *Indianapolis, P. & C. R. Co. v. Hood*, 66 Ind. 580; *Taylor v. Cedar Rapids & St. P. R. Co.* 25 Iowa, 371; *Owensboro & N. R. Co. v. Griffith*, 92 Ky. 137, 17 S. W. 277; *Howell v. Long Island R. Co.* 37 Hun, 381.

Breach followed by re-entry not only defeats the title of the original grantee, but avoids all intermediate rights acquired by third parties.

Gilchrist v. Foxen, 95 Wis. 428, 70 N. W. 585; *Schlesinger v. Kansas City & S. R. Co.* 152 U. S. 444, 38 L. ed. 507, 14 Sup. Ct. Rep. 647; *Barker v. Cobb*, 36 N. H. 344.

Land could not be taken under the right of eminent domain for such a track as this.

ness of the decision, and the report of the case is such as to make it of little value.

Where a man devised his land to his oldest daughter upon condition that within six months she should pay certain sums to her sisters, on default of which the second should have the same privilege, and so on, and the oldest did not make the payment within six months, the court held that it would enlarge the time of payment beyond the six months, even in case of a condition precedent. *Woodman v. Blake*, 2 Vern. 222. The reporter, in a note, states that this case appears to have been reversed by the House of Lords January 14, 1691.

And in an earlier case it had been held that, where a testator devised his land to his oldest daughter "if she shall pay a certain amount to her sisters in six months, and, if she shall not, then the others in turn to have the same privilege," time is of the essence of the condition, and equity will not enlarge it. *Maston v. Willoughby*, 2 Eq. Cas. Abr. 211, 5 Vin. Abr. 93, pl. 12.

And where a father made a voluntary settlement on his eldest son, with a provision that, if he did not pay a certain sum to the second son at the age of twenty-one, the estate, both in law and in equity, should cease; and the eldest son did not comply with the condition, whereupon the father made a new settlement,—the court refused to relieve, because, the settlement being merely voluntary, the father might make such conditions as he thought fit *Longdale v. Longdale*, 1 Vern. 456.

4. Nonpayment of rent.

Perhaps the most familiar instance of equitable relief is its prevention of a landlord's attempted termination of the lease for nonpayment of rent.

Relief may be granted for breach of covenant to pay rent, although the rent is a rack-rent equal to the value of the land. *Taylor v. Knight*, 4 Vin. Abr. chap. Y, pl. 31, p. 406. The decision was made against the contention that the rule of relief extends only to beneficial leases, where fines have been paid or great sums laid out in improvements, so that the tenant is a sort of purchaser of part of the interest in the term. The court held that in this and the like cases the clause of re-entry is in the nature of a penalty, and therefore relievable 69 L. R. A.

Hays v. Risher, 32 Pa. 169; *Chicago & E. I. R. Co. v. Wiltse*, 116 Ill. 449, 6 N. E. 49; *Sholl v. German Coal Co.* 118 Ill. 427, 59 Am. Rep. 379, 10 N. E. 199; *Gustafson v. Hamm*, 56 Minn. 334, 22 L. R. A. 565, 57 N. W. 1054; *Glaessner v. Anheuser-Busch Brewing Assn.* 100 Mo. 508, 13 S. W. 707; *Pittsburg, W. & K. R. Co. v. Benwood Iron Works*, 31 W. Va. 710, 2 L. R. A. 680, 8 S. E. 453; *Re Split Rock Cable Road Co.* 128 N. Y. 408, 28 N. E. 506.

Numerous cases will be found in the reports where chancery has sustained an action, after condition broken and re-entry, to remove a cloud on the title by canceling the conveyance containing such condition.

Gilchrist v. Foxen, 95 Wis. 428, 70 N. W.

in a court of equity upon making satisfaction to the injured party.

In *Doe ex dem. Jersey v. Smith*, 7 Price, 326. Wood, B., in observing upon the statute regulating the relation of landlord and tenant says that before its passage, even if the landlord had succeeded in making out a case for ejectment, it was the uniform practice of courts of equity to relieve the tenant against the forfeiture upon payment of the rent and costs.

Equity will relieve a lessee from forfeiture for nonpayment of rent where there is a proviso in the lease that in that case the lease shall be void, as well as where there is a mere power of re-entry. *Bowser v. Colby*, 1 Hare, 109.

In *Garner v. Hannah*, 6 Duer, 262, which was an action involving a forfeiture of a leasehold for nonpayment of rent, the court says: I take the rule to be well settled that equity will readily, where the breach is not wilful, relieve from a forfeiture, as where the stipulation is obtained as a mere security for the payment of money, and precise compensation can be made. And the tenant cannot be prejudiced as to this relief by the mere fact that judgment is obtained in favor of the landlord.

Equity will relieve against a forfeiture for nonpayment of rent, unless the defaulting party, by his inequitable conduct, has debarred himself from such relief, or the special circumstances show that the relief should not be given. *Sunday Lake Min. Co. v. Wakefield*. 72 Wis. 204, 39 N. W. 136.

In *Kemble v. Graft*, 6 Phila. 402, the court granted relief against a forfeiture for nonpayment of rent where the rent was tendered after only a few days' delay, and no injury had been done to the lessor.

Equity will relieve from the forfeiture of a lease if the tenant acts in good faith and promptly pays the rent when demanded, or before the landlord suffers loss or inconvenience from the default. *Wilson v. Jones*, 1 Bush, 173.

The true ground of relief from forfeiture of a leasehold for nonpayment of rent is from the original intent of the case where the forfeiture is designed only to secure money, and the court can, by way of recompense, give all that was expected or desired. The right to redeem and continue the lease, even after forfeiture and re-entry, exists whenever the lessee will pay what

585; *Liebrand v. Otto*, 56 Cal. 242; *Birmingham v. Lesan*, 76 Me. 485; *Mott v. Danville Seminary*, 129 Ill. 403, 21 N. E. 927; *Harper v. Tidholm*, 155 Ill. 370, 40 N. E. 575; *McClellan v. Coffin*, 93 Ind. 456; *Indianapolis, P. & C. R. Co. v. Hood*, 66 Ind. 580; *Richter v. Richter*, 111 Ind. 456, 12 N. E. 608; *Memphis & C. R. Co. v. Neighbors*, 51 Miss. 412; *Vicksburg & M. R. Co. v. Ragsdale*, 54 Miss. 200.

Part performance will not prevent forfeiture for failure to complete the performance.

Rowell v. Jewett, 71 Me. 408.

Messrs. Thomas M. Kearney and James Cavanagh, for respondents:

A court of equity will not entertain an action to aid or enforce a forfeiture.

Clark v. Drake, 3 Pinney (Wis.) 228;

Lawe v. Hyde, 39 Wis. 345; *Pom. Eq. Jur.* § 459; *Donnelly v. Eastes*, 94 Wis. 390, 69 N. W. 157; *Stringer v. Keokuk, Mt. P. & N. R. Co.* 59 Iowa, 277, 13 N. W. 308.

The appellant induced her grantor, not for any apparent benefit to himself, but to enable her to carry on a controversy of doubtful propriety with the railway company, to go with her legal and other representatives to the vicinity of this strip and the railway track thereon, and to join with her in tearing down and destroying fences which her grantor had recently requested defendants to construct, and in building barriers across the railway track, then in use. The manner of this entry is forbidden by the statutes of this state.

Wis. Rev. Stat. § 3360.

is due, and, if the lessor declines to receive it when tendered, the amount will be ordered paid into court, and he will be enjoined from ousting the tenant. *Laurence v. Savannah*, 71 Ga. 392.

A condition for forfeiture for nonpayment of rent is relieved against in equity on payment of the rent due and damages which the lessor may have sustained. *Abrams v. Watson*, 59 Ala. 524. And the court says further that a judgment in favor of the lessor in an action of unlawful detainer or of ejectment does not bar relief in equity, because in such action the right of possession alone is involved. The only inquiry the court can make is whether the lease has been forfeited and the lessor has the right of entry. There can be no set-off or recoupment allowed the lessee because of the lessor's breach of covenants.

Courts of equity are governed by the same rules, in the exercise of their jurisdiction to stay a judgment in ejectment for forfeiture of a leasehold estate for nonpayment of rent, as are courts of law. All arrears of rent, interest, and costs must be paid or tendered. If there be no special reason to the contrary, an injunction thereupon goes to restrain further steps to enforce the forfeiture. The grounds upon which a court of equity proceeds are, that the rent is the object of the parties, and the forfeiture only an incident intended to secure its payment; that the measure of damages is fixed and certain; and that when the principal and interest are paid the compensation is complete. *Sheets v. Seiden*, 7 Wall. 416, 19 L. ed. 166.

There are circumstances, however, which would make it plainly inequitable to grant relief to the lessee. The courts have used various terms in attempting to describe these circumstances.

In *Little Rock Granite Co. v. Shall*, 59 Ark. 405, 27 S. W. 562, the court says equity will relieve from a forfeiture for breach of condition to pay rent at a specified time upon the notion that such condition and forfeiture are intended merely as a security for the payment of money the amount of which can be ascertained, unless the violation of the contract is the result of gross negligence, or is wilful and persistent.

But the fact that the failure is wilful is not in all cases sufficient to defeat the relief.

In *Mactier v. Osborn*, 146 Mass. 399, 4 Am. 69 L. R. A.

St. Rep. 323, 15 N. E. 641, the court says, where there has been a breach of a covenant to pay rent equity will relieve against a forfeiture although the breach is wilful on the part of the lessee; and where there has been a breach of a covenant to perform some collateral duty, such as to repair or insure, which has been caused by accident or mistake, equity will relieve if the lessor can, by compensation or otherwise, be placed in the same condition as if the breach had not occurred.

On the other hand, it has been held that the breach of a condition giving a right of re-entry for failure to pay rent need not be wilful to prevent the interposition of equity. The court says if, through accident or mistake, or the misleading conduct of the lessor, the lessee has failed to comply with the covenants of the lease, and adequate compensation can be made for the breach, relief will be afforded, there being no wilful and culpable neglect on the part of the lessee. But it does not follow that, because equity will afford relief in a proper case where the breach of the covenant has not been wilful, it will do so in all cases where it has not been wilful. It will deny it in all cases where it has been wilful, and grant it, where it has not been wilful, in such cases as come within the domain of equitable relief. *Randolph v. Mitchell* (Tex. Civ. App.) 51 S. W. 297.

Noncompliance with the condition after demand is a wilful neglect from which a court of equity will not relieve. *Chesterman v. Mann*, 9 Hare, 206.

In *Case 129*, *Freem. Ch.* 115, it is said that where a lease is forfeited for nonpayment or rent it is a usual equity for the court to decree, upon payment of the arrears, that the lessor shall make a new lease with like covenants, but in some cases it will not; so, if there be any unreasonable covenants, and the party has once legally discharged himself of them, the court will not compel him to make the same covenants again.

It would seem that the most that can be said is that the relief will depend upon the equities of the case being refused whenever it would seem to be inequitable to grant it.

In *Davis v. Thomas*, 1 Russ. & M. 506, it is stated that where a tenant is given the privilege of purchasing within a certain time on condition that the rent is promptly paid, failure to comply with the condition will ter-

The conduct of Uhen in treating obligations imposed upon the grantee in the deed of the strip of land referred to as continuing obligations, after default, and in insisting upon and accepting performance up to what was practically the time of the alleged re-entry, constitutes a waiver of his right to declare the title forfeited, if such right ever existed.

2 Washb. Real Prop. 5th ed. pp. 20, 21; Fry, Spec. Perf. pp. 536, 537; Parsons, Contr. 539; *Yancey v. Savannah & W. R. Co.* 101 Ala. 234, 13 So. 311; *Ludlow v. New York & H. R. Co.* 12 Barb. 440.

Considering the conditions as conditions subsequent, instead of mere covenants, they must be construed strictly against the grantor, and forfeiture must not be enforced

unless that right clearly appears from such construction.

Mills v. Evansville Seminary, 58 Wis. 135, 15 N. W. 133; 2 Devlin, Deeds, 2d ed. § 970; *Hartung v. Wittie*, 59 Wis. 285, 18 N. W. 175.

Marshall, J., delivered the opinion of the court:

The statement of facts shows that, though there was no controversy but that Uhen conveyed the land to Boyle upon conditions subsequent which were breached, and reclaimed the property by a distinct assertion of his rights—so far as a claimer thereof was possible under the circumstances—before the conveyance to appellants, it was held that his first grantee was the owner

minute his rights, and equity will not relieve him.

But where a landlord who has recovered a judgment for possession of the property for nonpayment of rent brings a suit in equity to enjoin the removal of buildings placed upon the leased property contrary to the terms of the lease, equity will, in granting him relief, impose the condition that he give the tenant an opportunity within a reasonable time to pay the rent in arrear, and re-entitle him to possession of the fixtures. *Rooney v. Crary*, 8 Ill. App. 329.

5. Nonrenewal of lease.

Many leases, especially in England and Ireland, are granted upon long terms in case they are renewed by the payment of a fine or stipulated sum as a premium to the landlord upon the happening of certain conditions. It appears that in many cases the tenants have failed to renew, and have continued to hold over sometimes for many years, and then, when a forfeiture was sought for breach of condition, they have applied to equity for relief. It seems to have been the practice to afford such relief in the earlier cases; but, the question having finally come before the English courts, they held that equity could not relieve, which occasioned such surprise and hardship that Parliament immediately interposed and restored the equity. It is very difficult to glean from the cases the rule which equity will apply in such cases. In *Eaton v. Lyon*, 3 Ves. Jr. 692, the chancellor attempted to limit the relief to cases of unavoidable accident, fraud, surprise, and ignorance, but in *Maxwell v. Ward*, 11 Price, 16, the lord chief baron stated that the doctrine had been too strongly stated in that case.

In *Lennon v. Napper*, 2 Sch. & Lef. 684, Appx., the court, in discussing the correctness of the decisions which had been made on the Irish leases, says the courts in all cases of contracts for estates in land have been in the habit of relieving when the party, from his own neglect, had suffered a lapse of time, and from that or other circumstances could not maintain an action to recover damages at law. In these leases time is not essential, for the mere object of fixing a time is to preserve the tenure, and, if the rent and fine are preserved, the substance of the contract is performed. 69 L. R. A.

So in *Boyle v. Lysaght*, 1 Ridgw. P. C. 384, Vern. & S. 135, it is said that where application for renewal and payment of fines had been delayed for a long period courts of equity adopted the rule of decreeing a renewal upon making compensation, which was held to be a payment of a fine for every seven years, upon the principle that the period of a life was, in law, seven years. And, upon making such payment, the tenant was entitled to relief, except in case of fraud or dereliction. And the lord chancellor, although an Englishman, enforced the rule as one of local equity.

A renewal of the lease was decreed in *Freeman v. Boyle*, 2 Ridgw. P. C. 69.

In *O'Neill v. Jones*, 1 Ridgw. P. C. 176, the renewal of a lease for lives was decreed, although there had been a failure to comply with the covenants to nominate new lives and pay a fine as fast as the lives fell in, twenty years having elapsed since the falling of the first life.

So where a long-time lease is renewable upon payment of a year's rent extraordinary at the expiration of the rental term, and, through a mistake as to the time when the payment is due, the time for making such extraordinary payment is allowed to pass, equity will relieve from the forfeiture. *Selden v. Camp*, 95 Va. 527, 28 S. E. 877. The court holds that, even treating the payment as a condition precedent, there is no lack of power in a court of equity to grant relief against the failure to perform punctually conditions precedent when time is not of the essence of the contract and compensation can be made. In determining the right of the lessee to renew in this class of cases, the question to be considered is, Has the party asking relief been guilty of gross negligence, or is the default relied on the result of mere negligence?

In *Lennon v. Napper*, 2 Sch. & Lef. 684, Appx., *Ross v. Worsop*, 1 Bro. P. C. 281, is stated to have granted relief as against mere neglect on the part of the tenant to apply for renewals.

Equity may relieve against forfeiture of interests under a leasehold by failure to give notice of a desire for renewal within the time specified in the lease. *New York L. Ins. & T. Co. v. St. George's Church*, 12 Abb. N. C. 50.

In *Sweet v. Anderson*, 2 Bro. P. C. 256, 5 Vin. Abr. 93, pl. 15, a tenant who had not tendered a fine for renewal of the lease according to the conditions of the mortgage, by

of the property, and entitled to recover costs of the appellant. That conclusion was reached upon several grounds which we will consider.

The principal reason suggested, why it was supposed appellant was not entitled to recover, is that a court of equity will not exercise its jurisdiction to declare or aid a forfeiture, but leave the parties to their remedy at law. We are unable to perceive how that principle applies to this case. Appellant did not seek by her suit to reclaim the property in controversy. Her complaint and the evidence in support of it, at every point, repel any such idea. The pleading distinctly declared that plaintiff was the absolute owner of the property in dispute and in possession thereof. To establish the

truth thereof, proof was made that her grantor, under whom all parties to the suit claimed title, sold the property upon conditions subsequent to the grantor of the ice company; that such conditions were breached, and that such grantor made re-entry for the purpose of enforcing a forfeiture of the property to him, and then made a conveyance thereof to appellant. There can be no question but that such circumstances caused the title conveyed to Boyle to revert to Uhen if his entry was rightful. *Gilchrist v. Foxen*, 95 Wis. 428, 70 N. W. 585. The learned circuit judge seems to have supposed, and counsel for respondents now maintain, that the evidentiary facts showing title in appellant, notwithstanding the paper title in the ice company, should

reason of which he had suffered a forfeiture, was relieved by the court, but the reasons for granting the relief are not stated. But in 1 Ridgw. P. C. 185, it is said that it was not known whether the *cestui que vie* had been dead or not.

In *Lawless v. Grogan*, 1 Dru. & Walsh, 53, which was a bill to compel a renewal of an Irish lease, the court held that, when a notice by the landlord is relied on for the purpose of working a forfeiture, the service of such notice must be clearly proved so that there shall be no doubt of the intention of the landlord to insist on the forfeiture, and information of the facts which were peculiarly within the knowledge of the landlord must have been fully brought home to the tenant; and, this not appearing, the tenant was granted relief.

Where the lessor covenanted to renew the lease from term to term for a period of ninety-nine years upon prompt payment of rent, and the lessee defaulted causing the lessor to re-enter, whereupon the lessee brought a bill for a renewal, the master of the rolls said the case was to be distinguished from breach of condition to pay a fine. And, the lessee having added greatly to the value of the property and the ejectment having been brought without notice to him, the court said that, in order to refuse relief, there must be neglect on the part of the lessee, or a prejudice on the part of the lessor. No time was limited in the lease for the payment of rent. The relief was granted on condition of payment of the accruing rent together with interest and costs. *Rawstorne v. Bentley*, 4 Bro. Ch. 415.

But, the question having been brought before the English courts upon Irish leases, Lord Mansfield, in *Kane v. Hamilton*, 1 Ridgw. P. C. 180, held that no such relief could be granted where there had been great laches in complying with the covenant. He states that it is necessary, on the falling of a life, that another should be inserted in due time, and before the day of renewal has elapsed. There is no foundation for relief, for it is not like the case of a penalty. Neglect in not naming a new life deprives the landlord of the chance of a fine. And a court of equity cannot give compensation for the damages which may be sustained, it being merely eventual and uncertain.

In a note to *Rawstorne v. Bentley*, 4 Bro. Ch. 415, the editor cites *Allen v. Hinton*, 1 Fonbl. Eq. 432, note, as holding that where there

has been default in making application for renewal equity will not decree relief unless the delay has been explained.

In *Bateman v. Murray*, 1 Ridgw. P. C. 187, Lord Thurlow, in determining the rights of a lessee who had failed to nominate new lives and pay the fines, as the lives upon which the lease depended fell in, asks: How can equity interfere? Can conscience compel a man to do what he has not agreed to do?

Upon the question of the effect of failure of the lessee to pay the stipulated fine for renewal according to the conditions of the lease, Lord Thurlow said, in *Bateman v. Murray*, as cited in 4 Bro. Ch. 417, courts of equity will relieve the lessee if he has lost his right by fraud of the lessor, or accident on his own part; but they will never assist him where he has lost his right by his own gross laches or neglect. Where the lessee has lost his legal right he must prove some fraud on the part of the lessor by which he was debarred from the exercise of his right; or some accident or misfortune on his own part which he could not prevent, by means whereof he was disabled from applying for a renewal at the stated times according to the terms of the lease.

In *Lennon v. Napper*, 2 Sch. & Lef. 684 Appx., *Bateman v. Murray* is explained as having involved fraud on the part of the tenant.

In *Baynham v. Guy's Hospital*, 3 Ves. Jr. 205, a lease depending upon lives, renewable upon payment of a fine whenever a life should cease, was held to be forfeited upon failure to comply with the condition beyond the aid of equity.

In *Bayley v. Leominster*, 3 Bro. Ch. 529, it appeared that a lease had been granted for three lives, renewable upon payment of the fine upon the falling in of any one life. The tenant made valuable improvements upon the property, and permitted two lives to fall in when he tendered the fine for both lives and an additional one, on the presumption that the substituted life at the termination of the first one might also have fallen in had the renewal taken place at that time. He insisted that no forfeiture is to be incurred when compensation can be made. But the lord chancellor held that plaintiff was not bound to renew upon the falling in of one life. He had his election whether to renew or not, and, having made that election by failing to renew at the specified

have been pleaded. Manifestly, that is a mistake. If one sells and conveys real estate upon condition subsequent, and the title thereto thereafter reverts to him, he may then invoke judicial remedies in respect thereto, pleading his title in general terms the same as if that title were dependent upon any other circumstances. It follows that the judgment appealed from cannot be sustained upon the theory that the action was brought for the purpose of forfeiting the title to the property for nonperformance of the conditions subsequent. It was instituted upon the theory that the title had been already reclaimed and was vested in appellant, and the respondents must stand or fall on the facts in that regard.

The court further grounded the judgment

time, he had lost his equity. He, however, expressly placed this ruling upon the Irish law.

Under the act of 19 & 20 Geo. III., what should be considered a reasonable time after demand in which to pay renewal fines depends upon the circumstances of each case. *Jackson v. Saunders*, 1 Sch. & Lef. 443.

But, after the refusal of the English House of Lords to recognize the custom of renewal, the equity was revived by the act of 19 & 20 Geo. III., chap. 30, which provided that mere negligence, in the absence of fraud, should not deprive equity of the power to grant relief. See *Boyle v. Lysaght*, 1 Rldgw. P. C. 384.

The tenantry act lays down the rule as to what shall be considered mere neglect. *Lennon v. Napper*, 2 Sch. & Lef. 684, Appx.

The equities of the case will be given weight in this class of cases.

Thus, where the delay in paying the fines and applying for renewal of the lease results from errors of the landlord in computing the amount due, equity will relieve. *Freeman v. Waterford*, 1 Sch. & Lef. 451, note.

But where the lessee wilfully conceals the death of one of the *cestuis que vie*, and acts under such concealment to his own advantage, equity will not relieve from the forfeiture. *Pendred v. Griffith*, 1 Bro. P. C. 314.

So in *Magrath v. Muskerry*, 1 Rldgw. P. C. 469, Vern. & S. 166, relief was refused where the landlord, after long neglect on the part of the tenant until all the lives upon which the lease depended had fallen in, had enforced the forfeiture and obtained possession, which he had retained for two years before an application was made for relief, which was only after the passage of the statute looking to the relief of tenants. And it was held that gross, wilful, obstinate, and contentious neglect took the case even out of the provisions of the statute.

And equity will not grant relief from forfeiture of a right to perpetual renewal of a lease by noncompliance with its conditions, where, by reason of laches and alteration of the property, it cannot be enjoyed according to the intent of the parties. *London v. Mitford*, 14 Ves. Jr. 58.

6. Nonpayment of taxes.

Although a breach of conditions as to payment of taxes is literally within the rule that equity will relieve where the condition is to secure payment of money, the incidents at-

on the doctrine that equity will in some cases, intervene where there has been a failure to perform a condition subsequent, and prevent a forfeiture. Here there was failure again to perceive, as it seems, that the rule mentioned is one invoked to prevent, not to defeat, a forfeiture after it has occurred. Unless one keeps in mind the peculiar doctrine of equity in respect to this matter he may be misled by the expressions of courts and text writers as well. In *Donnelly v. Eastes*, 94 Wis. 390, 396, 69 N. W. 157, 159, this language was used: "If there were a rightful entry for condition broken, so that the estate reverted under the terms of the deed, or even if the title reverted under the terms of the deed without a re-entry, the court is yet not powerless to re-

tending the payment of taxes, and the penalties for their nonpayment, are such that the equities in case of their nonpayment very soon desert the obligor and range themselves on the side of the obligee. Nevertheless the rule is that equity will relieve as long as the obligee can be fully compensated.

A breach of covenant to pay taxes, being merely for payment of money, is emphatically one from which equity will relieve. *Buckley v. Beigle*, 8 Ont. Rep. 85.

A breach of covenant to pay taxes and assessments may be relieved against in equity. *Muller v. Earle*, 3 Jones & S. 473.

Provisions for forfeiture for failure of a tenant to pay taxes are relieved against in equity whenever compensation can be made, the clause for re-entry being treated as a mere security. Therefore, if the payment be made before the forfeiture is taken advantage of by re-entry by the landlord for this purpose in accordance with the provisions contained in the lease, the forfeiture is saved. *Planter's Ins. Co. v. Diggs*, 8 Baxt. 563.

Where land is devised to one for life upon condition that he pay the taxes, equity will relieve him from a forfeiture for failure to comply with the condition upon his paying the taxes, interest, and costs, where it appears that the refusal to pay was due to ignorance of the defaulting party, and not mainly wilful. *Tibbetts v. Cate*, 66 N. H. 550, 22 Atl. 559.

Equity will relieve against a forfeiture by a tenant for failure to pay taxes and assessments where it was not wilful or the result of gross negligence, where refusal of relief would entail great loss upon the tenant, and the lessor made no effort to secure compliance with the contract. *Eichenlaub v. Neil*, 10 Ohio C. C. 427.

But equity will not relieve against the forfeiture of a leasehold for breach of condition to pay taxes where the breach has been culpable, so long persisted in that the time for redemption from the tax sale has almost expired, and detrimental to the lessor to the extent that his title to the property has been nearly sacrificed by the acts of the lessee. *Bacon v. Park*, 19 Utah, 246, 57 Pac. 28.

Covenants by a tenant to pay taxes and assessments are in the nature of covenants to pay money, and forfeiture incurred by their breach may be relieved against in equity. By the payment of the amount due at any time before sale or the expiration of the right to

lieve the defendant from the consequences thereof." That was said having in mind that, regardless of the express intent of the parties, or the intention inferable from the language used by them, applying strict legal principles thereto, which would effect a reversion of the title, a court of equity may, in some circumstances, hold the real contractual intent not to be according to the literal meaning of such language or within the reasonable scope thereof according to the ordinary rules for the construction of contracts, but that the condition was created as a mere security for the performance of an obligation resting upon the grantee; and give effect thereto in opposition to the expressed intent of the parties. By such arbitrary rule of construction the title which would

be in the grantor at law is held to be still in the conditional grantee, and so subject to control in equity that the conditional grantor may be compelled to accept compensation in money for the damages suffered by non-performance of the condition in lieu of an enforcement of his legal rights, the theory being all the way through that there has been no real violation of the contractual intent of the parties. The rule followed in such a case is the one which is supposed to justify courts in saying that parties, in stipulating for the payment of a specific sum as damages for breach of a contract, did not mean what they said, but intended the sum named to stand as security against loss from such breach, and the recoverable damages therefor to be limited to enough

redeem, the landlord is placed in precisely the same position as if no default had occurred; and, where there is no bad faith on the part of the tenant, mere delay in making the stipulated payments should not bar him of relief. *Giles v. Austin*, 62 N. Y. 486, 48 How. Pr. 269, Affirming 6 Jones & S. 215, where the court said, in the case of a person of slender capacity, as the plaintiff is shown to be, who, through ignorance of the consequences of his default in promptly meeting his obligations, the binding force of which he does not wilfully dispute, although he negligently postpones; and, who blindly relies upon the mistaken advice of others, in whom he is justified in confiding; and when an adequate compensation for the default can be ascertained and made in money, the severe consequences of the default being the forfeiture of a considerable property upon which he is greatly dependent,—the benign principles of equity should interfere to shield him from the strictly legal consequences.

Upon a former hearing the court had held that the lessee was entitled to no relief, because, although he had covenanted to pay taxes, he had permitted them to become in arrears for more than seven years, and, after the action was brought to terminate his rights, had delayed answer for three months, and then falsely denied that any taxes were due. *Giles v. Austin*, 2 Jones & S. 171.

7. Failure to remove encumbrance.

Equity will enjoin proceedings to enforce a forfeiture for failure to comply with a condition in a grant to remove certain encumbrances from the property upon compliance of the grantee with the condition. *Stone v. Ellis*, 9 Cush. 95.

IV. Fraud, accident, mistake.

The granting of relief from the consequences of fraud, accident, and mistake is a well-recognized head of equity jurisdiction. Therefore, equity will, in a proper case, interfere to prevent a forfeiture which is sought to be secured through such means.

A breach of condition in a lease of the basement of a building used as a theater, that alterations should be made without noise, so as not to disturb performances in the theater, which consisted of the driving of a chisel through a soft wall for the purpose of ascer-

taining its thickness, which takes only about a minute, by one who, having been sent to ascertain the thickness of the wall, forgot that a performance was in progress, will be relieved against on the ground of mistake. *Lundin v. Schoeffel*, 167 Mass. 465, 45 N. E. 933.

In discussing the validity of a provision in the mortgage making the entire amount due on default in interest payments, the court, in *Houston v. Curran*, 101 Ill. App. 203, says a court of equity may grant relief against forfeitures occasioned by fraud, accident, or mistake, but, where the agreement creates a mere pecuniary obligation, it will not do so where the default arises from gross negligence, or is wilful and persistent.

Where a trust was established to raise a portion for testator's daughter upon her marriage with consent, and the making of a settlement by her husband upon her, and the marriage was with consent, but the settlement was not made through the neglect of the trustee, equity granted relief. This ruling was put upon the ground of the mistake of the trustee. *O'Callaghan v. Cooper*, 5 Ves. Jr. 117.

Where a mortgagor has forfeited his estate by failure, through accident, to forward the money for its redemption within the time set by the court, equity will relieve. *Kopper v. Dyer*, 59 Vt. 477, 59 Am. Rep. 742, 9 Atl. 4.

Equity will not permit a mortgagee to exercise his statutory right of sale in such a manner as to enlarge his demand, and compel the mortgagor either to pay more than he owes or forfeit his estate; and, if such a thing is attempted, either by mistake or through fraud, a court of equity, if applied to in season and in a proper manner, will prevent the forfeiture by allowing the party to pay the true sum in redemption of the estate. *Sandford v. Flint*, 24 Mich. 26.

The attempt to convert into an absolute conveyance that which was intended to be in the nature of a mortgage, or to set up as absolute and conclusive a deed which is collateral and redeemable, is a fraud upon the law which a court of equity will rebuke and defeat. *Rogan v. Walker*, 1 Wis. 527.

In *Foley v. Grand Hotel Co.* 57 C. C. A. 629, 121 Fed. 509, it is said that courts of equity will grant relief against a forfeiture which has been incurred through accident or mistake, or by reason of any fraudulent, oppressive, or un-

to adequately measure such loss. 2 Story, Eq. Jur. 13th ed. §§ 1314, 1315. The process by which courts thus turn a contract which parties say they made into what the law says on the subject was treated at considerable length in *Seeman v. Biemann*, 108 Wis. 365, 84 N. W. 490. An eminent text writer is there quoted, in effect, thus: "Parties may contract for stipulated damages at their pleasure, but such damages only as the law says are liquidated, according to the artificial rules which have been adopted to justify courts in saying what the parties intended, are in fact to be regarded as such damages." So, as regards a condition subsequent in a deed, regardless of the intention of the parties as indicated by the fair meaning of their language, in

certain cases, to prevent the great hardship which would flow from giving effect to the strict legal contractual intent, the court will, by construction dependent upon no reason which can be easily assigned, other than a long line of precedents grounded wholly upon the arbitrary power of the court, say that they intended something else, and by that means, in theory, not take title from the grantor upon condition after it has reverted to him by breach of condition and assertion of his right, but hold that the title still remains in the conditional grantee in harmony with the judicial intention, we may call it, and in that way save his adversary from the consequences of his fault, preserving the title to the property in him notwithstanding such fault, giving the grantor a

fair conduct on the part of one who is asserting a right of forfeiture.

But in *Gregory v. Wilson*, 10 Eng. L. & Eq. 138, which was a suit to compel specific performance of an agreement to execute a lease after the tenant had been in possession and committed a breach of covenants, it is said that, although in some cases a distinction has been made between wilful and obstinate refusal to comply with the covenants of a lease and cases of mere neglect and accident, yet there is no rule that the court will in all cases of accident even relieve against breach.

It being established that equity will afford relief in cases of fraud, accident, or mistake, the question arises whether or not jurisdiction is limited to such cases. From the cases which have already been cited, it would seem that the relieving from forfeitures whenever such relief was equitable was a distinct branch of equity jurisdiction, entirely independent of the other branch now under examination. But soon after the English House of Lords had refused to recognize the right to renew the Irish leases, as stated *supra*, III., b, 5, the master of the rolls took upon himself the duty of attempting to lay down a general rule upon the subject.

In *Eaton v. Lyon*, 3 Ves. Jr. 692, which was a suit to compel the execution of a renewal lease notwithstanding default on the part of the tenant, the court said, in equity a covenant must be really and substantially performed according to the true intent and meaning of the parties so far as circumstances will admit; but, if by unavoidable accident, and by fraud, by surprise, or ignorance not wilful, parties have been prevented from executing it literally, equity will interfere; and, upon compensation being made, the party having done everything in his power, and being prevented by the means alluded to, will give relief. It is true that has been carried to a length that has become to some degree alarming, having got into the habit of construing terms and conditions, of covenants as being only *in terrorem*. But undoubtedly in modern times that has been much restricted. The relief was denied, and the master of the rolls said: "I hope now it will be known . . . that equity will interpose and go beyond the stipulations of the covenant at law only where a literal performance has been prevented by the means mentioned, and no injury is done the lessor."

That doctrine did not pass long unchallenged, but it has had the effect of throwing confusion into the law. In *Sanders v. Pope*, 12 Ves. Jr. 282, Lord Erskine, in granting relief for failure to repair, says of *Eaton v. Lyon*, 3 Ves. Jr. 692, that some of its expressions go against all that has been laid down in a series of preceding cases, and which, if they were taken in their full extent, would create considerable uncertainty. He also says that, if the covenant is broken with a consciousness that it is broken,—that is, if it is wilful, not by surprise, accident, or ignorance,—still, if it is a case where full compensation can be made, equity may grant relief.

And in *Maxwell v. Ward*, 11 Price, 16, which involved the question of relief from the consequences of not giving proper notice of intention to apply for a renewal of a lease, the lord chief baron said that *Eaton v. Lyon*, 3 Ves. Jr. 692, stated the doctrine more strongly than the cases warrant. That it was not necessary in all cases of this sort that there should be fraud, surprise, or ignorance, not wilful, shown to entitle a party to relief. These are common grounds of relief in all cases of any description. This sort of relief is given constantly without any such causes existing.

Lord Erskine's rule is undoubtedly the one which has prevailed, but the result of the false note is found in several subsequent cases. Where a forfeiture of a mining lease had been declared because of failure to pay the taxes, the court said that equity will relieve against penalties and forfeitures wherever the penalty involved is designed merely as security for the payment of money, and the failure to make such payment is capable of compensation to the party injured. But there is a recognized distinction in equity between penalties and forfeitures. In the latter, although compensation can be made, the forfeiture will not always be relieved. The true doctrine on this subject now seems to be that, in all cases of forfeiture for the breach of any covenant other than a covenant to pay rent, no relief will be granted in equity unless upon the ground of fraud, accident, surprise, or mistake, and this although the breach of covenant is capable of just compensation. *Townsend v. Stetler*, 5 Kulp, 11.

In *Livingston v. Tompkins*, 4 Johns. Ch. 415, 8 Am. Dec. 598, the court said, by way of argument, that the cases are full of discussions as to how far equity can relieve against sub-

In *Livingston v. Tompkins*, 4 Johns. Ch. 415, 8 Am. Dec. 598, the court said, by way of argument, that the cases are full of discussions as to how far equity can relieve against sub-

money consideration for his damages. While, viewing the situation from the legal rights of the parties, relief is granted after forfeiture if at all, as said in *Donnelly v. Eastes*, 94 Wis. 390, 69 N. W. 157, the absurdity is avoided by the arbitrary holding that no such forfeiture has occurred because the parties intended otherwise, regardless of what they said on the subject. The origin of such arbitrary dealing with contracts in violation of the general rule that courts cannot make contracts for parties—can only interpret them so far as to determine what the parties intended, and enforce such intent, not going for their purpose outside the reasonable scope of the language they saw fit to use to express it—is involved in much obscurity, but it is one

of the oldest doctrines of equity jurisprudence, and, although the reason for it is difficult to discover in the light of what judicial remedies are ordinarily supposed to stand for, it has many vigorous defenders. Judge Story, in his work on Equity Jurisprudence (vol. 2, § 1316), says: "Law, as a science, would be unworthy of the name if it did not, to some extent, provide the means of preventing the mischiefs of improvidence, rashness, blind confidence, and credulity on one side, and of skill, avarice, cunning, and a gross violation of the principles of morals and conscience on the other. There are many cases in which courts of equity interfere upon mixed grounds of this sort. There is no more intrinsic sanctity in stipulations by con-

sequent conditions; the general rule formerly was that, if the court could make compensation to the party in damages for nonperformance of the condition, it would then relieve. That relief seems now to be confined to cases where the forfeiture has been the effect of accident, and the injury is capable of compensation.

In *Baxter v. Lansing*, 7 Paige, 350, the court intimates that a court of equity can relieve against a forfeiture for a breach of condition in a lease only in cases where the act or omission by which the forfeiture was incurred was the result of an accident or mistake for which compensation can be made to the other party, or where the penalty or forfeiture is of the nature of a mere security for the payment of money; the court stating that the decisions in the more recent English cases limited the active interference of the court to such cases.

Even as late as 1891 the English court of Queen's bench recognized the rule that equity would relieve only in cases of fraud, accident, or mistake. In the case of *Barrow v. Isaacs* [1891] 1 Q. B. 417. The case was, however, one in which the forfeiture was claimed for breach of a covenant not to underlet. Such a breach as appears in subd. VI., d, *infra*, is one which is not capable of compensation, and is therefore not within the class of which equity has jurisdiction under its power to relieve from forfeiture, but must acquire the jurisdiction under some other head of equity jurisprudence. Under such circumstances the statements of the court were correct as applicable to the case before it, but, in view of the general doctrine which has prevailed upon the question, they cannot be regarded as having universal application.

The doctrine that no relief ought to be granted in equity unless upon the ground of accident, mistake, fraud, or surprise, although the breach was capable of a just compensation, was questioned in *Spaulding v. Hallenbeck*, 39 Barb. 79.

It is stated in *Henry v. Tupper*, 29 Vt. 358, that it is putting the matter on reasonable grounds when it is stated that relief is confined to cases where the forfeiture has been the result of accident and the injury is capable of compensation. But, the court adds, if the matter is really capable of compensation it is more doubtful, perhaps, whether the cases will warrant any denial of relief upon the ground that the forfeiture was not the result of

of accident. It is certain no such thing is required to be shown in the naked case of a pecuniary duty. The nonpayment may be wilful, and the party still entitled to relief as matter of right. But relief for nonperformance of collateral duties is a matter of discretion to be judged of according to the particular circumstances of each particular case. In cases where the condition is for the payment of money, or for the performance of a certain value of services, it has been the general practice of the court to grant relief as a matter of right without reference to the inquiry whether the default was accidental or wilful. But in all cases where the thing to be done was something collateral there the issue *quantum dam-nificatus* must be sent either to a jury or masters. Before the court would grant relief, they have pretty generally required to be satisfied that the omission to perform was not wilful, but accidental and by surprise; and it has been held always in such cases to depend very much upon the circumstances of the particular case.

V. Effect of conduct of obligee.

The one having the right to insist on the forfeiture may not have been guilty of fraud, and yet his conduct may have been such as to make it inequitable to insist on his legal rights; and, under such circumstances, equity will not permit him to do so. Thus, he may have waived strict performance.

Equity will relieve if the forfeiture has been waived. *Gourlay v. Somerset*, 1 Ves. & B. 68; *Whitehead v. Bennett*, 9 Week. Rep. 626; *Bridges v. Longman*, 24 Beav. 27; *Lan-gridge v. Payne*, 2 Johns. & H. 423; *Little Rock Granite Co. v. Shall*, 59 Ark. 405, 27 S. W. 562.

In *Orr v. Zimmerman*, 63 Mo. 72, it is stated that, although equity will not interfere where the exaction of a forfeiture is made for the protection of the vendor, and under circumstances where a strictly legal right is fairly claimed with full notice to the vendee, yet, where the right has been repeatedly waived, and valuable improvements have been made, and the vendee is thus led by frequent waivers to assume that he will at all events be apprised of any change of policy on the part of the seller, the sudden exaction of a forfeiture will not be favorably viewed by the court.

So equity will not permit a landlord who

tract than in other solemn acts of parties which are constantly interfered with by courts of equity upon the broad ground of public policy or the pure principles of natural justice." That was said by the learned author with reference to situations not involving any fraud either in fact or in law.

The rule of equity discussed is not one of universal application. It does not extend beyond situations where there is some room for saying the conditions were inserted to stand as security, either for the payment of money, or the performance of some promise, damages for a breach of which are susceptible of ascertainment by some definite rule, and the doing of the particular thing, or the doing thereof at a particular time, was not the principal object secured

by the condition. 2 Story, Eq. Jur. 13th ed. § 1321; 2 Washb. Real Prop. 5th ed. 24: *Gates v. Parmly*, 93 Wis. 294, 66 N. W. 253, 67 N. W. 739; *Nelson v. Stephens*, 107 Wis. 136, 82 N. W. 163; *Donnelly v. Eastes*, 9: Wis. 390, 69 N. W. 157. Courts and text writers acknowledge the limitation mentioned to be distinctly marked. This language is used in 2 Story, Eq. Jur. 13th ed. § 1321: "It is admitted, indeed, that, where the condition or forfeiture is merely a security for the nonpayment of money, . . . there it is to be treated as a mere security and in the nature of a penalty, and is accordingly relievable. But, if the forfeiture arises from the breach of other covenants of a collateral nature, as, for example, of a covenant to repair, there, although compen-

has leased the premises giving the right to purchase at the expiration of the lease, after valuable improvements have been placed upon the property, and rent has been received for a long period after the time when by the terms of the lease it was due, suddenly to enter for nonpayment without notice, and thereby confiscate the improvements. *Carpenter v. Willson* (Md.), 59 Atl. 186.

So where a landlord, by acquiescence in the tenant's dilatoriness in payment of rent, has induced the tenant to believe that strict observance of his covenant to pay rent at a specified time will not be required of him, equity will not permit the landlord to enforce a forfeiture which would be inequitable where full compensation can be made to the landlord. *Thropp v. Field*, 26 N. J. Eq. 82.

So where, for a period of forty years, money has been received as rent, instead of a foreign-made article, for which the lease stipulates, which has ceased to be imported, equity will enjoin a re-entry for nontender of such article at a rent day, unless adequate notice of an intention to insist on the terms of the lease has been given to the lessee. *Miley v. Fifty Associates*, 101 Mass. 432.

If, after the forfeiture has been incurred for nonpayment of rent, the landlord proceeds to make a distress for rent previously due, he waives the forfeiture, and equity will relieve the tenant therefrom. *Chase v. Knickerbocker Phosphate Co.* 32 App. Div. 400, 53 N. Y. Supp. 220.

Equity will not permit the forfeiture of an estate for breach of condition prohibiting the sale of intoxicating liquors, where the breach has been permitted for many years without objection. *Lehigh Coal & Nav. Co. v. Early*, 162 Pa. 338, 29 Atl. 736.

And the same principle was applied in *Fidelity Ins. Trust & S. D. Co. v. Fridenberg*, 175 Pa. 500, 52 Am. St. Rep. 851, 34 Atl. 848.

In *Bonniwell v. Madison*, 107 Iowa, 85, 77 N. W. 530, which was a suit in equity to quiet plaintiff's title to certain real estate, it appeared that plaintiff had covenanted to maintain a fence as a condition to a conveyance of land; that he had failed to do so; and that defendant entered, and was insisting on the forfeiture when the action to quiet title was brought. The court granted the relief upon the grounds of waiver and absence of demand for performance, saying that when maintenance

or use is a part of the condition there must be such a neglect to maintain as to indicate an intention not to comply, to constitute a breach of condition.

The obligee may have prevented compliance with the contract.

Where a state makes a grant of land to a railroad company on condition that it complete its road within a specified time, and then prevents a compliance with the condition by plunging into war, equity will regard the conditions as if no particular time for performance were specified, and will prevent a forfeiture if performance occurs within a reasonable time. *Davis v. Gray*, 16 Wall. 203, 21 L. ed. 447.

The obligee may have misled the obligor to such an extent that he will be precluded from insisting on a forfeiture.

Equity will not permit a forfeiture for acts occurring during a period when the landlord, by his conduct, leads the tenant to believe that a forfeiture will not be insisted on. *Flattery v. Anderson*, 12 Ir. Eq. Rep. 218.

Equity will relieve against a forfeiture for breach of covenant to repair where the landlord has led the tenant into supposing that the covenant will not be insisted on. *Hughes v. Metropolitan R. Co.* L. R. 1 C. P. Div. 120. Affirmed in L. R. 2 App. Cas. 439.

If the landlord has led the tenant to suppose that the provisions of the lease will not be strictly insisted on, he will not be permitted to enforce a forfeiture for nonpayment until he has given notice that such is his intention. *Cogley v. Browne*, 15 Phila. 162, 11 W. N. C. 224; *Wanamaker v. McCaully*, 31 W. N. C. 450.

In *North Staffordshire Steel & I. Co. v. Camoys*, 11 Jur. N. S. 555, it is intimated that, where a landlord is aware that a lease has been forfeited, and permits the lessee to go on spending money on the property, he will not be permitted to rely on the forfeiture.

If the lessor in an oil lease has, by his conduct, led the lessee to believe that prompt payment of rentals will not be insisted on, equity will not permit him suddenly to take advantage of a lapse in payment and enforce a forfeiture without notice to the lessee that he intends to do so. *Hukill v. Myers*, 36 W. Va. 630, 15 S. E. 151.

Equity will not permit the landlord to entrap the tenant by establishing a certain course of dealing, and then, without notice, suddenly enter up a judgment and evict him.

sation might be ascertained, . . . yet it has been held that courts of equity ought not to relieve, but should leave the parties to their remedy at law." The subject was discussed at some length in *Klein v. New York L. Ins. Co.* 104 U. S. 88, 26 L. ed. 662, where it was held that the doctrine, that the consequences of nonperformance of a condition precedent are relievable in equity upon the basis of a money compensation for damages suffered, has no application to a case where the condition was inserted in the contract to secure something other than the payment of money, or something having a distinct money value, which was made a principal and essential thing. The case before the court involved the question of whether equity can relieve from the

consequences of failure to make payment of a renewal premium upon an insurance policy, the contract stipulating the effect thereof to be to render the policy void. It was contended on the one side that the damage to the company by reason of being out of the money a short time was easily ascertainable, and that, as compensation could be made therefor, equity had jurisdiction to say that the insurance company should take that compensation instead of what was its right under the terms of the insurance contract. The decision was adverse thereto, because the condition was not inserted merely to secure payment of money, but to secure prompt payment in accordance with a general policy of the company, and because the injurious consequences of a violation

But if the tenant, by his conduct, has shown that he no longer depends upon the course of dealing, but relies upon the exact performance of the terms of the lease, equity will not interfere to relieve him from failure of compliance therewith. *Times Co. v. Siebrecht*, 15 Phila. 235, 11 W. N. C. 288.

VI. Collateral covenants.

a. In general.

When the covenant for breach of which a forfeiture is sought is not one requiring merely the payment of money, but is of the class to which the generic name "collateral covenants" has been applied, that is, where it requires the performance of some act, or the pursuance of some course of conduct,—the matter of compensation is not as easily settled as in the other class of cases, and the courts will interpose with greater hesitation. The presence of fraud, accident, or mistake may induce the court to interpose even if the rule of compensation is not clear. And if there is a plain rule of compensation, and the case is one for equitable relief, the court will interpose merely to save the forfeiture. But in the latter case, before the court will entertain the suit, the equities of the case must be made strongly to appear.

Relief may be granted in equity, even where the condition is for the performance of collateral acts. *Henry v. Tupper*, 29 Vt. 358.

In *Davis v. West*, 12 Ves. Jr. 476, the court says the authorities establish that where covenants other than for payment of rent are broken, and there is no fraud, and the party is capable of giving complete compensation, it is the province of equity to interfere and give relief against the forfeiture.

In *Lovat v. Ranelagh*, 3 Ves. & B. 24, it is intimated that relief would be granted against a breach of covenant as to the manner of cultivation of the land if little damage had resulted from it.

In *Dowell v. Dew*, 1 Younge & C. Ch. Cas. 345, the court, in considering the question of relief from breaches of covenants in a farm lease, says if, according to a literal interpretation of strict covenants, a tenant was to be ejected for a foul turnip field, an unbinged gate, a broken shutter, or some matters of that description which frequently occur on the best-managed farms, there would scarcely be a lease in existence throughout the Kingdom. It is 69 L. R. A.

necessary in these cases to make a reasonable allowance, and not put too strong and precise interpretation on such covenants.

In *Paschall v. Passmore*, 15 Pa. 295, the court, in discussing the effect of a provision of a grant, "under this condition, nevertheless, that the grantee should maintain a bridge, said that considerations such as the fact that no attention had been paid for a long period of time to the nonmaintenance of the bridge, and that the enforcement of the condition would result in the forfeiture of a valuable estate, at one time induced the English courts of equity to favor the doctrine that, where no injury had in fact been inflicted by the non-performance of a condition, or only such as might have been compensated in pecuniary damages, equity would not permit a forfeiture of the estate. And, though Lord Eldon and succeeding chancellors have since confined the rule to conditions of re-entry for nonpayment of rent, it may at least admit of question whether, in cases like the present, the courts of this country would not lean in favor of a liberal extension of the rule, in prevention of injustice.

In *Descarlett v. Dennett*, 9 Mod. 22, the court refused to relieve against a breach of covenant not to permit the use of a way over the premises upon the ground that it was wilful, and that the loss could not be estimated in damages, since it tended to the prejudice of the inheritance inasmuch as it might amount to evidence for a prescription.

And if there is a breach of several covenants in a lease, and there is any one of them with respect to which there exists no equitable ground for relief, although there may be as to all the others the most unquestionable right to relieve, equity will not interfere to prevent the lessor from recovering possession because of the breach. *Nokes v. Gibbon*, 8 Drew, 681, 26 L. J. Ch. N. S. 433.

So relief from a breach of covenant to cultivate the portion of the demised premises not built upon cannot be granted because of an alteration of the contract as to the portion upon which buildings have been placed. *Hills v. Rowland*, 4 De G. M. & G. 430.

And the Supreme Court of the United States has stated that, in respect to covenants pertaining to leasehold estates other than for the payment of rent, or where the elements of fraud, accident, or mistake are wanting, and the power of compensation is uncertain, equity

thereof could not be measured by any definite rule.

It is not strictly accurate to say, expressly or by inference, that relief from a breach of condition subsequent can be granted merely because a stipulation for a forfeiture was inserted in the contract as a security. *Nelson v. Stephens*, 107 Wis. 145, 82 N. W. 165. It must stand as security for the payment of money or for the performance of something the breach of which can be definitely measured in money, the doing of the particular thing, or the doing of it at a particular time, not being by the contract expressly made material, or, in other words, of the essence thereof. There is no better illustration of this than the ordinary agreement to pay a certain sum of

money at a particular time upon a land contract, coupled with a condition of forfeiture in case of the nonpayment according to the agreement. Ordinarily it is held that the payment of the money is the principal thing. Therefore, equity will give compensation for the breach as to time by the usual rules for measuring loss caused by a breach of an agreement as to time in the payment of money. But, if the contract expressly and unequivocally makes time of payment the principal thing the condition was inserted to secure, equity will not relieve from a breach thereof though no real pecuniary loss be suffered thereby by the person entitled to the benefit of the condition. In *Gates v. Parnly*, 93 Wis. 294, 66 N. W. 253, 67 N. W. 739, this language was used: "It would

will not interfere. It allows the forfeiture to be enforced if such is the remedy provided by the contract. This rule is applied to the covenant to repair, to insure, and not to assign. *Sheets v. Selden*, 7 Wall. 416, 19 L. ed. 166.

So in a California case it is stated that there are numerous cases arising under leases and in contracts where time is not of the essence of the contract, in which courts of equity will relieve against a forfeiture. The general doctrine is that equity will relieve where the thing may be done afterwards, or compensation can be made for it; but that, unless a full compensation can be given so as to put the party in precisely the same situation, a court of equity will not interfere. The only cases where equity interposes as to such conditions are where the failure of performance has been the effect of accident, and the injury is capable of compensation in damages which the court has the means of measuring, and where the grantor can be made perfectly secure and indemnified, and can be placed in the same situation as if the occurrence had not happened. This applies to cases where the condition is for the payment of money at a particular time, and compensation for the delay can be measured by the interest during that time. But where the condition is for the performance of a collateral act, the rule is different, as the court has no standard by which to measure damages. *Parsons v. Smilie*, 97 Cal. 653, 32 Pac. 702.

b. Failure to improve or repair.

Equity will relieve against a forfeiture incurred by breach of covenant in a lease of real estate to prosecute the work of fitting up the premises for certain purposes without delay, in the absence of bad faith on the part of the lessee, and where no actual damage has been sustained by the lessor. *Lundin v. Schoefel*, 167 Mass. 465, 45 N. E. 933.

But where one who had taken a lease of ground upon condition that he would erect houses on it failed to comply with the condition after he had commenced operations, whereupon the landowner proceeded to enforce the forfeiture, and the tenant applied to equity for relief, the court said that the tenant's failure to perform had not arisen from any default of the landowner, and that the landowner had a perfect right to insist on the 69 L. R. A.

forfeiture, and the bill was dismissed. *Croft v. Goldsmid*, 24 Beav. 312.

So breach of condition in a lease to make a roadway in front of the property is not excused by the fact that it would be cut up by building operations on adjoining lots. *Nokes v. Gibbon*, 3 Drew. 681, 26 L. J. Ch. N. S. 433.

So breach of covenant to construct a drain is not excused by the fact that the tenant had employed a person to do the work, but he had done it improperly and deceived the tenant as to its efficacy. *Ibid*.

It will be noticed that in the cases in which relief was denied the covenant had not been complied with, and no offer of compliance is shown, but an excuse is offered for noncompliance. That is not sufficient to bring the case within any rule justifying relief.

With respect to the right to relief in case of nonrepair, the cases are conflicting.

In *Sanders v. Pope*, 12 Ves. Jr. 282, the chancellor (Erskine) relieved against breach of a covenant to lay out a certain sum within a given time in repairs.

But in *Bracebridge v. Buckley*, 2 Price, 200, it was held that there can be no relief against breach of covenant to lay out a certain amount in making repairs on the leasehold, because there can be no effectual means of ascertaining or of making compensation. But Wood, B. dissented on the ground that such a decision would overrule *Sanders v. Pope*, 12 Ves. Jr. 282, which he thought to be rightly decided.

The cases may be distinguished on the ground that in the first the failure was to lay out the sum within a given time, with nothing to show that it would not be equally efficacious if made subsequently. In the other, it does not appear that there was an offer to lay out the sum subsequently.

And in *Bamford v. Creasy*, 3 Giff. 675, where a judgment had been taken for breach of covenants to pay rent and repair and to insure, the cases holding that no relief would be granted a tenant who had failed to repair and insure were noticed, and the court stated that they were cases in which the plaintiff came into equity seeking injunction to restrain proceedings at law, confessing breach of covenant and asking relief. In these cases equity always refused to interfere, treating the question of forfeiture or not as one with which equity would not deal where the landlord has a legal right

seem that where the condition is security for the payment of money or the performance of any particular act, . . . relief may be granted." The broad statement was unnecessary to the decision of the case in which it was used, and may be misleading. Manifestly, courts have not yet gone so far as to hold that equity can relieve from the consequences of the breach of a condition wherever it stands as security for the performance of some act. It cannot if the act itself is of the essence of the contract, the principal thing, and it cannot if the damages caused by the breach are not susceptible of accurate determination by calculation, substantially the same as if the act were the mere payment of money. It is said by Judge Story that the English

courts hold that in all cases of forfeiture for the breach of any covenant other than the covenant to pay rent, no relief ought to be granted in equity unless upon the ground of accident, mistake, fraud, or surprise, although the breach is capable of a just compensation. 2 Story, Eq. Jur. 13th ed. § 1323. A somewhat broader doctrine than that has prevailed in the courts of this country, care being exercised, as indicated in *Klein v. New York L. Ins. Co.* 104 U. S. 88, 26 L. ed. 662, not to substitute a contract of their own for the one the parties made so as to prevent them from having the thing made by them the very essence of their agreement. Probably as valuable a discussion of the scope of the rule, as recognized generally in this country, as

upon the covenant. But it had never been said that equity would not, under any circumstances, grant relief for breach of such covenants. Special circumstances might entitle a tenant to relief in such cases, such as accident and surprise. And relief was granted where a judgment in ejectment had been taken by default, without anything to show that there had been a breach of covenant.

But in *Hill v. Barclay*, 16 Ves. Jr. 402, where a similar covenant was involved, Eldon, chancellor, says that considerable arguments might be urged against the relief granted in the *Sanders Case*. He says that the difficulty with its doctrine is that there is no mutuality in it. The tenant cannot be compelled to repair; and is the tenant to have the option, against the will of the landlord, of keeping the lease upon these terms, from time to time breaking the covenant which he cannot be compelled to perform, and saying that he will not fulfil the obligation? The relief was refused in that case, although the court does not hold that equity would be precluded in all cases from affording any relief.

In *Gregory v. Wilson*, 9 Hare, 683, in speaking of breach of covenant to repair, the vice-chancellor said, where a man who knows that he is charged with a legal obligation neglects to perform it, his neglect to do so must be deemed to be wilful, and, if he persists in it, to be obstinate.

In *Job v. Banister*, 2 Kay & J. 374, where there was a breach of covenants to repair and insure, the court says it cannot interfere between the parties to the legal contract. One had agreed to insure and keep the premises in repair, for a breach of which the other had a right to re-enter. It is as much a part of the contract that the lessor should have the right to re-enter on breach of the covenants to insure or repair as that he should have the rent. The case could be dealt with in no other way than by leaving the parties to their rights at law.

In *Ex-parte Vaughan*, Turn. & R. 434, the court, in the exercise of its supervisory power over a lunatic's estate, relieved his tenant from a forfeiture for nonrepair, where the repairs were properly made by the direction of the court, and the tenant was in other respects a desirable one.

So where a landlord is attempting to enforce a forfeiture for nonrepair, which will work

great hardship on the lessee, and full compensation can be made in money, equity will relieve. *Hagar v. Buck*, 44 Vt. 285, 8 Am. Rep. 368.

So where there was a breach of covenant to repair in permitting the roof of the barn to get out of repair, the lord chancellor said he could not apprehend what damage the landlord could sustain if the lessee suffered the buildings to be out of repair, so as he kept the main timber from being rotten, and left all in good repair before the end of the term; and he granted the relief. *Hack v. Leonard*, 9 Mod. 91.

The same special equities may govern in this class of cases as have been apparent in other classes already noticed.

Thus, where repairs had been undertaken and proceeded with mostly to completion, but delayed by the weather, while the landlord appeared to be satisfied with what was being done, relief was granted. *Bargent v. Thomson*, 4 Giff. 473.

So where the time allowed for making repairs is consumed by a negotiation upon an offer by the lessee to sell his interest in the property, equity will relieve from a forfeiture which the lessor attempts to enforce. *Hughes v. Metropolitan R. Co.* L. R. 2 App. Cas. 439. Lord O'Hagan places his concurrence upon the ground that, while equity has no right to relieve the tenant because the forfeiture pressed hardly upon him, yet, that he was entitled to relief because he failed to act through a mistake induced by the conduct of the landlord.

And in *Hannam v. South London Waterworks Co.* 2 Meriv. 61, the chancellor granted an injunction to restrain proceedings to enforce a forfeiture for breach of a covenant to repair, upon the ground that a treaty with a third person was pending, upon the successful outcome of which the repaired buildings would immediately be pulled down.

But there is no ground for relieving a tenant whose conduct has been gross and ruinous that the landlord may be placed in the same situation by afterwards putting the premises in sufficient repair. The chancellor asks, How can it be ascertained that the subsequent repairs do put the landlord in the same state? *Hill v. Barclay*, 16 Ves. Jr. 402.

Upon a rehearing of the case, the court adhered to its former decision upon the ground that, after demand by the lessor, the tenant

can be found, is in the opinion of Redfield, Ch. J., in *Henry v. Tupper*, 29 Vt. 358. In *Grigg v. Landis*, 21 N. J. Eq. 494, it was held that a court cannot relieve from the consequences of the breach of a condition subsequent that certain improvements shall be put upon granted premises within a specified time, it appearing that time was made by the contract a principal thing; that the condition of forfeiture in such a case is not made merely to secure the making of the improvements, but the making of them within a particular time agreed upon. In discussing the subject the court said: "It is not therefore to be supposed that a court of equity will lightly dispense with contracts made between competent parties, and substitute other agreements more

in accordance with variable rules of right and conscience. Every presumption will be made in favor of such contracts and they will be enforced according to the intention of the parties expressed and implied, unless it can be shown that thereby some hardship or wrong, not within the presumed contemplation of the parties at the time, will result from such enforcement."

From what has been said it seems clear that the doctrine, that a court of equity may relieve a party from the consequences to him of his breach of a condition subsequent, does not apply to the facts of this case. The condition was not inserted in the deed to secure the payment of money, nor the performance of any act that could be substantially performed by the payment of

took not one step in compliance therewith; and the chancellor asks, Am I, then, to speculate under such circumstances, and determine that it is so clear that the repairs, if done in the future, will be equally or more beneficial, that all the contract between the parties shall be undone? My opinion is that this is more than is established by the decisions. 18 Ves. Jr. 56.

c. Failure to insure.

A failure to insure at once jeopardizes the rights of the obligee, and there can be no adequate compensation therefor; and, therefore, the general rule is that no relief can be granted from a forfeiture sought for such failure. *White v. Warner*, 2 Meriv. 459; *Elchenlaub v. Nell*, 10 Ohio C. C. 427; *Green v. Bridges*, 4 Sim. 96.

There will be no relief for breach of covenant to insure. Such a breach of covenant is out of the measure of damages. And the effect of giving relief would be that any tenant may break this special covenant with impunity, and every landlord must be content to take his tenant for his insurer. *Rolfe v. Harris*, 2 Price, 206, note.

In *Thompson v. Guyon*, 5 Sim. 65, it is assumed that there can be no relief in case of breach of covenant to insure.

In *Reynolds v. Pitt*, 19 Ves. Jr. 134, the court said, with reference to a forfeiture for breach of covenant to insure: If the tenant has wilfully and obstinately prevented the insurance, and it has so subsisted for years, upon what principle is a court of equity to say that a tenant who has neglected to fulfil his contract shall insist that the landlord shall keep all the terms with him?

In *Rolfe v. Harris*, 2 Price, 206, note, which was an application for relief from forfeiture of a leasehold for failure to insure, the vice chancellor said that the court will relieve only where the forfeiture is the effect of inevitable accident, and the injury or inconvenience arising from it must be capable of compensation; but that, where the transgression is wilful, or the compensation impracticable, the court will not interfere. *Sanders v. Pope*, 12 Ves. Jr. 282, is said to go further than the authorities warranted. The jurisdiction, if exercised at all, should be confined to cases of a pecuniary nature, such as nonpayment of

rent, and money not paid by a day certain, and where such breaches stand alone.

But where, by reason of accident, insurance policies secured by the tenant in compliance with the terms of the lease were not acceptable to the lessor, it was held that equity would relieve; the court saying that it may fairly be argued that, if a lessee, in good faith, procures insurance; intending to observe the requirements of the covenant, but fails to do so, the lessor cannot, without notice, enforce a forfeiture. But, assuming that there has been a breach, it is a case in which equity ought to furnish relief. *Mactier v. Osborn*, 148 Mass. 399, 4 Am. St. Rep. 323, 15 N. E. 641.

And where a property owner procured his creditors to take an assignment of leases of it, and cancel the debt, the property being comparatively worthless, but having been given a fictitious value by the owner's dealings with it, he was enjoined from enforcing a forfeiture for neglect to comply with the conditions as to insurance. *Meek v. Carter*, 4 Jur. N. S. 992.

d. Other covenants.

In *Worcester v. Copyholder*, *Freem. Ch.* 137, the court refused to relieve a forfeiture for voluntary waste in cutting timber.

But in *Bowen v. Whitmore*, *Freem. Ch.* 192, where a forfeiture had been declared for waste in cutting down great trees, and it was insisted that it was impossible to set them up again, and to put the lessor in the same plight he was in before, the court did not act upon the suggestion, but granted the relief granting an inquiry to ascertain the amount of the injury.

In *Thomas v. Porter*, 1 Ch. Cas. 95, which was a bill for relief from a forfeiture for commission of waste, the lord keeper stated that relief would be granted if the waste was not wilful, but not if it was wilful.

Equity will not relieve from forfeiture for alienation of the leasehold without license. *Wafer v. Mocato*, 9 Mod. 112. The reason given was because it was unknown what should be the measure of damages. For equity never relieves but in such cases where it can give some compensation in damages, and where there is some rule to be the measure of such damages to avoid being arbitrary.

In *Northcote v. Duke*, 1 Amb. 513, 2 Eden, 322, where there had been a breach of condi-

money damages. The condition was not only to inclose the granted premises by a good and sufficient legal fence, but it was to maintain the same forever. The grantee agreed to put in culverts where the cross drainage ditches were intercepted by the railway roadbed, and put in a suitable crossing where desired by the grantor, with substantial gates in the side fences, and, by inference, to maintain such connecting culverts, crossing, and gates perpetually. There is no rule by which damages for failure to do those things can be accurately measured in money. Moreover, it is manifest that the performance of the acts mentioned was made a principal thing, a matter of the very essence of the contract. The learned court said that no pecuniary loss accrued to the grantor by

reason of the default of the grantee, and therefore he would hold that equity would shield the respondents from the effects of the default. The fact that no damages accrued to Uhen, which the court could recognize and measure in money, notwithstanding evidence showing a clear breach of the conditions of the deed, should have prevented, rather than called for, an application of the rule mentioned. In *Wafer v. Mocato*, 9 Mod. 112, it was said that, if a man makes a lease for life upon condition that the lease shall be forfeited if the lessee assigns or aliens it without license, and afterwards the lessee doth assign it without license, that is a forfeiture; and such a forfeiture against which the court cannot relieve, because it is not known what shall be the

tion by a tenant for life not to alienate for more than seven years, the chancellor said it was so that equity would not relieve when the act was voluntary. But the landlord must not have been injured at all, or in a manner for which interest can compensate him. I take the rule to be that in all cases where a person has broken a condition and forfeited a penalty equity will relieve if there can be a compensation. I think the court may relieve where a tenant cuts down timber.

In *Davies v. Moreton*, 2 Ch. Cas. 127, the court refused to relieve from a forfeiture for assigning a lease contrary to its conditions, unless the amount received for the assignment was paid to the lessor, although he had taken a bond for the amount from the lessee.

In *Whetstone v. Sainsbury*, Prec. in Ch. 501, where a life tenant incurred a forfeiture by mortgaging the property, the court refused relief upon the ground that it was a contingency to destroy the settlement and disinherit the remainder-man, and in cases of this nature there would be no relief.

But the master of the rolls reversed this decision upon the ground that, under the settlement, the legal estate was in trustees, and the interest which was held to be forfeited was but a trust, and that a trust for life was not forfeited by a fine; and therefore there was no forfeiture which required the aid of equity. 2 P. Wms. 146.

Where there had been a breach of covenant not to underlet without the consent of the landlord, through the mistake of the solicitor in failing to look at the original lease in drawing the under lease; and the under tenant was a man of character, so that there could have been no reasonable objection to him; and the landowner could not have been injured by the breach of covenant,—the court held that equity could grant no relief. *Barrow v. Isaacs* [1891] 1 Q. B. 417. The court adopts the doctrine that equity will relieve only in case of fraud, accident, or mistake, and then only where complete compensation can be made, or there is no injury which requires compensation. It was further held that mere forgetfulness is not mistake. *Kay, L. J.*, says, at first there seems to have been some hesitation whether the relief extended in case of nonpayment of rent ought to be extended to other cases of forfeiture for breach of covenant, such as to repair, insure, and the like, where compensation

could be made; but it was soon recognized that there would be great difficulty in estimating the proper amount of compensation, and since *Hill v. Barclay*, it has always been held that equity would not relieve merely on the ground that it could give compensation upon breach of any covenant in a lease except the covenant for payment of rent.

And that case was followed in *Eastern Teleg. Co. v. Dent* [1899] 1 Q. B. 835, where *Hyde v. Warden*, L. R. 3 Exch. Div. 72, was disapproved.

In *Roberts v. Gels*, 2 Daly, 540, the court, in discussing the rights *inter se* of an assignor and assignee of a leasehold where the lease contained a clause of forfeiture for assignment, says the landlord could enter for condition broken, and equity would not relieve against a forfeiture thus incurred. The court says equity will relieve against a forfeiture incurred by accident or mistake, or where full compensation can be made, as for nonpayment of rent, or where there is some rule by which to measure the damages, or where an assignment is made by executors after the death of the lessee, without the lessor's consent, for there it is an alienation by the act of God; but not where the assignment is voluntarily made by the lessee without the lessor's consent. In such cases the court cannot estimate the damage. There is no rule to go by, for it cannot say whether the lessor will gain or lose by the assignment. It is sufficient that he insists upon his covenant.

But equity will relieve a tenant against a forfeiture for breach of condition against subletting if he was induced to make the sublease by conduct of his lessor, which amounts to fraud. *Burke v. Prior*, 15 Ir. Ch. Rep. 106. The court says the landlord will not be permitted, where, by a snare or contrivance, he has thrown the tenant off his guard to induce him to do an act amounting to a breach of covenant, then to turn around and insist on the forfeiture.

And in *Hyde v. Warden*, L. R. 3 Exch. Div. 72, which was a controversy between the tenant and one who had contracted for a sublease, as to the right to enforce the contract, it was objected that the required consent of the landowner had not been obtained. But the court held that it was stipulated that such consent should not be withheld from an assignment or underlease to a respectable and re-

measure of damages; for the court never relieves but in cases where it can give some compensation for damages, and where there is some rule to be the measure of such damages, to avoid being arbitrary. That was quoted with approval in *Sanders v. Pope*, 12 Ves. Jr. 282, and is found often referred to in American decisions. The idea running through all the authorities is that one of the essentials to the application of the doctrine, that a court of equity may relieve from the consequences of a breach of a condition subsequent, is that the damages flowing from the breach must be such that the court can measure the same in money by some established rule.

If the breach of such a condition as those involved in this case could be, under some

circumstances, dealt with by a court of equity, so as to save the wrongdoer from the legal consequences thereof, respondents would still have difficulty, for equity does not use its jurisdiction to save a party in such a case, if his default was wilful or inexcusable. 1 Jones, Real Prop. § 732. The doctrine applies that he who seeks equity must apply with clean hands. There must be grounds for equitable relief falling within the scope of the jurisdiction of the court, and the circumstances of the particular situation must be such as to excite a court of conscience to activity. How does this case stand tested by that rule? Neither Boyle nor his grantee, the Knickerbocker Ice Company, constructed, or attempted to construct, the connecting culverts to pre-

sponsible person. And, since there was no objection to the defendant, an attempt on the part of the landowner to eject him on the ground of absence of consent would fail.

So, where a tenant for life had forfeited the estate by mortgaging it and levying a fine in corroboration of the mortgage, the court decreed that the mortgagee should hold during the life of the life tenant. *Willis v. Fineux*, Prec. in Ch. 100.

e. Copyholds.

Equity has concurrent jurisdiction with a court of law for illegal seizure of copyhold property for alleged breach of covenant. *Andrews v. Hulse*, 4 Kay & J. 392.

Where timber was cut on one copyhold for repairs on another within the same manor, equity relieved. *Nash v. Derby*, 2 Vern. 537.

In *Penchy v. Somerset*, Prec. in Ch. 574, 2 Eq. Abr. Cas. 227, pl. 9, where a copyholder had leased a portion of the estate for years, had opened a quarry upon the property, cut down trees, and inclosed part of the lands, it was held that there could be no relief in equity, unless there was some equitable circumstance in the case.

In the report in 1 Strange, 447, the lord chancellor is reported as saying, inferentially, that it is not an unconscionable thing to take advantage of a law which is known and equal to all.

f. Mining leases.

Where the lessee in an oil lease failed to comply with his covenant to commence operations within a specified time, or to pay the monthly rental, equity refused to interpose for his relief, the court saying that, while the general statement that equity abhors a forfeiture is true, it is only when it works a loss that is contrary to equity; not when it works equity to protect the landowner against the indifference and laches of the lessee, and prevents a great mischief. *Brown v. Vandergift*, 80 Pa. 142.

And that case was followed in *Munroe v. Armstrong*, 96 Pa. 307.

Where the lessor in a gas lease was attempting to enforce a forfeiture for nonpayment of rent at the day, and it appeared that time had never been insisted on as material, but payments had been received after they were due, the court said it is the settled rule 69 L. R. A.

that where time is not stipulated as essential, and a forfeiture for nonpayment of money or other matter that admits of accurate and full compensation is provided as a mere penalty whose object is to enforce performance of another and principal obligation, equity will relieve against it, and will not permit it to be used for a different and inequitable purpose. *Lynch v. Versailles Fuel Gas Co.* 165 Pa. 518, 30 Atl. 984.

Where the lessees in an oil and gas lease, after striking a paying well, inadvertently deprive the lessor of the use of the product, to which he is entitled under a condition in the lease, thereby incurring a forfeiture, equity may grant relief. *South Penn Oil Co. v. Edgell*, 48 W. Va. 348, 86 Am. St. Rep. 43, 37 S. E. 596. The court held that the provision for forfeiture was in the nature of a penalty to secure the rights of the lessor, against which equity would relieve when compensation could be fully made, and great loss, wholly disproportionate to the injury occasioned by the breach of contract, would otherwise result to the lessee, negligently, but not fraudulently, in default.

VII. Conditions against marriage.

A condition in a conveyance of property which is in restraint of all marriage has been held to be absolutely void, even at law, from a very early period; so that it has not been necessary to apply to equity for relief in such cases. But there have been a great many instances of conditions against marriage under a specified age, or without consent, which have occasioned the courts considerable trouble. They were not cases which could be settled on the theory of fraud, accident, or mistake, nor yet under the jurisdiction to relieve from forfeitures when compensation could be made. The courts, therefore, invented, or rather borrowed, a doctrine applicable solely to this class of cases, and they are, therefore, in a class by themselves, although they come within the general doctrine of relief from forfeiture.

There is no doubt that a condition to the vesting of a portion provided for the daughter, that she should never marry, is void, and will not be given effect by equity. *Harvy v. Aston*, 2 Comyns, Rep. 726, Reversing *Cas. t. Talb.* 212.

But the question whether or not a condition

serve the usefulness of the cross drainage ditches. The failure was not caused by any mistake, nor was it the result of mere negligence. The obligation of the deed was intentionally disregarded. When called Boyle's attention to such obligation at the time he was preparing the granted premises for the railroad track. He was informed, in effect, that the culverts would not be put in because the purpose thereof could be served in another way. It is no answer to the neglect to construct culverts to say that the ditches made on either side of the granted premises, and the connection thereof with the cross drainage ditches, served the purpose of the culverts. The grantor was entitled to have just what he bargained for. The agreement to inclose the granted prem-

ises was not performed, though Boyle and his grantee, the ice company, were requested time and again to do so, attention being called at one time to the fact that the granted premises could be reclaimed for the default in that regard. Though in June, 1899, When consented to a delay in the construction of the fence till after harvest time, upon condition of its being then constructed, no attempt was made to fulfil that condition. In November, 1899, the railroad company inclosed the center 17 feet of the premises, being that portion theretofore leased to it by the ice company. That was not a substantial compliance with the conditions of the deed. On the contrary, it was a wilful disregard thereof. It was a distinct declaration to When that the de-

that the legatee shall marry with consent of some person named is valid, has been the subject of much discussion by the English courts. The question in most of them, however, was not whether or not equity would relieve from breach of the condition, but whether the condition was in fact enforceable. The cases upon the subject are fully collected in the arguments in the case of *Scott v. Tyler*, 2 Bro. Ch. 431, Dick. 712, where the court held that the applicant for the legacy had not brought herself within the description of the gift, so that it had not attached, and relief was therefore denied to her.

While the discussions have been confined to the question of the validity of the conditions, since that was the only ground upon which equity could relieve, the fact that the aid of courts of equity was sought, and that the suits were entertained by them, shows that the granting of relief from forfeitures was recognized as a prerogative of such courts.

Whenever it was possible to construe the provision so as to avoid a forfeiture, such construction was given.

In *Daley v. Desbouverie*, 2 Atk. 261, the court says as to conditions, whether precedent or subsequent, where they are in restraint of marriage, the court has always put the most favorable construction upon them to prevent a forfeiture.

In *Semphill v. Bayly*, Prec. in Ch. 562, it appearing that the clause of the will giving the interest read, "and, if my daughter should happen to marry with the consent of my executors, then I devise to her" the amount named, to be paid to her at the age of twenty-one, or day of marriage, which shall first happen, it was held, further, that this showed no intention to make a forfeiture, but was only a cautionary provision.

With respect to conditions as to marriage. Lord Hardwicke stated, in *Burleton v. Humfrey*, 1 Amb. 256, that of late courts have done all they can to prevent a child being stripped of a portion, especially where there are no aggravating circumstances, and the end of the father's intention and caution has been attained; and have laid hold of and made such construction of words which they would not do in other cases.

In *Berkley v. Ryder*, 2 Ves. Sr. 533, where there was breach of a condition not to marry without consent, the chancellor proposed a

compromise, stating that it would be no precedent, and it was agreed to.

In the early decisions the court felt itself bound to follow the rules of the common law if such rules were applicable. Therefore, if the condition was annexed to a devise of real estate, which, because of its local habitation, was regarded as peculiarly within the jurisdiction of the common-law courts, no relief could be afforded, because at common law there was no method of relief from a forfeiture for breach of a condition.

Therefore, where a legacy to one provided she do not marry without consent is charged on land, equity cannot relieve against a forfeiture for breach of the contract. Since, where the portion is charged on land, the case is governed by the rules of the common law, and the condition must be complied with to entitle to the benefit. *Sheriff v. Morlock*, W. Kelynge, 24.

But personal property was more under the control and supervision of the ecclesiastical courts, which had adopted the rule of the civil law, which regarded provisions in restraint of marriage as *in terrorem* because against the interests of the public, and as, therefore, not enforceable. Consequently the courts of equity considered themselves as free to follow the rule of the ecclesiastical courts when cases involving personality came before them.

In *Williams ex dem. Porter v. Fry*, 1 Mod. 86, Lord Hale said, with respect to a devise upon condition of marrying with consent, that chancery is so just as to enforce the civil and canon law as to personal legacies, but not as to land.

And, a bill having been brought in equity for relief, it was denied for the reason, *inter alia*, that it is a condition to constrain the party in that due obedience which law and nature require. There is a voluntary settlement with remainder over, both parties being in equal relation to the deviser, and the forfeiture was merely carrying out the intention of the deviser. *Fry v. Porter*, 1 Mod. 300.

But later, when courts of equity acquired more freedom, this distinction was no longer observed; and in *Harvey v. Ashton*, 2 Eq. Cas. Abr. 216, pl. 12, it is stated that there is no distinction between conditions annexed to money charged upon land and those annexed to provisions arising out of personal estate.

pendants proposed to build the fence in such manner as they saw fit, instead of to inclose the 33-foot strip of land according to the terms of the deed. Such a disregard of the rights of Uhen, in the absence of proof of a waiver thereof on his part, leaves respondents in no situation to be recognized in a court of equity.

It is suggested that Uhen waived performance of the conditions of the agreement, and that his re-entry was not rightful on that account. It is elementary that a person circumstanced as he was may lose the benefit of the condition of his grant by an express or implied waiver thereof. *Andrews v. Senter*, 32 Me. 394; *Ludlow v. New York & H. R. Co.* 12 Barb. 440; *Guild v. Richards*, 16 Gray, 309; *Hubbard v. Hubbard*,

97 Mass. 188, 93 Am. Dec. 75; *Sharon Iron Co. v. Erie*, 41 Pa. 341; *Grigg v. Landis*, 21 N. J. Eq. 494; *Bonniwell v. Madison*, 107 Iowa, 85, 77 N. W. 530; 1 Jones, Real Prop. § 699. However, the record before us does not disclose evidence to establish a waiver. Mere silence or delay is not sufficient for that purpose any more than to create an estoppel which will prevent the assertion of a right. That was all there was in this case. Where the benefit of a condition subsequent has been adjudged lost by silence or delay, the person failing to perform relied upon the attitude of his obligee as evincing consent, and incurred expense or placed himself in such a situation by reason thereof that a change of the apparent position of such obligee, if given effect.

Conditions precedent.

In accordance with the rule which has already been noticed *supra*, 11., the courts conceived the idea that, if the condition was such that compliance with it was necessary to vest the estate, no relief could be had, in the absence of compliance.

Therefore, it was held that, if the portion is charged on land, equity will not vest it in case of a breach of condition precedent. *Reves v. Herne*, 2 Eq. Cas. Abr. 215, pl. 10.

So where a legacy of a certain amount was given testator's granddaughter provided she remained with his executors and did not marry without their consent, and, upon noncompliance with either proviso she was to have a much less amount, and she married without their consent, the court held that the condition was in its nature precedent, and refused to grant her relief. *Creagh v. Wilson*, 2 Vern. 572.

So equity will not dispense with a condition precedent if one for whom a marriage portion is provided shall marry with consent. *Harvy v. Aston*, 2 Comyns, Rep. 726, Reversing Cas. t. Talb. 212.

And in the report of that case in 1 Atk. 361, it appeared that the case involved the enforcement of a condition in a will making the vesting of the estate depend upon marriage with consent, and Lord Chief Justice Lee said that though, where compensation can be made, there is but little difference between conditions precedent and subsequent, yet, where a condition is annexed to a portion in order to have a marriage with consent, there is an equitable difference. In case of a condition subsequent the thing is vested, and though in the nature of a penalty, yet, the intent shall be clear and plain by an express devise over to divest it; but in case of a condition precedent for which there can be no compensation, it would be giving an estate against the intent of the donor to dispense with the condition. And the lord chancellor said that where the condition of the vesting of the estate is marriage with consent, there is no rule in law or in equity that can excuse the want of consent. Lord Chief Justice Willes, however, said that the rule with regard to forfeiture had no application to the case; that the only question was whether or not the time had come when the sums ought to be raised and paid; reversing *Hervey v. Aston*, 69 L. R. A.

Cas. t. Talb. 212, where the master of rolls stated that where there was no devise over such provisions were construed to be *in terrorem* only. For, though the daughter marries with her father's consent, yet it is not to be supposed that this severity (was he living) would carry him so far as to leave her quite destitute. Besides, whatever is injurious to the commonwealth is unreasonable. And furthermore, the provision in this case was no more than providing for the daughter's dying unmarried.

And, as stated in the report in 2 Eq. Cas. Abr. 147, pl. 6, he held that the proviso was only *in terrorem*, and created no forfeiture.

The distinction between conditions precedent and subsequent was, however, somewhat relaxed.

Where property was devised to testator's heir at law upon condition of her marriage with consent, it was contended that the condition was precedent, and that the estate could not vest without compliance with the condition; but the court held that this provision of the will was a mere trust, and that the daughter, as heir at law, would take the beneficial interest until marriage, so that the condition operates as a condition subsequent. *Burleton v. Humfrey*, 1 Amb. 256.

The question whether or not equity can relieve will depend very largely on the peculiar circumstances of each particular case. There may be cases in which it is plain that no interest has ever vested, and that, therefore, there is no ground for relief.

Thus, where a will provides a portion to be raised out of realty for testator's daughter, to be paid at the age of twenty-one, or marriage, equity will not vest the estate in case of her death before twenty-one unmarried. *Foulet v. Poulet*, 1 Vern. 204.

Upon further hearing, however, the decree was made to depend upon the fact that the will was only a confirmation of a prior deed, by the terms of which the estate had never vested. 1 Vern. 321.

But the same doctrine was applied in *Yates v. Phettiplace*, 2 Vern. 416, and *Bruen v. Bruen*, 2 Vern. 439.

Many of the bequests were upon condition that the beneficiary should marry with the consent of some person named. The courts were generally of opinion that marriage with such consent was a condition precedent, non-

would seriously prejudice the obligor. *Ludlow v. New York & H. R. Co.* 12 Barb. 440, is a good illustration. The plaintiff conveyed land for right of way, to a railway company, upon condition of its road being completed over the premises on or before a particular day named in the conveyance. The condition was not satisfied. The grantor failed to claim the benefit of the condition for two years after the breach. He kept silent during that time as to any intention to claim a forfeiture, and in the meantime, to his knowledge, the grantee actually constructed the road as provided in the grant. The court held that the condition of the grant was waived by the conduct of the grantor, not because of mere delay or silence, but because such conduct

induced the grantee to expend money which would be lost if he were allowed to reclaim the property. In *Hubbard v. Hubbard*, 97 Mass. 188, 93 Am. Dec. 75, the conditional grantor received benefits from the grant after the breach, keeping silent as to any purpose to insist upon a forfeiture. In *Gray v. Blanchard*, 8 Pick. 284, 292, it was said that mere indulgence alone is never construed into a waiver of a breach of condition. In *Grigg v. Landis*, 21 N. J. Eq. 494, a breach of a condition as to making improvements upon the granted premises was held waived because the grantee, relying upon indulgence in that there was delay in claiming a forfeiture, and silence as to any intention in that regard, conveyed the property to another, who in good faith

compliance with which would bar all right to relief.

Where a legacy is given to one in case she marries with consent, it never vests if she dies unmarried. *Elton v. Elton*, 1 Wils. 159.

Equity will not dispense with a forfeiture for breach of a condition to marry with consent. *Anonymous*, 2 Eq. Cas. Abr. 212, pl. 2.

So if lands are settled or a term of years created on trust to raise portions for daughters to be paid at the age of twenty-one, or marriage, death of the daughter before compliance with the condition will cause the property to sink into the estate for the benefit of the heir. *Harvy v. Aston*, 2 Comyns, Rep. 720, Reversing Cas. t. Talb. 212.

Equity will not relieve where a will provides an annuity of a certain amount for testator's daughter, and, if she marries with consent, then she shall have a larger amount in lieu of the annuity, since, if she marries without consent, she does not meet the condition precedent to her taking the larger amount. *Gillet v. Wray*, 2 Eq. Cas. Abr. 213, pl. 3.

Where a legacy is given to one on condition of her marrying before a certain age with consent, and upon her failure to do so then over, marriage with consent is a condition precedent, nonperformance of which will prevent the title from vesting; and equity, therefore, cannot relieve. *Malcolm v. O'Callaghan*, 2 Madd. 349.

Under a devise in trust for testator's son while unmarried, and to convey to him in case he marries with consent, but in case of marriage without consent then to sell the estate and divide the proceeds, a marriage without consent vested the devise over, and defeated the son's interest. *Long v. Ricketts*, 2 Sim. & Stu. 179. The court says, to entitle himself to the estate, the son must marry with consent, and he has not performed that condition precedent.

Where a woman was left an annuity, but, in case she married with consent, she was to have a portion and the annuity to cease, it was held that there was a provision either way; and that, where the provision is in the alternative, and there is a condition precedent to the gift of the portion, viz. if she marries with consent, and that is not performed, and the child is still provided for, equity does not relieve. *Gillet v. Wray*, 1 P. Wms. 284.

But such course was by no means uniform.

For in *Reynish v. Martin*, 3 Atk. 330, it is 69 L. R. A.

stated that it is the doctrine of equity that, where a personal legacy is given to a child on condition of marriage with consent, this is not looked on as a condition annexed to the legacy, but as a declaration of the testator *in terrorem*. It being insisted that there could be no relief because the condition was precedent, the court said that where the condition is precedent the legatee takes nothing until the condition is performed, and consequently has no right to come and demand the legacy; but it is otherwise where the condition is subsequent, for in that case the legatee has a right, and the court will decree him the legacy. But this difference only holds where the legacy is a charge on real estate; and, therefore, if the legacy is merely of personality, marriage without consent would not preclude relief in equity. But if the legacy was a charge on real estate, the legatee could not come into equity to compel its payment after breach of condition, since the matter is governed by the rule of the common law. The reason is that when the jurisdiction originally and properly belonged to another forum equity would not break in, but would govern itself by the rules that had been established in that forum. The condition being good, it cannot, in law, be defeated, and, there being a full breach of it, since the law will not, equity cannot, help.

So a provision giving a certain amount in case the legatee shall marry with consent, and, in case she does not, she shall have a much less amount, is a provision *in terrorem*, against which equity will relieve. But it is intimated that, if any surprise or bribery had been used to procure an unsuitable marriage, the court might decree otherwise. *Hicks v. Pendarris*, 2 Eq. Cas. Abr. 212, pl. 1.

So where an estate was given to testator's grandchild upon condition that she marry with consent of a person named, and in case she should marry without such consent, then the estate should go to another, the master of the rolls held that the condition must be held to be *in terrorem*; and, since the legatee had no notice of the condition, he decreed in her favor. But upon appeal the bill was dismissed upon the ground that, the condition being good, it could not be, in law, defeated, and there being a full breach of the condition which the law will not, equity cannot, help. And also, the breach was not relievable in equity because it

made the improvements agreed upon, and made payments of the purchase money to the grantor, who received the same, but without knowledge of the breach of the condition.

Further discussion of this branch of the case, or citation of authority, seems unnecessary. There is some ground for saying that the demand for the construction of the fence, long after the breach in respect to the culverts, indicated a purpose to submit permanently to the method adopted by the grantee for conducting water from the cross drainage ditches off from the grantor's land, so that, if such demand had been complied with, all the conditions of the deed would be deemed waived. But the fence was not constructed. The act of building a fence

inclosing the center 17 feet of the premises was such a manifestly intentional disregard of the obligations contained in the deed that the grantor lost no rights merely by not objecting thereto. It has never been held that an open, intentional violation of the obligations of a grant is sufficient in equity, coupled with mere silence on the part of the obligee, to constitute a waiver of strict performance.

The only other ground upon which judgment was awarded to respondents is that the premises in controversy were entered upon by consent of the ice company, and the railway track laid down and devoted to public purposes, and that the only remedy of appellant, if she possesses any, is under the statute in respect to the enforcement of

was a voluntary settlement to which the grantor had a right to attach such conditions as he saw fit. *Fry v. Porter*, 1 Ch. Cas. 138.

So where a legacy is given upon condition that the legatee marry with consent of a person named, without any devise over in case she marries without such consent, equity will hold the condition void as being merely *in terrorem*. *Bellasis v. Ermine*, 1 Ch. Cas. 22.

So in *Gresley v. Luther*, F. Moore, 857, *Winch, J.*, cites *Pigot's Case* as holding that a legacy might be recovered notwithstanding noncompliance with a condition as to marriage with consent.

In *Needham v. Vernon*, Cas. t. Finch, 62, a settlement had been made to raise portions for the daughters of the settlor, payable at their respective marriages with consent, and for their maintenance in the meantime, and, if they marry without consent, then the portion of the one so marrying to go over. Both daughters, being advanced in years, and not intending to marry, applied to have the portion paid into their possession, which the court decreed upon their giving security to those entitled in remainder. Lord Chancellor Hardwicke disposes of this case in *Reynish v. Martin*, 3 Atk. 332, by saying that it is reported in a book of no authority. But a reference to it, of the same import, is found in 1 Eq. Cas. Abr. p. 111, pl. 6.

Alternative provisions.

Where a devise is to testator's daughter at twenty-one, or marriage, provided that, if she should marry without consent a portion of the amount should cease, and she gains the age of twenty-one, and then marries without consent, there shall be no forfeiture, for the devise vests at twenty-one. *Kling v. Withers*, Prec. in Ch. 348. The court says, since her marriage with consent was one condition, so her attaining her age of twenty-one was another, and whichever of them first happens entitles her to the whole portion.

Necessity of devise over.

Under the rule that a construction would be given to the condition, if possible, which would uphold the bequest, the courts held that where there was a mere bequest upon condition that the beneficiary should not marry without consent, without any disposition of the portion so bequeathed in case of breach of the condition, the testator would be regarded not as intending a forfeiture for noncompliance, but merely as having inserted the provision as a matter of advice or discipline.

tion, the testator would be regarded not as intending a forfeiture for noncompliance, but merely as having inserted the provision as a matter of advice or discipline.

In *Jarvis v. Duke*, 1 Vern. 19, the lord chancellor says, by way of argument, that where a legacy is given to a woman upon condition that she marry with consent, if the legacy is not limited over it is only *in terrorem*, and, though she marry without consent, she shall have the legacy.

In *Garret v. Pritty*, 2 Vern. 293, there was a devise to testator's daughter at twenty-one, or marriage, provided she married with consent, otherwise the legacy to cease. She married without consent, but the court decreed her the whole amount, "principally because it was not expressly devised over, but to fall into the surplus."

Where an interest does not accrue to a third person by breach of a condition as to marrying with consent, such a condition is void and only *in terrorem*, although the provision is that, in case of marriage with consent, the legacy shall be a certain amount, but, in case of marriage without consent, it shall be a less amount. *Hicks v. Pendarvis*, Freem. Ch. 41, 2 Eq. Cas. Abr. 212.

In *Marples v. Bainbridge*, 1 Madd. 590, where the condition was that the devisee should continue unmarried, the court relieved from the forfeiture, not upon the ground that the condition was void as in restraint of marriage, but because there was no bequest over.

If there is no devise over upon a condition requiring marriage with consent, it will not be given effect; otherwise if there is, and also where the devise is to be raised out of land. *Pulling v. Reddy*, 1 Wils. 21; *Rhenish v. Martin*, 1 Wils. 130; *Wheeler v. Bingham*, 1 Wils. 135.

If there is no limitation over, it is merely a condition *in terrorem*, which equity will not enforce. *Smphill v. Bayly*, 2 Eq. Cas. Abr. 213, pl. 6.

In *Harvey v. Ashton*, 2 Eq. Cas. Abr. 216, pl. 12, it appears that the master of the rolls declared that by a clause declaring that, if any should die before marriage with consent her portion should cease, this was not a sufficient disposition, within the meaning of the cases, to allow a limitation over to be good, for this is not to take place upon the marrying without consent, but upon dying before marriage with

the rights of a landowner in case of the occupancy thereof by his consent, express or implied, by a railway company, without its having compensated him therefor. Manifestly, that does not apply to the facts of this case, for two reasons: First, the track in question was laid down and operated for purely private purposes; second, the entry for that purpose is referable to an express contract. There was no intention, at the time of constructing the road, or thereafter, to devote it to any purpose other than the private use of the ice company. The evidence is all one way on that subject. It is absolutely essential to the right to exercise the power of eminent domain that there be a bona fide intention to devote the property, when acquired, to public use.

Chicago & N. W. R. Co. v. Morehouse, 112 Wis. 1, 56 L. R. A. 240, 88 Am. St. Rep. 918, 87 N. W. 849. The learned circuit court, in an opinion filed, seems to have had that in mind, and comprehended that the spur track in question was a purely private affair, and that, without a change in the attitude of the railway company in respect thereto, it could not, by adversary proceedings, acquire the right to continue the track if the title to the right of way were found to be in appellant; but the undisputed evidence as to the character of the way was lost sight of in making up the findings. In the opinion it is said, in effect: True, there can be no right of way secured by condemnation in the existing circumstances, but, though the track is now

such consent, and it is no more than providing for the daughter's dying unmarried.

And in the report of that case in 2 Comyns, Rep. 726, Reversing Cas. t. Talb. 212, it is stated that it is settled that, if a pecuniary legacy is given on consideration that the legatee should not marry without consent, such condition is ineffectual if there is no devise over. But the contrary is true if there is a devise over.

Conversely, a devise over would prevent equitable relief.

Thus, in *Sutton v. Jewke*, 2 Rep. in Ch. 95, the court refused to relieve where money was left to be paid to a certain person at marriage, but, if she should marry without consent of a person named, then one third of the money should go as such person should appoint; and the marriage took place without consent, a provision having been made that in such event the one-third portion should be paid to another person named.

So, in *Duffield v. Elwes*, 1 Sim. & Stu. 239, where a man had conveyed certain estates in trust for his daughter, but declared that, if she married under age and without his consent, the trustees should hold the estate in trust for himself and his heirs, the court assumed that marriage without his consent vested the equitable estate in him.

So where a legacy is devised to a daughter, but, if she marry without consent, then a portion of it to go to a son, equity will not relieve in case she marries without consent. *Stratton v. Grymes*, 2 Vern. 357.

But even this rule was not consistently followed, for in *Fleming v. Walgrave*, 1 Ch. Cas. 58, a fund was raised for a *feme sole* in case she did not marry contrary to the liking of a person named, and if she did then to such parties as the person named should nominate. The *feme sole* married without consent, and the court was of opinion that it was not in the power of the trustee to dispose of the fund otherwise than for the benefit of the *feme sole*.

So in *King v. Withers*, Prec. in Ch. 348, the lord keeper says that the rule that where there is no devise over the condition shall be taken only *in terrorem*, is a great deal too wide.

The question what is a sufficient devise over has occasioned some discussion.

Equity will relieve against a condition in a 69 L. R. A.

bequest that the legatee shall not marry without consent, where there is no gift over other than of the general residue, without any express direction that the lapsed legacy shall sink into the residue; such condition being void as *in terrorem*. *Wheeler v. Bingham*, 3 Atk. 364. The chancellor said the true ground upon which this court has suffered the condition to effectuate is not the intention of the testator, but the right of a third person, it being given over and vesting in that third person if the condition is not performed.

So there must be an express bequest over of the particular legacy, and a mere gift of the residuum will not be sufficient to deprive the beneficiary of the legacy. The reason is because, when a testator makes one the residuary legatee, he has not that particular thing in his view or contemplation. *Wheeler v. Bingham*, 1 Wills. 135.

A provision for testator's niece, which should cease upon her marrying without consent, was held to be a condition subsequent, in *Lloyd v. Branton*, 3 Meriv. 108; and, the will having provided that the lapsed portion should fall into the residue, the court says the question whether a residuary bequest amounts to a disposition of the legacy has been a matter of much controversy, but states that in the case before it there is an express provision that the forfeited bequest shall sink into the residue, and holds that this was a sufficient express disposition of what was forfeited to prevent equity from granting relief.

The master of the rolls having suggested, in *Lloyd v. Branton*, 3 Meriv. 118, that the case of *Garret v. Pritty*, 2 Vern. 293, could not proceed upon the ground stated by the report, Merivale sets out the record from the register, and suggests that it must be inferred from the circumstances that the case really turned upon the subsequent approbation of the marriage.

Under a devise of a certain amount upon reaching a specified age, or marriage with consent; but, in case of marriage without consent, then devise to have only one half the amount named, with nothing but a general disposal of the residue,—the master of the rolls refused to relieve against the forfeiture on the ground that it was more than a clause *in terrorem*. *Amos v. Horner*, 1 Eq. Cas. Abr. 112, pl. 9.

What consent sufficient.

There has been a tendency to hold that if any

but a private way, it is competent for the railway company to make it a public way and to invoke the power of eminent domain to acquire a property right in the premises for that purpose; and that is sufficient to warrant a court of equity in refusing to aid appellant to secure the undisputed enjoyment of her property. That is the idea we gather from the opinion. The mere statement of the proposition is sufficient to condemn it. It has often been held that, if the owner of real estate permits a railway company to occupy the same with a public railroad track, he will be deemed to have consented to take, as compensation for the permanent use thereof, what he can obtain by the procedure laid down by the statutes for the protection of his constitutional

rights. But it has never been held, and it would be manifestly absurd to hold, that consent can be obtained, expressly or by implication, for the occupancy of land by a railway company for a private purpose, and the possession thus obtained be referred to as evidence of consent to the occupancy of the property for public purposes, so as to render the doctrine mentioned applicable.

It follows from what has been said that, at the time of the commencement of this action, appellant was the owner in fee simple and in possession of the premises described in the complaint, and that, under existing circumstances, she was entitled to invoke the jurisdiction of equity to quiet her title thereto against the defendants, and to enjoin them from interfering with her

consent appeared which could be held to meet the requirements of the testator it would be sufficient.

Thus, if the condition is marriage with consent of two persons named, the death of one relieves the condition. *Peyton v. Bury*, 2 Eq. Cas. Abr. 214 pl. 9.

The ground of this ruling is stated in 2 P. Wms. 626, to be that the condition was subsequent, and that, if such a condition becomes impossible by the act of God, this excuses and discharges the grantee from it.

So, in *Clark v. Lucy*, 2 Ep. Cas. Abr. 213, pl. 4, it is said that conditions for marriage with consent, whether precedent or subsequent, are in the nature of forfeitures, and, if the substantial part and intent are performed, equity will supply some small defects and circumstances, and favor the devisee.

In that case the condition was marriage with consent of the trustees, but the father had given his consent before his death, and this was held sufficient. 5 Vin. Abr. 87, pl. 6.

Where the condition is that the marriage shall be with the consent or approbation of a trustee, consent after the marriage is sufficient. *Burleton v. Humfrey*, 1 Amb. 256.

But in *Clarke v. Parker*, 19 Ves. Jr. 1, equity refused to relieve where the will required consent of three, and that of two, only, was obtained.

Where lands were devised to testator's daughters for life, but upon condition that, if they married without the consent of their mother, the property should be held in trust for their separate use, and the mother, after giving consent, withdrew it from caprice, the court refused to enforce the condition, and placed the property at the separate use of the daughters. *Strange v. Smith*, 1 Amb. 263.

But in *Dashwood v. Burkeley*, 10 Ves. Jr. 230, it is said that it would be very dangerous to hold that if, at a particular time, a person *in loco parentis*, upon a conscious sense of duty, thinks himself required to give consent, and previous to the marriage is duly informed of circumstances that ought to have operated at first to make him withhold his consent, if he has once given it he shall not afterward alter his mind. And it was held that, upon the refusal of the intending husband to comply with his agreement to execute a settlement, the trustees had a right to withdraw their consent to the marriage, and that equity would not relieve

from the result of marrying without such consent.

Necessity of notice.

In *Malloon v. Fitzgerald*, 3 Mod. 28, which was an action at law, there was a settlement in trust for the grantor's only heir provided she marry with consent, and it was held that she must have notice of the condition to make it enforceable against her.

The same doctrine is announced in the report of the case in 2 Shower, 323. But no judgment is announced in the report in *Skinner*, 125.

Relief with no reasons given.

In *Bennett v. Salisbury*, Freem. Ch. 119, where a certain amount was provided to be paid to the daughters of the settlor at the age of twenty-five, or marriage, so as that marriage be had after the age of sixteen with consent; and, if they shall marry otherwise, then to have one half the amount,—it was held that, even if the provisions intended that marriage under the age of sixteen should work a forfeiture, yet equity will relieve.

And in *Southampton v. Cramborne*, Freem. Ch. 186, where similar facts appeared, except that the additional proviso was made, that there should be issue male of the marriage, this ruling was approved on the ground that, since the daughter reached the age of sixteen, she might have been held to have married after that age. This case was, however, reversed by the House of Lords in *Wood v. Southampton*, Shower, P. C. 83. And in 2 Comyns, Rep. 732, this reversal is said to be on the ground that the requirement of issue male had not been complied with.

Summary.

In *Stackpole v. Beaumont*, 3 Ves. Jr. 89, the lord chancellor said, with respect to a condition of marriage with consent when attached to a legacy, it is impossible to reconcile the authorities, or range them under one sensible, plain, general rule. There can be no ground in the construction of legacies for a distinction between legacies out of personal and out of real estate. The construction ought to be precisely the same. I do not see more importance in reality in the distinction between conditions precedent and subsequent. In deciding questions

possession thereof. The case seems clear upon all the points involved.

The judgment of the Circuit Court is reversed and the cause remanded with directions to render judgment in favor of the plaintiff according to the prayer of the complaint.

Cassoday, Ch. J., dissenting:

I do not understand this to be a bill in equity brought by the defendants, or either of them, to relieve themselves from a forfeiture. On the contrary, I understand it is a bill in equity filed by the plaintiff to have a forfeiture adjudged in her favor, and to enforce the same. The complaint alleges that at the times mentioned the plaintiff was the owner in fee simple and

in the possession of the premises described. Each of the answers denies such allegations, and alleges that at all such times the defendant ice company was the owner in fee simple, and in the exclusive possession of such premises. Such was the controversy between the parties. At the close of the testimony the plaintiff requested the court to find that January 4, 1900, Boyle's grantor made re-entry in person upon the land in question, and declared the title thereto forfeited for noncompliance with the condition subsequent in the deed, and took possession of the same, and thereupon conveyed the same to the plaintiff. The trial court refused to so find, presumably upon the ground that this court had repeatedly held that "courts of equity will not take juris-

that arise upon legacies out of land, the court very properly followed the rule that the common law prescribes and common sense supports to hold the condition binding where it is not illegal. Where it is illegal, the condition will be rejected, and the gift pure. In regard to legacies out of personalty, the court attempted to follow the supposed rule of the ecclesiastical court. Distinction upon distinction was taken to get out of the supposed difficulty. The rule of the civil law as to restraints upon marriage was said to be inapplicable in England. So far, therefore, as a condition operates in restraint of marriage only up to twenty-one years of age, it is not illegal, and a court of equity will not relieve against its breach. The question is not whether a forfeiture has been incurred, but whether the parties to whom the legacy is given have put themselves in a situation to answer the description of the person to take. The chancellor also says: "I do not see the great importance of the distinction upon a bequest over of the legacy. It is one of the points that occurred to the judges to deliver them from the difficulty arising from a rule of the civil law."

And that case was followed in *Clifford v. Beaumont*, 4 Russ. Ch. 325.

VIII. After forfeiture declared.

Although the mere declaration of the forfeiture will not, of itself, destroy the power of equity to afford relief, yet that is an important step towards the assertion of the rights of the obligee; and, where he has taken the necessary steps to reassert his title at law, the obligor must make a stronger case to entitle himself to relief.

In *Gould v. Bugbee*, 6 Gray, 371, the court held that evidence to show the forfeiture and entry was admissible in an action of trespass, for, "though the defendants were relievable in equity," proof of the facts offered would enable plaintiffs to maintain an action for damages at law.

Even though an action is brought in equity to compel the reconveyance for breach of a condition subsequent after re-entry for the forfeiture, that court will not aid the grantee on the theory that it will not aid in the enforcement of a forfeiture if the forfeiture has already been declared, and all that remains is the right to remove the cloud from the title of the

grantor. *Parsons v. Smille*, 97 Cal. 647, 32 Pac. 702. The court says that the re-entry at law revested the title in the grantor, and that, in order to defeat his right to remove the cloud from his title, it would be necessary for the grantee to show that equity has the power to defeat the operation of the law and the acts of the parties, and take away from the grantor the estate which has become re-vested in him and again vest it in the grantee.

Where a tenant refused for twenty years to perform his covenants, the court denied him relief from an entry for forfeiture for the breach. *Cox v. Higford*, 2 Vern. 664.

Relief will not be granted to a lessee if the lessor has entered for nonperformance of the covenant, so that he cannot be restored to his former position. *Peoples' Bank v. Mitchell*, 78 N. Y. 408.

Where the tenant wilfully refuses to pay the arrears, he will not be relieved after the landlord has entered and leased the premises to another. *Dorrington v. Jackson*, 1 Vern. 449.

In *Stamps v. Cooley*, 91 N. C. 316, where the landlord entered for nonpayment of rent, and terminated a lease which gave the tenant the right to remove improvements at the end of the term, whereupon the tenant brought an action for their value, it was held that a court of equity will not interfere for the purpose of exposing a party to an action for damages. If any relief shall be granted it will be one for extending the time for removal of the improvements.

After forfeiture and re-entry for breach of covenant to pay taxes, equity will grant no relief. *Baldwin v. Rees*, 6 Ohio Dec. Reprint. 869. The court says nonpayment of taxes is not like nonpayment of rent, it puts in jeopardy the estate of the lessor, and equity does not relieve against a forfeiture effected for such a breach.

In *Wilmington Star Min. Co. v. Allen*, 95 Ill. 288, the court refused to protect the lessee of a mine from forfeiture for breach of his contract to continue mining operations, without discussing the principles upon which courts of equity proceed in such cases. But in that case it appeared that the lessee had abandoned the lease and surrendered possession, while the lessor had re-entered and released the property; and the court says that, after such conduct, it would be highly inequitable to retract what

diction of a case for the purpose of aiding or enforcing a forfeiture, but will leave the complainant to his remedy at law." *Clark v. Drake*, 3 Pinney (Wis.) 228; *Lawe v. Hyde*, 39 Wis. 345; *Mills v. Evansville Seminary*, 47 Wis. 354, 2 N. W. 550, 52 Wis. 669, 9 N. W. 925, 58 Wis. 135, 15 N. W. 133; *Hagerty v. White*, 69 Wis. 317, 326,

34 N. W. 92. In my judgment it is not the case of a party in the exclusive possession of land after the breach of condition subsequent, and then filing a bill in equity to quiet the title and protect such possession. To my mind the trial court properly relegated the plaintiff to her remedy at law.

was a virtual surrender of the lease, and there should be an estoppel to do so.

Equity will not entertain a bill to relieve from a forfeiture of a leasehold for nonpayment of rents where the right to declare it was reserved in the lease, and the power so reserved has been properly exercised. But where the lessor has neglected to declare a forfeiture until long after the rent became due pending negotiations for a change in the contract, he will not be permitted to declare the forfeiture without giving notice to the lessee. *Palmer v. Ford*, 70 Ill. 369.

But equity may relieve where the forfeiture is illegally enforced, as where it is enforced against an infant. *Litton's Case*, Cary, 6.

And the jurisdiction to grant relief to the tenant who has forfeited his lease for nonpayment of rent extends to cases where the lessor has obtained peaceable possession of the property without the aid of the court. *Howard v. Fanshawe* [1895] 2 Ch. 589.

IX. Statutory forfeiture.

If the forfeiture is declared by statute, equity has not jurisdiction to afford relief from it.

Where a forfeiture is imposed by statute for failure to comply with the condition of a public grant, equity cannot relieve against it. *Woodson v. Skinner*, 22 Mo. 13; *Huth v. Carondelet*, 26 Mo. 466; *Taylor v. Carondelet*, 22 Mo. 105.

Equity has no power to avoid the provisions of a statute limiting a lessee to six months in which to regain possession after he has been dispossessed for breach of condition. *Gorman v. Low*, 2 Edw. Ch. 324.

Equity will not interpose to relieve from a forfeiture under a statute providing that, upon failure to make payments for public land at the time specified in the contract, all right of the purchaser shall cease. Where the expression of the legislative will is clear and explicit, equity cannot defeat its operation on the ground that it is harsh and severe. *Smith v. Mariner*, 5 Wis. 551, 68 Am. Dec. 73.

In *Keating v. Sparrow*, 1 Ball & B. 373, where a tenant had incurred a forfeiture under the statute for failure to pay a renewal fine at the time specified, the court says that the principle that equity will relieve against forfeitures when compensation can be made is applicable to cases of contract between the parties, but not to the provisions of an act of Parliament or conditions in law. The true ground of relief against penalties is when, from the original intent of the case, the penalty is designed only to secure the money.

Keating v. Sparrow was recognized in *Re Brain*, L. R. 18 Eq. 389, which involved the forfeiture of a lease of a government mine; but the court refused the relief in that case because the time in which, in analogy to the statute governing the rights between landlord and tenant, it might have been granted, had passed.

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But where a statute provides for the lease of government land by an instrument which shall contain the usual covenant for payment of rent, and a condition for re-entry on nonpayment thereof, equity will regard the clause as subject to the ordinary rule that equity will relieve from a forfeiture for noncompliance therewith. *Atty. Gen. v. Eitershank*, L. R. 6 P. C. 354.

The forfeiture of a lease by a municipal corporation under authority of the legislature for nonpayment of rent cannot be relieved against. *Carondelet v. Wolfert*, 39 Mo. 305.

X. Statutory jurisdiction.

As has already been stated *supra*, III., b. 5, as soon as the English House of Lords refused to grant relief in cases of failure promptly to renew leases a statute was passed providing for such relief. Other statutes have been passed regulating the relief of tenants, and the powers of the court in such cases are very largely controlled by the provisions of the statutes.

By statute, in New York, equity is given jurisdiction of a suit to avoid a forfeiture for nonpayment of rent. *Horton v. New York C. & H. R. R. Co.* 12 Abb. N. C. 30, Affirmed in 102 N. Y. 697.

The Irish act of 19 & 20 Geo. III. provided that equity, upon adequate compensation being made, shall relieve tenants against lapse of time for payment of rent if no circumstances of fraud be proved, unless it shall appear that after a demand made the tenant refused or neglected to renew within a reasonable time after such demand. Therefore the court will relieve from a forfeiture for delay in payment of rent or renewal of the lease where the delay is satisfactorily accounted for. *Jessop v. King*, 2 Ball & B. 81.

Under the Irish tenantry acts, the right of equity to relieve was limited to cases of mere negligence. *Jackson v. Saunders*, 2 Dow, P. C. 442.

Under-tenants are entitled to relief under the Irish acts. *Berney v. Moore*, 2 Ridgw. P. C. 310.

Under a statute providing that, upon neglect to renew a lease at the time specified, courts of equity, upon adequate compensation being made, shall relieve the tenant against lapse of time if no circumstances of fraud be proved against him, unless it be proved that the landlord had demanded the payment of the fine and the same had been refused or neglected to be paid within a specified time, renewal will not be decreed in equity where the tenant refuses, for a number of years after demand, to comply with it; and inability to comply is no excuse. *Mountnorris v. White*, 2 Dow, P. C. 459.

In *Doe ex dem. Hitchings v. Lewis*, 1 Burr. 619, it is stated that the purpose of the act of 4 Geo. II., chap. 28, was to require the tenant to take his proceedings to secure relief from

MASSACHUSETTS SUPREME JUDICIAL COURT.

Albert L. GORDON, *Appt.*,

v.

Alice G. RICHARDSON.

(185 Mass. 492.)

1. A tenant cannot be relieved from forfeiture of his term because of breach of his covenant to pay taxes after the premises have been sold because of his default, since he can no longer perform his covenant, or make compensation for the breach, so as to entitle himself to equitable relief.
2. That there is evidence in the record that a tenant permitted the premises to be sold for taxes in violation of his covenant through mistake does not require a reversal of a judgment dismissing his bill for equitable relief from a forfeiture claimed on that ground, where there is no statement of facts found, or of rulings made; since it cannot be held to have been error to refuse to give credence to such evidence.
3. One filing a bill for relief from a forfeiture, at law, of a lease, will not be heard to contend that the entry of the landlord was invalid because there was no forfeiture.

(May 17, 1904.)

A PPEAL by plaintiff from a judgment of the Superior Court for Suffolk County in favor of defendant in an action brought to secure relief from an attempted forfeiture of a lease. *Affirmed.*

Plaintiff had taken a lease of property on Winter street, Boston, under an instrument

a forfeiture within a specified time, or be barred from all relief.

Under the statute 4 Geo. II., relief can be given the tenant only in case the breach is for nonpayment of rent. *Wadman v. Calcraft*, 10 Ves. Jr. 67.

Under the English act of 4 Geo. II., it is not necessary that the arrears of rent be brought into court to entitle the lessee to relief. *Bowser v. Colby*, 1 Hare, 109.

The English statute of 22 & 23 Vict., chap. 35, provides for relief from forfeiture for failure to insure, and applies to contracts made before as well as after its passage. *Page v. Bennett*, 6 Jur. N. S. 419.

And so the provisions of the act of 44 & 45 Vict., chap. 41, for the relief of the tenant, were held to extend to breaches committed before the enactment of that statute, and to proceedings pending when they came into operation. *Quilter v. Mapleson*, L. R. 9 Q. B. Div. 672.

In *Croft v. London & C. Banking Co.* L. R. 14 Q. B. Div. 347, Cotton, L. J., says that the terms imposed by the statute governing the rights of tenants as to payment of rent and costs are conditions imposed by the act, without compliance with which the injunction to restrain ejectment for nonpayment of rent could not be granted by the court.

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which reserved a right of entry for breach of covenant, and provided that "thereupon the lessor may, at discretion, relet the premises, or any part thereof, at the risk of the lessee, who shall remain for the residue of the term responsible for the rent, taxes, and water rates herein reserved, and shall be credited with such sums, only, as shall be by the lessor actually realized."

Plaintiff sublet the premises, permitted some taxes to become in arrear, and defendant entered for breach of covenant, and made a new contract with the sublessee.

Further facts appear in the opinion.

Mr. Charles R. Darling, for appellant:

Under the provision of the lease, the plaintiff is to continue to pay rent, *eo nomine*, and, as one who pays rent is a tenant, the attempt is to retain him as a tenant while denying him the tenant's right to possession of the premises.

Accepting a sum of money as rent *eo nomine*, after an alleged forfeiture, operates as a waiver of the forfeiture, although the landlord may protest that he does not waive it.

Croft v. Lumley, 5 El. & Bl. 648; *Davenport v. Queen*, L. R. 3 App. Cas. 115; *Smith v. McNany*, 170 Mass. 28, 64 Am. St. Rep. 272, 48 N. E. 871.

If the defendant had a right of re-entry under the lease, he parted with it by the lease to Bailey, since he thereby parted with the reversion, and the right of re-entry attends the reversion.

The statute in England authorizes relief from forfeiture for nonpayment of rent and failure to insure in proper cases. *Bamford v. Creasy*, 3 Giff. 675.

In *Swanton v. Biggs, Beaty*, 170, the court says it was the object of the statute to give an evicted tenant a remedy for fraud,—reinstatement in case he paid his arrears of rent within a specified time; and that the court could not take into consideration breaches of other conditions in the lease for the purpose of defeating that remedy.

Failure to give the notice required by the act of 1881 is ground for relief in equity. *North London Freehold Land & House Co. v. Jaques*, 49 L. T. N. S. 659. [1883] W. N. 187.

Under the statute, when a demand is made the neglect to pay when it goes beyond what is a reasonable time for payment, ceases to be mere neglect, and becomes wilful. *Barrett v. Burke*, 5 Dow, 1.

Under the Canadian statute (Ont. Rev. Stat. chap. 143, § 22) providing that, if the lessee obtain equitable relief he shall hold and enjoy etc., he is not entitled to relief from forfeiture for nonpayment of rent as matter of right without regard to the collateral equities. *Coventry v. McLean*, 21 Ont. App. Rep. 176.

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Dumpor's Case, 4 Coke, 119; *Wright v. Hurrelghes*, 3 C. B. 685.

Conditions in leases are intended as security, and are enforceable only for that purpose. Where compensation can be made for the breach, that is all that can be demanded.

2 Story, Eq. Jur. 13th ed. §§ 1314-1316; 2 Platt, Leases, pp. 475, 479, 482; 2 Taylor, Land. & T. 8th ed. §§ 495, 496; Tiedeman, Eq. Jur. § 35; *Mactier v. Osborn*, 146 Mass. 399, 4 Am. St. Rep. 323, 15 N. E. 641; *Lundin v. Schæffel*, 167 Mass. 465, 45 N. E. 933.

Breach of covenant to pay taxes comes within the rule.

Lundin v. Schæffel, 167 Mass. 465, 45 N. E. 933; *Giles v. Austin*, 62 N. Y. 486; *Hagar v. Buck*, 44 Vt. 285, 8 Am. Rep. 368.

For most purposes, a tax sale is considered to create an encumbrance rather than to divest the title, so long as the right of redemption remains.

Stuart v. Reliance Ins. Co. 179 Mass. 434, 60 N. E. 929.

Indulgence by the landlord may prevent him from taking advantage of delay in payment by the tenant.

Thropp v. Field, 26 N. J. Eq. 82; *Horton v. New York C. & H. R. R. Co.* 12 Abb. N. C. 30.

It is no objection to the maintenance of this bill that the overdue rent and taxes were not paid before bringing the bill. This is not required when the landlord is in possession, as here, and no injunction is granted against him pending suit.

2 Platt, Leases, p. 479; *Bowser v. Colby*, 1 Hare, 109; *Atkins v. Chilson*, 11 Met. 112; *Thomas v. Beals*, 154 Mass. 51, 27 N. E. 1004.

The alienation to Bailey by the lease given to him by the defendant does not affect the plaintiff's right to relief; Bailey takes subject to all the equities of the plaintiff.

Abrams v. Watson, 59 Ala. 524.

Mr. Harvey N. Shepard, for respondent:

The provision, in the indenture, for forfeiture on nonpayment of rent and taxes, is good in law, and enforceable.

Brand v. Frumveller, 32 Mich. 215; *Allen v. Dent*, 4 Lea, 676; *Morrill v. De la Granja*, 99 Mass. 383.

In this cause there is no accident or mistake for the petitioner to plead; but, on the contrary, his neglect was deliberate and wilful, and in the face of repeated warnings. His petition is without equity.

Barnet v. Passumpsic Turnp. Co. 15 Vt. 757; *Gregory v. Wilson*, 9 Hare, 683; *Hill v. Barclay*, 18 Ves. Jr. 56.

The petitioner cannot be restored, as prayed by his bill of complaint, without injury to Byron E. Bailey; and it would be a hardship to compel Mr. Bailey, who is with-

out fault, to become again a subtenant of the petitioner. The court, therefore, will not interfere.

Kerr, Fraud & Mistake, 436; *Giles v. Austin*, 62 N. Y. 486.

Loring, J., delivered the opinion of the court:

The ground on which a tenant gets relief in equity from the forfeiture of his estate for a failure to pay rent is that in equity the landlord's right of re-entry is given as security for the payment of the rent, and on the rent being paid the very thing is done for which the security was given; and, although the payment in that case is made after it is due, on interest being paid compensation is made for the delay in performance, and on compensation being made the plaintiff is entitled to relief. *Peachy v. Somerset*, 1 Strange, 447; *Hill v. Barclay*, 16 Ves. Jr. 402, and 18 Ves. Jr. 56; *Reynolds v. Pitt*, 19 Ves. Jr. 134; *Howard v. Fanshawe* [1895] 2 Ch. 589. The Massachusetts cases are *Atkins v. Chilson*, 11 Met. 112; *Sanborn v. Woodman*, 5 Cush. 36. See also, in this connection, *Stone v. Ellis*, 9 Cush. 95; *Hancock v. Carlton*, 6 Gray, 39, explained in *Mactier v. Osborn*, 146 Mass. 399, 402, 4 Am. St. Rep. 323, 15 N. E. 641.

But that does not cover the case before us. In this case the defendant entered for breach of the covenant to pay taxes, as well as for breach of the covenant to pay rent. When he exercised his right of re-entry in September, 1902, not only was the tax for 1900 not paid, but the estate of the defendant had been sold because of the plaintiff's failure to pay this tax as he had covenanted to do. The defendant's estate had been sold to pay this tax in the June preceding the September when the defendant entered on the estate. The thing here in question secured by the right of re-entry not only has not been performed, but it cannot be performed now. The tax for 1900 has been paid, and no longer can be paid by the plaintiff. The tax was paid to the collector by the application thereto of the proceeds of the tax sale. There is a right to redeem this tax title, but the tax has been paid, and the thing secured by the landlord's right of re-entry can no longer be performed by the tenant. By the very terms of the covenant secured by the forfeiture, any performance of it is at an end, and that is the end of the plaintiff's application for relief from the forfeiture in the case at bar.

Moreover, if it were permissible to look behind the terms of the covenant here in question to what might be termed its true nature and substance, the plaintiff would gain nothing. If you look beyond its terms, the real substance and nature of a covenant

to pay taxes assessed on the demised premises is to protect and hold harmless the landlord's estate. When the breach of the covenant has reached the stage where the landlord's estate has been sold to pay the taxes which the tenant should have paid, and through the default of the tenant a paramount outstanding title has come into existence, we have a breach of covenant for which the plaintiff fails to show that compensation can be made. It is like the breach of a covenant to insure or repair, where equity does not ordinarily grant relief against forfeiture of the tenant's estate. *Mactier v. Osborn*, 146 Mass. 399, 402, 4 Am. St. Rep. 323, 15 N. E. 641. *Hill v. Barclay*, 16 Ves. Jr. 402, and 18 Ves. Jr. 56 (overruling Lord Erskine's opinion in *Sanders v. Pope*, 12 Ves. Jr. 282, which never went to decree, page 294); *Reynolds v. Pitt*, 19 Ves. Jr. 134; *Bracebridge v. Buckley*, 2 Price, 200; *Green v. Bridges*, 4 Sim. 96. Lord Erskine's opinion in *Sanders v. Pope* was in effect that the forfeiture of a leasehold estate for breach of a collateral covenant stood on the same ground at common law as that on which the forfeiture of a bond stands under Stat. 8 & 9 Wm. III., chap. 11, § 8, which (as Baron Parke said in *Beckham v. Drake*, 2 H. L. Cas. 579, 629) "in effect makes the bond a security only for the damages really sustained." But that view did not prevail. It is settled that in case of waste (*Peachy v. Somerset*, 1 Strange, 447), in case of a breach of a covenant to make repairs (*Hill v. Barclay*, 16 Ves. Jr. 402, and 18 Ves. Jr. 56; *Bracebridge v. Buckley*, 2 Price, 200), and in case of the breach of a covenant to insure (*Reynolds v. Pitt*, 19 Ves. Jr. 134; *Green v. Bridges*, 4 Sim. 96), it being impossible for the tenant to show affirmatively that compensation can be made, relief ordinarily will not be given. It was this which C. Allen, J., had in mind in *Lundin v. Schæffel*, 167 Mass. 465, 469, 45 N. E. 933, when he said of the case then before the court that it "was not like a case where the omission caused a present injury or increase of risk to the lessors, as in the case of waste, nonrepair, or noninsurance." The lack of recent cases in England is owing to the fact that relief is given by statute in case of covenants other than the covenant to pay rent. Stat. 22 & 23 Vict. chap. 35, § 4, authorized relief in case of the breach of a covenant to insure, and Stat. 44 & 45 Vict. chap. 41, § 14, in case of all other covenants except the covenant to pay rent (see clause 8 of § 14), in which case a bill must be brought within six months from the execution putting the landlord in possession, by force of Stat. 4 Geo. II. chap. 28. It is settled that, if a bill is brought within the time allowed for relief against a forfeiture

for breach of a covenant to pay rent, the relief is given at common law. *Howard v. Fanshawe* [1895] 2 Ch. 589; *Stanhope v. Haworth*, 3 Times, L. R. 34. As to the purpose of Stat. 4 Geo. II. chap. 28, see Lord Mansfield in *Doe ex dem. Hitchings v. Lewis*, 1 Burr. 614, 619, and Wigram, V. C., in *Bourser v. Colby*, 1 Hare, 109, 125.

From what has been said it is apparent that we are not prepared to go so far as the court of appeals went in its opinion in *Giles v. Austin*, 62 N. Y. 486, 493. The facts in that case are stated in 6 Jones & S. 215, and it appears that the failure to pay the taxes in that case was in fact through accident and mistake, although that was not relied on in the opinion of the court.

There is, however, jurisdiction to relieve against a forfeiture for breach of collateral covenants, if the breach came through accident or mistake. This was established in this commonwealth in *Mactier v. Osborn*, 146 Mass. 399, 4 Am. St. Rep. 323, 15 N. E. 641, following the suggestion of Lord Eldon in *Hill v. Barclay*, 18 Ves. Jr. 56, 62, Affirmed in *Bamford v. Creasy*, 3 Giff. 675, 680, and *Bargent v. Thomson*, 4 Giff. 473. If it be assumed in favor of the plaintiff that he could have relief here on proving that it was through an accident or a mistake on his part that the nonpayment of the 1900 taxes went to a sale, yet the decree in the case at bar must be affirmed. The case comes here by appeal from a decree dismissing the bill. The evidence is before us, but there is no statement of facts found, or of rulings made. The decree, so far as it involves matters of fact, is to stand, unless it appears by the evidence to be clearly erroneous. *Brown v. Brown*, 174 Mass. 197, 75 Am. St. Rep. 303, 54 N. E. 532; *Dickinson v. Todd*, 172 Mass. 184, 51 N. E. 976; *S. K. Edwards Hall Co. v. Dresser*, 168 Mass. 136, 46 N. E. 420; *Lundin v. Schæffel*, 167 Mass. 465, 45 N. E. 933. See also *Blossom v. Negus*, 182 Mass. 515, 65 N. E. 846. It is enough that the presiding judge who saw the plaintiff on the stand may not have given credit to the excuse which he made, namely, that the sale for the 1900 tax was made earlier than usual.

We have not considered the plaintiff's argument that there was no forfeiture of the lease. We are of opinion that, in a bill in equity to be relieved from a forfeiture at law, it is not open to him to make the contention that there is no forfeiture at law. Such a case comes within *Pitkin v. Springfield*, 112 Mass. 509, in which it was held that, in a petition for compensation for land taken, it was not open to contend that the statute providing for the taking was unconstitutional, or that the taking was invalid.

See also, in this connection, *Smith v. Valence*, 1 Rep. in Ch. 169. The case of *Boston & M. R. Co. v. Graham*, 179 Mass. 62, 60 N. E. 405, stands on its special circumstances. Whether the plaintiff could have attached the forfeiture at law and filed this

bill in case he was unsuccessful at law (see *Moore v. Sanford*, 151 Mass. 285, 7 L. R. A. 151, 24 N. E. 323), or must in such a case make his election in the first instance, it is not necessary to consider.

Decree affirmed.

INDIANA SUPREME COURT.

Lida M. GARRIGUE, Impleaded, etc., *Appt.*,
v.

Jacob KELLER

(.....Ind.....)

1. That a note for the payment of which a married woman becomes surety is made payable in a state where such contract is invalid will not, although the suit is brought in that state, defeat her liability if the contract was valid at her domicile, where it was executed.
2. The execution of a renewal note in consideration of the surrender of one upon which the signer was liable as surety will bind him as principal, as between himself and the payee.
3. The admission of evidence of a conversation between the maker and payee of a note as to the law by which it shall be governed, which took place in the absence of the surety, is not reversible error upon complaint of the surety, where the conversation merely corroborated the effect of the contract itself, and there was no evidence to the contrary.
4. Failure to set out instructions to which objection is made, as required by rule of court will waive the objection.
5. Delivery of notes into the mail, to be forwarded to another state in accordance with the understanding between maker and payee, completes the delivery so as to make the contract one to be governed by the laws of the state where the postoffice is located.
6. The enforcement of a contract of suretyship against a married woman, which is valid in the state where made, is not impossible in another state, as violative of its public policy, merely because its statutes forbid her to bind herself by such a contract.

(May 23, 1905.)

APPPEAL by defendant Lida M. Garrigue from a judgment of the Circuit Court for Noble County in favor of plaintiff in an action brought to enforce payment of certain promissory notes out of the property

NOTE.—For conflict of laws as to capacity of married women to contract, see also, in this series. *Union Nat. Bank v. Chapman*, 57 L. R. A. 513, and *note*.

For conflict of laws as to negotiable paper, see also *Spies v. National City Bank*, 61 L. R. A. 193, and *note*, and *Cherry v. Sprague*, 67 L. R. A. 33.
69 L. R. A.

of a married woman, who signed them as surety. *Affirmed.*

The facts are stated in the opinion.

Mr. L. W. Welker, for appellant:

It matters not where the domicile of the maker of the note is if the parties fix a place for the performance of the contract, for in such case the parties will be presumed to have contracted with reference to the law of the place.

Hunt v. Standart, 15 Ind. 36, 77 Am. Dec. 79; *Butler v. Myer*, 17 Ind. 77; *Browning v. Merritt*, 61 Ind. 425; *Midland Steel Co. v. Citizens' Nat. Bank* (Ind. App.) 72 N. E. 290; *Fordyce v. Nelson*, 91 Ind. 447; *Gray v. State*, 72 Ind. 567; *Kopelke v. Kopelke*, 112 Ind. 435, 13 N. E. 695; *Brown v. Jones*, 125 Ind. 375, 21 Am. St. Rep. 227, 25 N. E. 452; *Pritchard v. Norton*, 108 U. S. 124, 27 L. ed. 104, 1 Sup. Ct. Rep. 102; *Coghlan v. South Carolina R. Co.* 142 U. S. 101, 35 L. ed. 951, 12 Sup. Ct. Rep. 150; *Buchanan v. Drovers' Nat. Bank*, 5 C. C. A. 83, 6 U. S. App. 566, 55 Fed. 223; *Bascom v. Zediker*, 48 Neb. 380, 67 N. W. 148; *Baum v. Birchall*, 150 Pa. 164, 30 Am. St. Rep. 797, 24 Atl. 620; *Bell v. Packard*, 69 Me. 105, 31 Am. Rep. 251; *Milliken v. Pratt*, 125 Mass. 374, 28 Am. Rep. 241; *Evans v. Beaver*, 50 Ohio St. 190, 40 Am. St. Rep. 666, 33 N. E. 643; *Chapman v. Robertson*, 6 Paige, 627, 31 Am. Dec. 264; 22 Am. & Eng. Enc. Law, 2d ed. p. 1325, ¶¶ 4, 5, 6; 1 Beach, *Modern Law of Contracts*, §§ 592, 595; 1 Dan. Neg. Inst. 3d ed. § 895; *Story, Confli. L.* 8th ed. § 301a.

The court erred in refusing to enter judgment in favor of appellant, Lida M. Garrigue.

Frankel v. Michigan Mut. L. Ins. Co. 158 Ind. 304, 62 N. E. 703; *Geddes v. Blackmore*, 132 Ind. 551, 32 N. E. 567; *Ohio & M. R. Co. v. Stansberry*, 132 Ind. 533, 32 N. E. 218; *Shirk v. Wabash R. Co.* 14 Ind. App. 127, 42 N. E. 656; *Todd v. Fenton*, 66 Ind. 25; *Manning v. Gasharie*, 27 Ind. 399; *Louisville, N. A. & C. R. Co. v. Pedigo*, 108 Ind. 481, 8 N. E. 627; *Toledo & W. R. Co. v. Goddard*, 25 Ind. 185; *Pittsburgh, C. & St. L. R. Co. v. Spencer*, 98 Ind. 186; *Walkup v. May*, 9 Ind. App. 409, 36 N. E. 917; *Cincinnati I. St. L. & C. R. Co. v. Grames*, 8 Ind. App. 112, 34 N. E. 613. 37 N. E. 421:

National Exch. Bank v. Berry, 21 Ind. App. 261, 52 N. E. 104; *Dixon v. Duke*, 85 Ind. 434; *Indianapolis v. Kingsbury*, 101 Ind. 200, 51 Am. Rep. 749.

Admissions of the maker of a note, who is not making a defense, are not competent against a surety if not made in her hearing.

Pierce v. Goldsberry, 35 Ind. 317; *Leach v. Dickerson*, 14 Ind. App. 375, 42 N. E. 1031; *Ricketts v. Harvey*, 78 Ind. 152; *Smith v. Wagaman*, 58 Iowa, 11, 11 N. W. 713; *Baker v. Briggs*, 8 Pick. 122, 19 Am. Dec. 311; *Rogers v. Anderson*, 40 Mich. 290; *D. M. Osborne & Co. v. Bell*, 62 Mich. 214, 28 N. W. 841.

The notes in controversy were executed in this state, and made payable at a bank in this state; consequently they are governed by the laws of this state.

The parties fixing the place of performance of the contract as the Noble County Bank, Kendallville, Indiana, the contract from that fact alone must be governed by the laws of this state.

Story, Conf. L. § 241.

Messrs. R. P. Barr and Chapin & Denny for appellee.

Montgomery, J., delivered the opinion of the court:

This action was brought upon three promissory notes executed by appellants to the Noble County Bank, and payable at said bank, and by it assigned before maturity to appellee. Appellee filed with his complaint an affidavit and undertaking, and obtained a writ of attachment upon which certain real estate owned by appellant, Lida M. Garrigue, was attached. Appellant, Lida M. Garrigue, answered the complaint, first, by general denial, and, second, by alleging her suretyship and coverture. Appellee replied in three paragraphs to the second paragraph of answer; First. That at the time of the execution of said notes said appellant was and that she still is, a resident of the state of Illinois; that said notes were executed in said state; and that under the laws of said state, set out in full, she had the capacity to execute said notes as surety. Second. The same averments as in the first, and further, that said notes were given in renewal of a note for the principle sum of \$3,750, executed by both of the appellants on the 30th day of July, 1900, in the city of Chicago, and payable in said city in one year after date, for money loaned and paid to Rudolph H. Garrigue in the city of Chicago. Third. General denial. The cause was tried by a jury, and a general verdict returned for appellee, with answers to interrogatories. Appellant unsuccessfully moved the court for judgment in her favor upon the answers

to interrogatories and for a new trial, and judgment was thereupon rendered in favor of appellee for \$4,300 and for the sale of the attached real estate.

The assignment of errors requires us to review the decision of the court in overruling the demurrer to the first and second paragraphs of reply, and in overruling the motion for judgment on the special findings of the jury, and in overruling the motion for a new trial. The first question for decision is presented by appellant's demurrer to the first paragraph of reply, and is this: Is a note executed in Illinois, by a married woman, as surety, while domiciled in that state, but made payable at a bank in this state, valid and enforceable in Indiana? The statute of Illinois in regard to contracts of married women, in force at the time of the execution of the notes in suit and at all other times covered by this controversy, is as follows: "Contracts may be made and liabilities incurred by a wife, and the same enforced against her, to the same extent and in the same manner, as if she were unmarried; but, except with the consent of her husband, she may not enter into or carry on any partnership business unless her husband has abandoned or deserted her, or is idiotic or insane, or confined in the penitentiary." Hurd's Rev. Stat. 1903, chap. 68, § 6. The Indiana statute applicable to the matter under consideration is as follows: "A married woman shall not enter into any contract of suretyship, whether as indorser, guarantor, or in any other manner; and such contract, as to her, shall be void." Burns's Anno. Stat. 1901, § 6964. The decisions of the courts of different states upon the question before us are in irreconcilable conflict and in hopeless confusion. It has been held by some courts that when conflicting laws affect the enforcement of a contract like the one in suit the law of the domicile of the maker governs, by others the law of the place of execution, by others the law of the place of performance, and by others the law of the place of enforcement. We cannot reconcile the cases, or harmonize the divergent views contained in the books, but must be content to extract therefrom such principles as we believe to be sound, and declare the law as it is and ought to be in this state. The law applicable to promissory notes executed in one state and payable in another, having conflicting laws, may be summed up as follows: (1) All matters bearing upon the execution, the interpretation, and validity of the note including the capacity of the parties to contract, are to be determined by the law of the place where the contract is made. (2) All matters connected with the payment, includ-

ing presentation, notice, demand, protest, and damages for nonpayment, are to be regulated by the law of the place where by its terms the note is to be paid. (3) All matters respecting the remedy to be pursued, including the bringing of suits, service of process, and admissibility of evidence, depend upon the law of the place where the action is brought. *Scudder v. Union Nat. Bank*, 91 U. S. 406, 23 L. ed. 245; *Bowles v. Field*, 78 Fed. 742; *Union Nat. Bank v. Chapman*, 169 N. Y. 538, 57 L. R. A. 513, 88 Am. St. Rep. 614, 62 N. E. 672; *Ruhe v. Buck*, 124 Mo. 178, 25 L. R. A. 178, 46 Am. St. Rep. 439, 27 S. W. 412; *Mendenhall v. Gately*, 18 Ind. 149. A contract must be construed and its validity determined under the laws of the state where it is executed, unless it can be fairly said that the parties at the time of its execution clearly manifested an intention that it should be governed by the laws of another state. *Grand v. Livingston*, 4 App. Div. 589, 38 N. Y. Supp. 490; *F. B. Hauck Clothing Co. v. Sharpe*, 83 Mo. App. 385; Wharton, Conf. L. § 401. If a contract is valid in the state where it is executed, it is valid everywhere. *Milliken v. Pratt*, 125 Mass. 374, 28 Am. Rep. 241; *Wright v. Remington*, 41 N. J. L. 48, 32 Am. Rep. 180; *Taylor v. Sharp*, 108 N. C. 377, 13 S. E. 138; *Holmes v. Reynolds*, 55 Vt. 39; *Miller v. Wilson*, 146 Ill. 523, 37 Am. St. Rep. 186, 34 N. E. 1111; *Baer Bros. v. Terry*, 105 La. 479, 29 So. 886; *First Nat. Bank v. Mitchell*, 34 C. C. A. 542, 92 Fed. 565. Applying these general principles to the case in hand, it is our conclusion that the validity of the notes in suit, as to the appellant, Lida M. Garrigue, must be determined by the laws of Illinois, where it is alleged they were executed, notwithstanding the fact that the place of payment was in Indiana. If the notes were executed in Illinois, as averred, and were valid there, the designation of a place of payment in this state will not be accepted as conclusive evidence, or as clearly manifesting an intention by the parties, that their validity should be governed by the laws of Indiana, when such an interpretation would render them wholly void as to one of the makers. This conclusion is supported by the rule of sanity and honesty "that no contract must be held as intended to be made in violation of the law, whenever by any reasonable construction it can be made consistent with the law, and which it was competent for the parties to adopt." *Bell v. Packard*, 69 Me. 105, 31 Am. Rep. 251; Wharton, Conf. L. § 429. The substantial essence of a contract evidenced by a promissory note is the undertaking by the makers to pay the principal sum of money named. The place of payment is an

incidental matter. The makers are not discharged from their principal obligation by an unaccepted tender of the amount owing at the time and place designated for payment, but by such tender are released only from liability for damages, which otherwise would accrue from nonpayment. Makers of promissory notes cannot insist that they will pay at the place designated or not at all, but may be sued upon their obligation and payment of the principal amount enforced at any place where jurisdiction over their persons or property may be acquired.

In the case of *Union Nat. Bank v. Chapman*, 169 N. Y. 538, 57 L. R. A. 513, 88 Am. St. Rep. 614, 62 N. E. 672, a married woman executed a note as surety, in Alabama, payable in Illinois, and the court said: "It seems clear that the capacity of Mrs. Chapman to contract must be determined by the law of the state where the contract was executed, unless it can fairly be said that she, at the time of the execution of the instrument, clearly understood and intended that it should be governed by the laws of another state. Such an intention or understanding is not manifest in this case." In the case of *F. B. Hauck Clothing Co. v. Sharpe*, 83 Mo. App. 385, the defendant was a married woman, and resided in Missouri, where she executed a note for the accommodation of her son, and made it payable at a bank in Indiana, and the court said: "The law of the place of performance does not in any way affect the capacity of a married woman to contract in a state which authorized her to make the contract, unless made with reference to real estate situated in the state of performance, or it is apparent from the terms of the contract that the parties intended to incorporate the laws of the state of performance in the contract." From the case of *Wm. Glenny Glass Co. v. Taylor*, 99 Ky. 24, 34 S. W. 711, we quote the following paragraph: "The mere fact that the note was made payable in New York, and received by the payee in that city, under the circumstances of this case is not sufficient evidence of the fact that it was intended the law of that state should govern, or its validity to be tested by the statute in regard to usury. We will not assume, nor does the evidence authorize such a conclusion, that the brother living in Washington city, and executing the note in that place, and his sister executing the note in Bracken county, Kentucky, regarded or expected their liability to be determined by the statute of New York, and when sued in Kentucky could defeat the recovery upon the paper on the ground that the charge of the extra interest rendered the entire obligation void." Our statute makes void, at her option, the suretyship con-

tracts of a married woman executed within this state. If a promissory note executed within this state by a married woman, as surety, by merely inserting therein that it should be payable in Cincinnati, Chicago, or St. Louis, might be made an Ohio, Illinois, or Missouri contract, and thereby rendered valid and enforceable against her, our statute would be easily evaded, and its beneficent provisions in a large measure destroyed. We cannot so construe these contracts, but the declarations of principles above quoted accord with our views, and the conclusion follows that appellee's first paragraph of reply was sufficient, and the demurrer to the same was rightly overruled.

Appellant has cited a number of Indiana cases, in some of which the court has said that the maker of a promissory note will be held liable according to the place where it is payable. This and other like statements were made with regard to the liability of the maker to pay interest or damages after protest; and the decisions of the questions properly presented in those cases are not in conflict with the result reached in this case. In the cases of *Hunt v. Standart*, 15 Ind. 33, 77 Am. Dec. 79, and *Midland Steel Co. v. Citizens' Nat. Bank* (Ind. App.) 72 N. E. 290, the only question involved was the liability of the indorsers. In the cases of *Butler v. Myer*, 17 Ind. 77; *Browning v. Merritt*, 61 Ind. 425; *Gray v. State*, 72 Ind. 567; and *Kopelke v. Kopelke*, 112 Ind. 435, 13 N. E. 695,—the contention related only to the rate of interest recoverable. In *Fordyce v. Nelson*, 91 Ind. 447, the question was to the negotiability of the note, and in *Brown v. Jones*, 126 Ind. 375, 21 Am. St. Rep. 227, 25 N. E. 452, the controversy was with regard to days of grace and the time of protest.

If the first paragraph of reply was sufficient, it follows, also, that the second paragraph is good. The second paragraph, in addition to the allegations of the first, averred that the notes in suit were given in payment of a prior note for the same amount, executed by the same parties in the state of Illinois, and payable in that state. The first note, upon the facts alleged, was a valid and enforceable obligation against both the makers. The surrender of this note was a sufficient consideration for the execution of the renewal notes, and by the execution of the renewal notes the appellant, Lida M. Garrigue, as between her and the payee, became bound, not as surety, but as principal. *Vogel v. Lechner*, 102 Ind. 55, 1 N. E. 554; *Young v. Hart*, 101 Va. 480, 484, 44 S. E. 703; *Savage v. Fox*, 60 N. H. 17; *New York L. Ins. Co. v. McKellar*, 68 N. H. 326, 44 Atl. 516. In the case of *Young v. Hart*, 101 Va. 480, 484, 44 S. E. 703, the court said: "The

circuit court was of opinion that, treating Mrs. Young as a mere surety on the Chicago notes, which she had the unquestioned capacity to make, she could have been sued upon them in either the state of Pennsylvania or the state of Kentucky, and a personal judgment recovered against her, and that the renewal of the notes in the state of Pennsylvania under the facts of this case did not release her nor lessen her liability." The court did not err in overruling appellant's demurrer to the second paragraph of reply.

In answer to interrogatories propounded by the parties, the jury found the following facts specially: That the three notes were given in renewal of a note for \$3,750, dated July 30, 1900, for money loaned to Rudolph H. Garrigue, and upon which Lida M. Garrigue was surety, and for the payment of which collateral security was pledged, and which note was signed in Chicago, and sent by mail to the Noble County Bank at Kendallville, Indiana, and a draft for the amount, less exchange and revenue stamps, sent by mail to R. H. Garrigue at Chicago; that the notes in suit were executed in Chicago, Illinois, where the said Lida M. Garrigue then resided, and ever since has resided, and that at and before that time the statute hereinbefore set out was, and the same still is, in force in said state; that said notes were signed by Lida M. Garrigue as surety for her husband, who, with her consent, enclosed them in a sealed letter, and mailed them, with a draft for the interest accrued on the old note, at Chicago, directed to the Noble County Bank at Kendallville, Indiana; that the notes were prepared and sent by the bank to R. H. Garrigue at Chicago, who inserted the words "on or before," and signed and caused his wife to sign them, and that the signing and mailing at Chicago as aforesaid was done in pursuance of an agreement to that effect between Rudolph H. Garrigue and appellee, president, and acting for said bank; that the bank received said notes by mail, and thereupon returned the old note by mail to R. H. Garrigue at Chicago, and subsequently indorsed the notes to appellee; and that the bank and appellee at all times knew that Lida M. Garrigue was surety for her husband on said notes. These facts were not in conflict with the general verdict, but, in our opinion, support it; and what has already been said in discussing the sufficiency of the replies leads to the conclusion that there was no error in overruling appellant's motion for judgment in her favor upon the answers to interrogatories, notwithstanding the general verdict.

Appellant's motion for a new trial embraced a number of causes, many of which

have been waived. Appellee testified to a conversation between himself and Rudolph H. Garrigue had at Chicago the latter part of July, 1901, with regard to the payment or renewal of the note then outstanding and almost due, in which Mr. Garrigue said that he could not pay the note, but would make new notes on shorter time, and have his wife sign them, and the notes would then be sent to Kendallville, and that a wife could sign in Illinois, and her signature would be good against her property; and appellee said that would be satisfactory. Appellant, Lida M. Garrigue insists that the admission of this evidence over her objection was error. Appellee suggests that the record does not show that she was not present during this conversation. Her absence is not shown, unless it may be implied from the objection itself. As we have already shown, it will not be inferred from the substance of the notes themselves that they were Indiana contracts, and appellee's case was already made out, without reference to this extraneous evidence. If the notes were Illinois contracts as against the principal maker, they were the same, also, as to the surety under the facts of this case. Appellant, Lida M. Garrigue had no evidence, other than the notes themselves, upon which to rest her contention that they were Indiana contracts. It follows, therefore, that, conceding her absence, and that she could not be bound by the conversation to which objection was made, the utmost that may be said is that the evidence was harmless.

Exceptions were taken to the giving and refusal of the court to give, upon request, a number of instructions. The general ground of the objections of the appellant to these instructions was predicated upon the view that the law of the place of payment governs the validity of the notes. This subject has been sufficiently discussed.

Objection is urged to instruction No. 13 given by the court; but we are unable to find this instruction, either in full or in substance, set out anywhere in the brief of appellant, and must treat the objection as waived for noncompliance with subdivision 5 of rule 22 of this court (55 N. E. vi.). *Chicago Terminal Transfer Co. v. Walton* (Ind.) 72 N. E. 646; *Chicago & E. R. Co. v. Lain* (Ind. App.) 72 N. E. 539; *Lake Erie & W. R. Co. v. McFall* (Ind.) 72 N. E. 552; *Penn Mut. L. Ins. Co. v. Norcross*, 163 Ind. 379, 72 N. E. 132; *Barricklow v. Stewart*, 163 Ind. 438, 72 N. E. 128.

The remaining question presented by the motion for a new trial is whether the verdict of the jury is sustained by sufficient evidence, or is contrary to law. Appellant's counsel contends that the notes were not

delivered in Illinois, but in Indiana, and, if this contention is true, then they are Indiana contracts, and the judgment must be reversed. A precedent agreement between the principal in the notes and the appellee acting for the payee was shown by the evidence, according to the terms of which the notes were to be signed by the makers in Chicago, and sent to the payee by mail. They were properly signed and sealed in an envelope addressed to the payee, and delivered to the United States mail in the City of Chicago, according to agreement, and, in our opinion, the delivery was then and thereby completed. In the case of *Purviance v. Jones*, 120 Ind. 162, 16 Am. St. Rep. 319, 21 N. E. 1099, Justice Mitchell, speaking for the court (p. 164 of 120 Ind., p. 321 of 16 Am. St. Rep., p. 1099 of 21 N. E.), says: "While it is not indispensable that there should have been an actual manual transfer of the instrument from the maker to the payee, yet to constitute a delivery it must appear that the maker in some way evidenced an intention to make it an enforceable obligation against himself, according to its terms, by surrendering control over it, and intentionally placing it under the power of the payee, or of some third person for his use." In the case of *Wm. Glenny Glass Co. v. Taylor*, 99 Ky. 24, 34 S. W. 711, involving conflicting laws, Pryor, Ch. J., in the opinion says: "The note, when signed by Mary D. Bradford in Kentucky, and inclosed to the payee, was an executed instrument; as much so as if the payee had been present and the note delivered to her in Kentucky." In the case of *Barrett v. Dodge*, 18 R. I. 740, 27 Am. St. Rep. 777, 19 Atl. 530, the court, speaking upon the question under immediate consideration, said: "In the absence of instructions to the maker as to the mode by which he should return them when signed, the payees must have contemplated that the maker would return them by the natural and ordinary mode of transmitting such obligations, and must be deemed to have authorized him to so return them. The natural and ordinary mode of transmitting them was by mail, the mode adopted by the maker. In such cases the postoffice may be regarded as the common agent of both parties,—of the maker for the purpose of transmitting the note, and of the payee for the purpose of receiving it from the maker. By depositing the note in the mail with the intent that it shall be transmitted to the payee in the usual way, the maker parts with his dominion and control over it, and the delivery is, in legal contemplation, complete." We accordingly conclude that the notes were fully executed by delivery in the state of Illinois, and are Illinois contracts, and are

der the laws of that state, valid against both the makers. The notes, being valid under the laws of Illinois, are equally valid and enforceable in this state, by the principle of comity, unless their enforcement would be contrary to good morals, or in violation of public policy, or forbidden by positive law. It is clear that a contract of suretyship by a married woman, executed in a foreign state, is not in itself immoral, nor is its enforcement forbidden by our laws. In some states, where the common-law disabilities of married women still exist, it has been held that the enforcement of such an alleged contract against them would be contrary to the public policy of the state, and that it was nonenforceable within that jurisdiction. Almost all the states of the Union have removed substantially all the disabilities of married women to contract, and in the interests of commerce and business, and upon the principle of comity among the states, have sustained and enforced contracts validly executed elsewhere, although the particular contract, if executed within such states, would have been unauthorized and invalid. In the case of *Baer Bros. v. Terry*, 105 La. 479, 29 So. 886, the supreme court of Louisiana, speaking to this point, said: "Nor do we agree with the counsel's contention that, assuming defendant to have been liable on the notes before she came to this state the law of this state prohibiting wives from binding themselves for the debts of their husbands precludes recovery against her. That law is satisfied, and its whole object and purpose is accomplished, when Louisiana wives are protected against binding themselves for the debts of their husbands. This protection is not extended to Missouri wives, and, if these bind themselves in the state of their domicile for the debts of their husbands, they cannot be permitted to come to this state to be divorced from their obligations. When defendant crossed our borders as an immigrant to our soil the debt was already hers, and it has continued to be such. There is nothing in the atmosphere of Louisiana law and Louisiana jurisprudence to disintegrate or dissolve valid obligations. To such it is a healthful and bracing atmosphere." See also *Wright v. Remington*, 41 N. J. L. 48, 32 Am. Rep. 180.

We hold, in accord with the great weight of authority, that the enforcement of the notes in suit against appellant, Lida M. Garrigue, is in no sense violative of the public policy of this state. There is no suggestion that any unfair means or undue influence was used to procure the execution of the notes, and, their collection not being in conflict with our public policy, we affirm that the verdict is sustained by the evidence, and 69 L. R. A.

in accordance with the law, and that the motion for a new trial was properly overruled.

The judgment is affirmed.

PITTSBURGH, CINCINNATI, CHICAGO,
& ST. LOUIS RAILROAD COMPANY.
Appt.,

v.

William J. MONTGOMERY.

(152 Ind. 1.)

1. An employee injured by the negligence of another while both are acting in the line of duty as employees of a corporation has a right of action against the company, under the Indiana employer's liability act of 1893.
2. A provision creating a new liability is within the title of a statute, "An Act Regulating Liability of Railroads and Other Corporations."
3. The employer's liability act changing the law as to the defense in case of negligence of fellow servants of corporations is not within a constitutional provision as to local or special laws "regulating the practice in courts."
4. The question whether a general law can be made applicable to a particular case is for the legislature, and not for the court, to determine.
5. Railroad corporations are persons within the constitutional provisions as to equal privileges and immunities of citizens and the equal protection of persons.
6. A question of the unconstitutionality of a statute as to other corporations cannot be raised by a railroad company as to which the act is valid.
7. The exemption of municipal corporations from a statute making other corporations liable to a servant for negligence of a fellow servant does not make the statute invalid.
8. A statute making void a contract by a corporation for the release or relief from liability to an employee for negligence of a fellow servant is not unconstitutional.
9. A prohibition of contracts releasing corporations from their liability to injured employees is within the main subject expressed in the title, which is the regulation of liability in such cases.
10. An agreement by a railroad employee that the acceptance of benefits from a relief fund shall operate as a release of all claims against the railroad company is void, under the employer's liability act of 1893, although the release is only conditional.
11. The excusing of a competent juror on motion of the court itself is not ground

NOTE.—As to validity of statute imposing liability for injury by fellow servant, see *Johnson v. St. Paul & D. R. Co.* 8 L. R. A. 419, and *Funk v. St. Paul City R. Co.* 29 L. R. A. 208, also the case following this one.

of error, if a fair and impartial jury was obtained.

12. The court may properly refuse to require the jury to return to their room and insert specified facts in their special verdict; but the remedy, if any, is by motion for a new trial.
13. Instructing the jury not to consider evidence withdrawn by the party who offered it is proper, when requested by the other party.
14. Physical and mental suffering arising out of a personal injury may be taken into consideration in estimating damages.
15. A manifest clerical mistake in copying an instruction is not prejudicial error.

(February 19, 1898.)

A PPEAL by defendant from a judgment of the Circuit Court for Cass County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have resulted from defendant's negligence. *Affirmed.*

The facts are stated in the opinion.

Messrs. N. O. Ross and G. E. Ross, for appellant:

The statute in question is in derogation of the common law, and must be strictly construed.

Thornburg v. American Strawboard Co. 141 Ind. 443, 50 Am. St. Rep. 334, 40 N. E. 1062.

What contracts does this statute prohibit?

The contract must be between a railroad company and one of its employees, or between some other corporation and one of its employees.

The contract was not one made by appellant with appellee. It was made by the appellee with an organization known as the "Voluntary Relief Department of the Pennsylvania Lines West of Pittsburgh;" hence it is not within the prohibition of the statute.

The terms of the contract must be to release or relieve appellant from a liability to the appellee. The liability must be released by the contract alone. In this case it was not. This contract provided that, if appellee accepted certain payments for a certain period of time, such payments should operate as a release, and nothing more. Having accepted the former, he cannot justly ask the latter in addition.

Johnson v. Philadelphia & R. R. Co. 163 Pa. 127, 29 Atl. 854.

This contract has been considered and construed with reference to the question now under consideration in the following cases:

Donald v. Chicago, B. & Q. R. Co. 93 Iowa, 284, 33 L. R. A. 492, 61 N. W. 971; 69 L. R. A.

Otis v. Pennsylvania Co. 71 Fed. 136; *Cor v. Pittsburgh, C. C. & St. L. R. Co.* 1 Ohio N. P. 213; *Pittsburg, C. C. & St. L. R. Co. v. Cox*, 55 Ohio St. 497, 35 L. R. A. 507, 45 N. E. 641; *Vickers v. Chicago, B. & Q. R. Co.* 71 Fed. 139.

That this contract was not between appellant and appellee, but between appellee and a third party, does not prevent the appellant from claiming protection under it.

Rodenbarger v. Bramblett, 78 Ind. 213; *Harrison v. Wright*, 100 Ind. 515, 50 Am. Rep. 805; *Waterman v. Morgan*, 114 Ind. 237, 16 N. E. 590; *Leake v. Ball*, 116 Ind. 214, 17 N. E. 918; *Claypool v. School Comrs.* 132 Ind. 261, 31 N. E. 665.

Said act denies to certain persons or citizens equal protection of the laws, and grants privileges and immunities to some which are not granted to others similarly situated. It abridges the right and privileges of certain citizens, and deprives them of their liberty and property without due process of law.

While there may be a classification of subjects or kinds of business by the legislature, it cannot classify the persons to be affected so that all similarly situated shall not be granted the same privileges or immunities.

Cooley, Const. Lim. 391; *Wally v. Kennedy*, 2 Yerg. 554, 24 Am. Dec. 511; *Lodi Twp. v. State*, 51 N. J. L. 402, 6 L. R. A. 56, 18 Atl. 749; *State ex rel. Randolph v. Wood*, 49 N. J. L. 85, 7 Atl. 286; *Edmonds v. Herbrandson*, 2 N. D. 270, 14 L. R. A. 725, 50 N. W. 970.

Inasmuch as the law must apply equally to all persons or citizens similarly situated, if for any reason any part of them cannot be made to come within its compass it is unconstitutional. If the act is invalid as to any of the persons embraced in its provisions, it is invalid as to all, since the valid can only be separated from the invalid by construction, which is not permissible.

United States v. Reese, 92 U. S. 214, 23 L. ed. 563; *Baldwin v. Franks*, 120 U. S. 678, 30 L. ed. 766, 7 Sup. Ct. Rep. 656, 763; *State ex rel. McCue v. Ramsey County*, 45 Minn. 236, 31 Am. St. Rep. 650, 51 N. W. 112; *Lavalley v. St. Paul, M. & M. R. Co.* 40 Minn. 249, 41 N. W. 974; *Nichols v. Walter*, 37 Minn. 264, 33 N. W. 800; *State ex rel. Richards v. Hammer*, 42 N. J. L. 436; *Missouri P. R. Co. v. Mackey*, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161; *Deppe v. Chicago, R. I. & P. R. Co.* 36 Iowa, 52; *Johnson v. St. Paul & D. R. Co.* 43 Minn. 222, 8 L. R. A. 419, 45 N. W. 156; *Pearson v. Portland*, 69 Me. 278, 31 Am. Rep. 276; *Millett v. People*, 117 Ill. 294, 57 Am. Rep. 869, 7 N. E. 631; *Holden v. James*, 11 Mass. 396, 6 Am. Dec. 174; *Min-*

neapolis & St. L. R. Co. v. Herrick, 127 U. S. 210, 32 L. ed. 100, 8 Sup. Ct. Rep. 1176; *Bucklew v. Central Iowa R. Co.* 64 Iowa, 611, 21 N. W. 103; *Herrick v. Minneapolis & St. L. R. Co.* 31 Minn. 11, 47 Am. Rep. 771, 16 N. W. 413.

Laws must not only be uniform in their application throughout the territory over which the legislative jurisdiction extends, but they must apply to all classes of citizens alike.

Shaver v. Pennsylvania Co. 71 Fed. 931.

Such contracts have been upheld, and the answers based thereon sustained, in—

Graft v. Baltimore & O. R. Co. 5 Sadler, (Pa.) 94, 8 Atl. 206; *Fuller v. Baltimore & O. Employees' Relief Asso.* 67 Md. 433, 10 Atl. 237; *Owens v. Baltimore & O. R. Co.* 1 L. R. A. 75, 35 Fed. 715; *State use of Black v. Baltimore & O. R. Co.* 36 Fed. 655; *Martin v. Baltimore & O. R. Co.* 41 Fed. 125; *Com. v. Equitable Beneficial Assn.* 137 Pa. 412, 18 Atl. 1112; *Lease v. Pennsylvania Co.* 10 Ind. App. 47, 37 N. E. 423; *Johnson v. Philadelphia & R. R. Co.* 163 Pa. 127, 29 Atl. 854; *Ringle v. Pennsylvania R. Co.* 164 Pa. 529, 44 Am. St. Rep. 628, 30 Atl. 492; *Donald v. Chicago, B. & Q. R. Co.* 93 Iowa, 284, 33 L. R. A. 492, 61 N. W. 971; *Chicago, B. & Q. R. Co. v. Bell*, 44 Neb. 44, 62 N. W. 314; *Vickers v. Chicago, B. & Q. R. Co.* 71 Fed. 139; *Otis v. Pennsylvania Co.* 71 Fed. 136; *Shaver v. Pennsylvania Co.* 71 Fed. 931; *Pittsburg, C. C. & St. L. R. Co. v. Cox*, 55 Ohio St. 497, 35 L. R. A. 507, 45 N. E. 641; *Maine v. Chicago, B. & Q. R. Co.* 109 Iowa, 260, 70 N. W. 630, 80 N. W. 315; *Chicago, B. & Q. R. Co. v. Curtis*, 51 Neb. 442, 66 Am. St. Rep. 456, 71 N. W. 42; *Eckman v. Chicago, B. & Q. R. Co.* 169 Ill. 312, 38 L. R. A. 750, 48 N. E. 496.

Section 5 of said act is in conflict with the 14th Amendment to the Constitution and the acts of Congress passed for the enforcement thereof.

State v. Julow, 129 Mo. 163, 29 L. R. A. 257, 50 Am. St. Rep. 443, 31 S. W. 781; *Bertholf v. O'Reilly*, 74 N. Y. 515, 30 Am. Rep. 323; *Braceville Coal Co. v. People*, 147 Ill. 66, 22 L. R. A. 340, 37 Am. St. Rep. 206, 35 N. E. 62; *State v. (Goodwill)*, 33 W. Va. 179, 6 L. R. A. 621, 25 Am. St. Rep. 863, 10 S. E. 285; *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; *Slaughter-House Cases*, 16 Wall. 30, 21 L. ed. 304; *Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co.* 111 U. S. 746, 28 L. ed. 585, 4 Sup. Ct. Rep. 652; *Re Parrott*, 6 Sawy. 349, 1 Fed. 481; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; *People v. Marx*, 99 N. Y. 377, 52 Am. Rep. 34, 2 N. E. 29; *Ex parte Westersfield*, 55 Cal. 550, 36 Am. Rep. 47; *Ragio v. State*, 69 L. R. A.

86 Tenn. 272, 6 S. W. 401; *State v. Divine*, 98 N. C. 778, 4 S. E. 477.

The vocation of an employer, as well as that of his employee, is his property.

Depriving the owner of property of one of its attributes is depriving him of his property under the provisions of the Constitution.

People ex rel. Manhattan Sav. Inst. v. Otis, 90 N. Y. 48; *State v. Fire Creek Coal & Coke Co.* 33 W. Va. 188, 6 L. R. A. 359, 25 Am. St. Rep. 891, 10 S. E. 288; *Godcharles v. Wigeman*, 113 Pa. 431, 6 Atl. 354; *State v. Loomis*, 115 Mo. 307, 21 L. R. A. 789, 22 S. W. 350; *Frorer v. People*, 141 Ill. 171, 16 L. R. A. 492, 31 N. E. 395; *Com. v. Perry*, 155 Mass. 117, 14 L. R. A. 325, 31 Am. St. Rep. 533, 28 N. E. 1126; *Ramsey v. People*, 142 Ill. 380, 17 L. R. A. 853, 32 N. E. 364; *San Antonio & A. Pass. R. Co. v. Wilson*, 4 Tex. App. Civ. Cas. (Willson) p. 565, 19 S. W. 910; *Harding v. People*, 160 Ill. 459, 32 L. R. A. 445, 52 Am. St. Rep. 344, 43 N. E. 624; *Ritchie v. People*, 155 Ill. 98, 29 L. R. A. 79, 46 Am. St. Rep. 315, 40 N. E. 454; *Ex parte Kuback*, 85 Cal. 274, 9 L. R. A. 482, 20 Am. St. Rep. 226, 24 Pac. 737; *Low v. Rees Printing Co.* 41 Neb. 127, 24 L. R. A. 702, 43 Am. St. Rep. 670, 59 N. W. 362; *State ex rel. Luria v. Wagener*, 69 Minn. 206, 38 L. R. A. 677, 65 Am. St. Rep. 565, 72 N. W. 67; *Re House Bill No. 203*, 21 Colo. 27, 39 Pac. 431; *People v. Gillson*, 109 N. Y. 389, 4 Am. St. Rep. 465, 17 N. E. 343; *Wallace v. Georgia, C. & N. R. Co.* 94 Ga. 732, 22 S. E. 579; *New York L. Ins. Co. v. Smith* (Tex. Civ. App.) 41 S. W. 680; *Fraser v. McDonway & T. Co.* 82 Fed. 257; *Toledo, W. & W. R. Co. v. Jacksonville*, 67 Ill. 37, 16 Am. Rep. 611; *Vanzant v. Waddell*, 2 Yerg. 270; *Madison & I. R. Co. v. Whiteneck*, 8 Ind. 217.

This section does not seek to regulate the terms and conditions upon which a right may be enjoyed, but it denies to both the employer and the employee the right to contract at all. If contracts such as this section forbids are, or can be, classed as liable to be injurious to public morals or public safety, or as in any way jeopardizing the public welfare, they might be subject to reasonable restrictions, but not forbidden.

Printing & Numerical Registering Co. v. Sampson, L. R. 19 Eq. 462; *Diamond Match Co. v. Roeder*, 106 N. Y. 473, 60 Am. Rep. 464, 13 N. E. 419; *United States Chemical Co. v. Provident Chemical Co.* 64 Fed. 946; *Dent v. West Virginia*, 129 U. S. 114, 32 L. ed. 623, 9 Sup. Ct. Rep. 231.

Messrs. D. H. Chase, S. O. Pickens, and *G. W. Funk* also for appellant.

Messrs. McConnell & Jenkins and *Nelson & Myers* for appellee.

McCabe, J., delivered the opinion of the court:

This action was brought by the appellee against the appellant to recover damages suffered by him on account of the alleged negligence of the defendant, resulting in a personal injury to the plaintiff. A demurrer to the complaint for want of sufficient facts, and a demurrer to the second paragraph of the answer, were overruled, and the issues joined were tried by a jury, resulting in a special verdict and judgment, over defendant's motion for a new trial, for \$3,000 damages. The errors assigned call in question the rulings on demurrer, the refusal of a new trial, overruling motions for a *venire de novo*, for judgment in appellant's favor on the special verdict, and sustaining appellee's motion for judgment on the special verdict in his favor.

The only objection urged to the complaint is that it shows that the plaintiff was a freight brakeman in the defendant's service on its railroad, and that it was the negligence of the engineer of the train on which he was serving that caused his injury, and that, under the fellow-servant rule, there was no liability. The injury occurred on July 1, 1893, after the act approved March 4, 1893, took effect, touching the liability of railroads, commonly called the "employer's liability act." Acts 1893, p. 294; Burns' Rev. Stat. 1894, §§ 7083-7087 (Horner's Rev. Stat. 1897, §§ 5206-5206v).

Appellant's learned counsel contend that it is settled law that the employer is not liable to an employee for injuries caused by the negligence of a coemployee in the same general service, unless the employer was guilty of some negligence in employing the servant, with knowledge of his negligent habits or incompetency, or retained him after knowledge of such negligence or lack of skill. There is no showing of any such negligence on the part of the appellant, as employer, in the complaint. Appellee concedes this to be the common-law rule, and that it prevailed in this state prior to the enactment above mentioned. Indeed, it is conceded by the appellee that his complaint depends upon that act for its sufficiency in its facts to constitute a cause of action, and is founded thereon.

It is first contended by the appellant that the act does not change the common-law rule, and it would seem to follow, if that is true, that the complaint is clearly bad. The 1st section provides: "That every railroad or other corporation, except municipal, operating in this state shall be liable in damages for personal injury suffered by any employee while in its service, the employee so injured being in the exercise of due care and diligence, in the following cases." Then 69 L. R. A.

follow four subdivisions, specifying the cases in which liability is to attach, the fourth of which, and the one on which this action is founded, reads thus: "Where such injury was caused by the negligence of any person in the service of such corporation, who has charge of any signal, telegraph office, switch yard, shop, roundhouse, locomotive engine, or train upon a railway, or where such injury was caused by the negligence of any person, coemployee, or fellow servant engaged in the same common service in any of the several departments of the service of any such corporation, the said person, coemployee, or fellow servant, at the time acting in the place, and performing the duty of the corporation in that behalf, and the person so injured, obeying or conforming to the order of some superior at the time of such injury, having authority to direct; but nothing herein shall be construed to abridge the liability of the corporation under existing laws." Appellant's learned counsel say: "The complaint lacks two allegations to make it good under this provision. (1) That the engineer at the time was acting in the place and performing the duty of the corporation in that behalf; and (2) that appellee was obeying or conforming to the order of some superior at the time of such injury, having authority to direct. It was not alleged that the engineer was acting in the place or performing the duty of the master, or that appellee was acting in obedience to a superior," etc.

This language, together with other parts of appellant's brief, indicates that appellant's learned counsel construe the language of the statute above quoted as conveying the meaning that the right to recover against an employer for the negligence of a coemployee or fellow servant rests upon the condition that such negligent coemployee was at the time acting in the place and performing the duty that the master or employer owed to his or its servants or employees generally; and yet they do not say so in so many words. The majority of the court are of the opinion that the decision of that question is not necessary to the decision of this case. They hold that the only part of the 4th subdivision of said section which is necessary to be considered in determining the sufficiency of the complaint is the following: "Where such injury was caused by the negligence of any person in the service of such corporation who has charge of any . . . locomotive engine or train upon a railway, . . . and the person so injured, obeying or conforming to the order of some superior at the time of such injury, having authority to direct;" and that, hence, it was not necessary that the complaint should state that the alleged

negligent engineer, at the time he committed the alleged negligent injury, as provided in such concluding clause, was acting in the place and performing the duty of the corporation in that behalf; while the writer hereof is of the opinion that the whole of the 4th subdivision must stand together, and that the words quoted from the concluding clause qualify the liability created in the first clause or clauses. But the duty of the corporation therein mentioned, in the opinion of the writer, means, not the duty it owes to its servants, but the duty it owes to the public in carrying on its business; and the words, "acting in the place of such corporation," with the other words quoted, were used to convey the idea that, in order that the liability mentioned should exist, the negligent person, coemployee, or fellow servant must be acting as such employee, in the line of his duty, at the time of his negligence. The writer is of opinion that the complaint is good under this construction; and the holding of the court is that, in order to make the complaint good under the first part of the subdivision quoted, as to the point in question, it is only required that it state that the engineer, while in the service of appellant, in charge of a locomotive engine, negligently injured the appellee, both being at the time acting in the line of duty as employees of the appellant. That being so, the averments of the complaint, showing, as they do, that at Hartford City, Indiana, the freight train upon which appellee was brakeman stopped to switch out loaded cars; that the conductor of said train, acting in the service of appellant, the authority and position of said conductor making it appellee's duty to obey his orders in respect to said train and switching, ordered appellee to go between said cars to make couplings, and while so engaged the engineer in charge of said train, also in appellant's service, and in the line of his duty, without signal, carelessly, negligently, and recklessly reversed said engine and applied full steam, whereupon said cars were driven and jammed together with terrific force, without notice to appellee, whereby appellee's entire right hand was caught between the bumpers and mashed off, without any fault on his part,—make the complaint sufficient, under the statute, as to the objection thereto urged.

The next contention against the sufficiency of the complaint is that the act is unconstitutional, that being confessedly the foundation of the action. It is first contended that it violates § 19 of article 4 of the state Constitution, which provides that "every act shall embrace but one subject and matters properly connected therewith; which subject shall be expressed in the title." It is con-

tended that the subject is not expressed in the title, in that the title is "An Act Regulating Liability of Railroads and Other Corporations except Municipal," while the provisions of the act itself are, as claimed by appellant, to create a liability which up to that time had no existence. The precise question here involved was decided adversely to appellant's contention, on a statute similar to our own, under a Constitution an exact copy of our own in this respect, in *McAunich v. Mississippi & M. R. Co.* 20 Iowa, 338. We feel content to follow that case, without extending this opinion by repeating its reasoning, and, accordingly, hold that the subject is sufficiently expressed in the title.

The same rule has been, in effect, followed by this court in holding that the title of an act need not go into details. It is sufficient if it indicates with reasonable precision and clearness the subject it embraces. Nor is an act invalid because it includes details not mentioned in the title, provided the details are germane to the general subject designated in the title. *Bitters v. Fulton County*, 81 Ind. 125; *Crawfordsville & S. W. Turnp. Co. v. Fletcher*, 104 Ind. 97, 2 N. E. 243; *Benson v. Christian*, 129 Ind. 535, 29 N. E. 26; *State ex rel. Terre Haute v. Kolsem*, 130 Ind. 434, 14 L. R. A. 566, 29 N. E. 595; *State ex rel. Duensing v. Roby*, 142 Ind. 168, 33 L. R. A. 213, 51 Am. St. Rep. 174, 41 N. E. 145; *Lewis v. State*, 148 Ind. 346, 47 N. E. 675.

In the course of some of the briefs filed in other cases involving the validity of the act, it is contended that the act is void, in that it violates § 22 of article 4 of the state Constitution, providing that "the general assembly shall not pass local or special laws in any of the following enumerated cases, that is to say: . . . Regulating the practice in courts of justice." That the act does not violate the provision quoted is settled by *Woods v. McCay*, 144 Ind. 316, 33 L. R. A. 97, 43 N. E. 269, and cases cited; *Mode v. Beasley*, 143 Ind. 306, 42 N. E. 727, and cases there cited; *Jackson County v. State*, 147 Ind. 476, 46 N. E. 908. Also that it violates § 23 of the same article, requiring all laws to be of general and uniform operation throughout the state, where such a law can be made applicable. But that is a question for the legislature, whose determination is final and conclusive on the courts. *Mode v. Beasley*, 143 Ind. 306, 42 N. E. 727, and cases there cited; *Woods v. McCay*, 144 Ind. 316, 33 L. R. A. 97, 43 N. E. 269, and cases there cited.

It is next contended that the act violates § 23 of article 1 of the Constitution, providing that "the general assembly shall not grant to any citizen, or class of citizens,

privileges or immunities which upon the same terms shall not equally belong to all citizens." Railroad corporations are persons within the meaning of this provision of our Bill of Rights, and the equality clause of the 14th Amendment to the Constitution of the United States. *Charlotte, C. & A. R. Co. v. Gibbs*, 142 U. S. 386, 35 L. ed. 1051, 12 Sup. Ct. Rep. 255; *Santa Clara County v. Southern P. R. Co.* 118 U. S. 394, 30 L. ed. 118, 6 Sup. Ct. Rep. 1132; *Pembina Canal. Silver Min. & Mill. Co. v. Pennsylvania*, 125 U. S. 187, 2 Inters. Com. Rep. 24, 31 L. ed. 650, 8 Sup. Ct. Rep. 737. The inequality complained of is that corporations, except municipal, are made liable for damages caused to one of their servants by the negligence of a coemployee or fellow servant, without any negligence on the part of the employer, while other employers are left free from such liability to their employees. Appellant also contends that the act violates the equality clause of the 14th Amendment of the Constitution of the United States, demanding for every person the equal protection of the laws. The same provision, quoted from the Bill of Rights in the Constitution of this state, is found word for word in the Bill of Rights of the Constitution of Iowa. The supreme court of that state, in upholding the employers' liability act of that state, held that the provision mentioned in the Bill of Rights in the Constitution of that state was, in effect, the same as the equality clause of the 14th Amendment to the Federal Constitution, and that the employers' liability act did not violate either Constitution in respect of equality of laws or equality of rights secured by each of said provisions, in *Buckle v. Central Iowa R. Co.* 64 Iowa, 611, 21 N. W. 103. That decision rests largely on two decisions made upon the subject of the constitutionality of the employers' liability act of Kansas and that of Iowa in the Supreme Court of the United States. Mackey had recovered a judgment for \$12,000 damages against the Missouri Pacific Railway Company for injuries caused by a coemployee of that company, which, on appeal, was affirmed by the supreme court of Kansas. From that judgment the company appealed to the Supreme Court of the United States, on the ground that the Kansas statute violated the 14th Amendment to the Constitution of the United States. But that court affirmed the judgment, holding that the act in no way infringed that amendment. *Missouri P. R. Co. v. Mackey*, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161. Mr. Justice Field, speaking for the court, there said: "The company calls the attention of the court to the rule of law exempting from liability an employer for injuries to employees caused

by the negligence or incompetency of a fellow servant, which prevailed in Kansas and in several other states previous to the act of 1874, unless he had employed such negligent or incompetent servant without reasonable inquiry as to his qualifications, or had retained him after knowledge of his negligence or incompetency. The rule of law is conceded where the person injured and the one by whose negligence or incompetency the injury is caused are fellow servants in the same common employment, and acting under the same immediate direction. . . . Assuming that this rule would apply to the case presented but for the law of Kansas of 1874, the contention of the company . . . is that the law imposes upon railroad companies a liability not previously existing, in the enforcement of which their property may be taken, and thus authorizes, in such cases, the taking of property without due process of law, in violation of the 14th Amendment. . . . The supposed hardship and injustice consist in imputing liability to the company where no personal wrong or negligence is chargeable to it or to its directors. But the same hardship and injustice, if there be any, exist when the company, without any wrong or negligence on its part, is charged for injuries to passengers. . . . The utmost care on its part will not relieve it from liability, if the passenger injured be himself free from contributory negligence. The law of 1874 extends this doctrine, and fixes a like liability upon railroad companies, where injuries are subsequently suffered by employees, though it may be by the negligence or incompetency of a fellow servant in the same general employment and acting under the same immediate direction. That its passage was within the competency of the legislature we have no doubt. The objection that the law of 1874 deprives the railroad companies of the equal protection of the laws is even less tenable than the one considered. It seems to rest upon the theory that legislation which is special in its character is necessarily within the constitutional inhibition; but nothing can be further from the fact. The greater part of all legislation is special, either in the objects sought to be attained by it or in the extent of its application. Laws for the improvement of municipalities, the opening and widening of particular streets, the introduction of water and gas, and other arrangements for the safety and convenience of their inhabitants, and laws for the irrigation and drainage of particular lands, for the construction of levees, and the bridging of navigable rivers, are instances of this kind. . . . A law giving to mechanics a lien on buildings constructed or repaired by them, for the amount

of their work, and a law requiring railroad corporations to erect and maintain fences along their roads, separating them from land of adjoining proprietors so as to keep cattle off their tracks, are instances of this kind. Such legislation is not obnoxious to the last clause of the 14th Amendment, if all persons subject to it are treated alike under similar circumstances and conditions in respect both of the privileges conferred and liabilities imposed. . . . But the hazardous character of the business of operating a railway would seem to call for special legislation with respect to railroad corporations, having for its object the protection of their employees, as well as the safety of the public." A like decision was made by the same court, upholding the employers' liability law of Iowa, which has been in force in that state ever since 1862. *Minneapolis & St. L. R. Co. v. Herrick*, 127 U. S. 210, 32 L. ed. 109, 8 Sup. Ct. Rep. 1176. The Iowa statute is expressed in fewer words and better language than our own. It reads thus: "Every corporation operating a railway shall be liable for all damages sustained by any person, including employees of such corporation, in consequence of the neglect of agents, or by any mismanagement of the engineers or other employees of the corporation, and in consequence of the wilful wrongs, whether of commission or omission, of such agents, engineers, or other employees, when such wrongs are in any manner connected with the use and operation of any railway on or about which they shall be employed; and no contract which restricts such liability shall be legal or binding." Code Iowa, 1873, § 1307. Herrick was injured in Iowa by the negligence of a fellow servant in the employ of said railroad company. He sued and recovered against the company on the Iowa statute in the state court of Minnesota, which judgment was affirmed in the supreme court of that state, upholding the constitutionality of the Iowa statute. *Herrick v. Minneapolis & St. L. R. Co.* 31 Minn. 11, 47 Am. Rep. 771, 16 N. W. 413, 32 Minn. 435, 21 N. W. 471. On appeal to the Supreme Court of the United States, the constitutionality of the Iowa statute was upheld on the authority of *Missouri P. R. Co. v. Mackey*, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161, as above stated. Some ten or twelve states of the Union have such acts on their statute books, and none of them have ever been held unconstitutional, while the following decisions of state supreme courts have held such legislation to be constitutional and valid: *McAunich v. Mississippi & M. R. Co.* 20 Iowa, 338; *Bucklew v. Central Iowa R. Co.* 64 Iowa, 603, 21 N. W. 103; *Rose v. Des Moines* 69 I. R. A.

Valley R. Co. 39 Iowa, 246; *Kansas P. R. Co. v. Peavey*, 29 Kan. 169, 44 Am. Rep. 630; *Missouri P. R. Co. v. Mackey*, 33 Kan. 298, 6 Pac. 291; *Atty. Gen. v. Chicago & N. W. R. Co.* 35 Wis. 425; *Ditberner v. Chicago, M. & St. P. R. Co.* 47 Wis. 138, 2 N. W. 69. The questions decided by this court in *Townsend v. State*, 147 Ind. 624, 37 L. R. A. 294, 46 Am. St. Rep. 477, 47 N. E. 19, are analogous to and on the same lines as the cases just cited.

Appellant's learned counsel have urged upon our attention *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255, as probably declaring a different rule. The reference to that case is fortunate, because, while it does not in the least depart from the rule laid down in the two cases above cited, it lays down some principles governing the subject, doubtless in mind in both of the other judgments of the Federal Supreme Court, but not deemed necessary in those cases to be fully stated. In the course of the opinion, Mr. Justice Brewer, speaking for the court, said: "That such corporations may be classified for some purposes is unquestioned. The business in which they are engaged is of a peculiarly dangerous nature, and the legislature, in the exercise of its police powers, may justly require many things to be done by them in order to secure life and property. Fencing of railroad tracks, use of safety couplers, and a multitude of other things easily suggest themselves. And any classification for the imposition of such special duties—duties arising out of the peculiar business in which they are engaged—is a just classification, and not one within the prohibition of the 14th Amendment. Thus it is frequently required that they fence their tracks, and, as a penalty for a failure to fence, double damages in case of loss are inflicted. *Missouri P. R. Co. v. Humes*, 115 U. S. 512, 29 L. ed. 463, 6 Sup. Ct. Rep. 110. But this and all kindred cases proceed upon the theory of a special duty resting upon railroad corporations by reason of the business in which they are engaged,—a duty not resting upon others; a duty which can be enforced by the legislature in any proper manner; and, whether it enforces it by penalties in the way of fines coming to the state, or by double damages to a party injured, is immaterial. It is all done in the exercise of the police power of the state, and with a view to enforce just and reasonable police regulations. . . . But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the 14th Amendment forbids this. . . . It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equal-

ity clause of the 14th Amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground,—some difference which bears a just and proper relation to the attempted classification,—and is not a mere arbitrary selection.”

Objection is made to the validity of the act because it embraces all corporations except municipal, and that there are other corporations whose business may be such as not to afford any reasonable ground for their classification, in that their business may not be peculiarly dangerous to life and limb, like that of railroads. To this it may be answered, if the act is valid as to railroad companies, the appellant, a railroad corporation, cannot be permitted to litigate the constitutionality of the act as to other corporations. *Henderson v. State*, 137 Ind. 552, 24 L. R. A. 469, 36 N. E. 257; *Switzerland County v. Reeves*, 148 Ind. 467, 46 N. E. 995; *Currier v. Elliott*, 141 Ind. 394, 39 N. E. 554. It will be time enough to decide its validity as to other corporations when any of them come before this court with a case presenting the question.

It is also urged, as an objection to the validity of the act, that it exempts municipal corporations from its operation. But no reason has been suggested why municipal corporations should be classed as railroad corporations. We have many statutes applying to railroad corporations that do not apply to municipal corporations. There is no necessary similarity between them. Nor is the business of municipal corporations so peculiarly hazardous to their employees as to call for such special legislation as is called for in case of railroad corporations to protect their employees. We therefore conclude that the act does not violate the Constitution, either Federal or state.

It is next contended that the circuit court erred in sustaining the plaintiff's demurrer to the second paragraph of the defendant's answer. It sets up that on the 8th day of March, 1893, and prior to the plaintiff's injury, he became a member of the voluntary relief department of the Pennsylvania lines west of Pittsburgh, and was such member at the time he was injured, and so continued long after his said injury; that the management of said department is under the charge of said lines west of Pittsburgh; that said fund is made up of stated contributions from said lines and the employees thereon, and said lines guarantee the fulfillment of all the obligations of said department, and make up and pay all deficiencies in the amounts necessary to pay all benefits to its members. In becoming a member of

said relief department, he agreed to be bound by its rules and regulations, among which was that each member, on complying with its rules, was entitled to receive stipulated benefits on account of disability incurred by injury received to such member in the service of the company. This agreement is all set forth in the appellee's written application for membership, and signed by him; and, among the stipulations contained therein, is the following, namely: "And I agree that the acceptance of benefits from the said relief fund for injury or death shall operate as a release of all claims for damages against said company arising from injury or death which could be made by or through me, and that I, or my legal representatives, will execute such further instrument as may be necessary formally to evidence such acquittance." And it is further averred that, after receiving the injury complained of, while disabled thereby, he accepted benefits from said relief department to the amount of \$385. But it is contended by the appellee that by the 5th section of the act we have been considering the contract set up in this answer as a bar is made void. The contract set up is shown therein to have been entered into after the act took effect and became a law. The section reads thus: "All contracts made by railroads or other corporations with their employees, or rules or regulations adopted by any corporation releasing or relieving it from liability to any employee having a right of action under the provisions of this act, are hereby declared null and void." Burns's Rev. Stat. 1894, § 7087. The balance of the section makes the whole act apply to future injuries, and not to past. The validity of this section is assailed on the grounds that it violates the Bill of Rights and the 14th Amendment of the Federal Constitution. What we have said as to the validity of the other parts of the act, under these constitutional provisions, is applicable to this section, and hence it must be held not to infringe them.

And it is further insisted by appellant that said section violates § 19 of article 4 of the state Constitution, in that the subject of the 5th section is not expressed in the title, nor properly connected with the subject expressed in the title. The prohibition of contracts releasing corporation from their liability, as prescribed in the act, is germane to and properly connected with that main subject of the act, and hence the matter of the 5th section thereof need not be expressed in the title. *State ex rel. Duensing v. Roby*, 142 Ind. 168, 33 L. R. A. 213, 51 Am. St. Rep. 174, 41 N. E. 145, and cases there cited; *Warren v. Britton*, 84 Ind. 14; *Bitters v. Fulton County*, 81 Ind.

125; *Benson v. Christian*, 129 Ind. 535, 20 N. E. 26; *Farrell v. State*, 45 Ind. 371; *Thomasson v. State*, 15 Ind. 449; *Reams v. State*, 23 Ind. 111; *Bank of State v. New Albany*, 11 Ind. 139; *State ex rel. Stingley v. Sullivan*, 74 Ind. 121; *Indianapolis v. Huegele*, 115 Ind. 581, 18 N. E. 172; *Hunter v. Burnsville Turnp. Co.* 56 Ind. 213; *Walker v. Dunham*, 17 Ind. 483; *McCaslin v. State*, 44 Ind. 151; *State ex rel. Terre Haute v. Kolsem*, 130 Ind. 434, 14 L. R. A. 566, 29 N. E. 595; *Shoemaker v. Smith*, 37 Ind. 122; *Crawfordsville & S. W. Turnp. Co. v. Fletcher*, 104 Ind. 97, 2 N. E. 243; *Barnett v. Harshbarger*, 105 Ind. 410, 5 N. E. 718; *Hunt v. Lake Shore & M. S. R. Co.* 112 Ind. 69, 13 N. E. 263. We therefore hold that the 5th section is not invalid, because it is a matter properly connected with the subject of the act.

Assuming that it is valid, and makes contracts releasing or relieving corporations from liability under the act absolutely void, appellant's learned counsel contend that there is nothing in the agreement set forth in the second paragraph of the answer relieving or releasing the company from liability for negligence, or from any liability whatever. They say appellee "elected to accept benefits from the relief fund, and, having done so, he cannot maintain this action for damages. That is the essence of his agreement." Appellant's counsel further say in one of their briefs that "the payment and acceptance of benefits under the terms of the contract in this relief fund is simply a compromise and settlement of the claim of the injured employee against the company." Let us suppose that the above statement is true; it is certainly the strongest and best statement that can be made of appellant's position. What is it that makes the acceptance of benefits from the relief fund a compromise and settlement of appellee's claim? Only one answer can be made to this question, and that is that the antecedent contract alone makes it such. There is no allegation in the answer that in accepting the benefits appellee made any agreement or compromise whatever, and there is no claim that he did. He simply accepted that which he had a legal and moral right to demand. His own contributions helped to create the fund, and his injury brought him within the rules and regulations entitling him to the benefits. So, even if it was a compromise and settlement, it was such wholly and solely by virtue of the antecedent contract,—a contract executed before the injury occurred; and, that being so, it amounts to nothing more than an attempt to secure a release of future liability under the act, call it by whatsoever name we may. But such acceptance

is not, in any proper or legal sense, a compromise and settlement of liability under the act. The language of the contract is: "And I agree that the acceptance of benefits from said relief fund shall operate as a release of all claims for damages against said company, arising from such injury or death," etc. So, by the express terms of the contract, it is a release, and not a compromise and settlement. The acceptance of benefits shall operate as a release. But what makes it so? If the antecedent contract was abrogated, the acceptance of benefits would have no effect whatever upon the question of appellant's liability under the act; because he had a legal and moral right, as before remarked, to demand and receive such benefits. So, if the release takes place, it is not by virtue of the acceptance, but it is by the force, vigor, and effect of the antecedent contract. It breathes that effect into the acceptance.

But it is contended that the contract does not, of itself, operate as a release of liability under the act. The only difference between it and a contract of absolute release is that the one would be unconditional while the other is conditional. The conclusion seems unavoidable that the contract here is a conditional release of appellant from liability under the act. The condition upon which it is to become absolute is the acceptance of benefits from the relief fund. Section 5 of the act makes "all contracts . . . by any corporation releasing or relieving it from liability" under the act "null and void."

Appellant's learned counsel contend that an exact copy of this contract was held valid in the following cases: *Johnson v. Philadelphia & R. R. Co.* 163 Pa. 127, 29 Atl. 854; *Ringle v. Pennsylvania R. Co.* 164 Pa. 529, 44 Am. St. Rep. 628, 30 Atl. 492; *Lease v. Pennsylvania Co.* 10 Ind. App. 47, 37 N. E. 423; *Donald v. Chicago, B. & Q. R. Co.* 93 Iowa, 284, 33 L. R. A. 492, 61 N. W. 971. The first three cases just cited were decided in states not having employers' liability acts forbidding contracts of this kind in force at the time the injury sued for occurred. And they proceeded upon the sole ground that the contract did not violate public policy, and therefore they were upheld. But the Iowa case was decided in a state having in force at the time such an act. But in that case the injury resulted in death, and the administrator of the deceased had recovered a judgment against the company for the benefit of the mother of the deceased on account of his death, on a similar statute to our own. The deceased was a member of the relief association very similar to the one here involved. The case decided in 93 Iowa, 284, 33 L. R. A. 492.

and 61 N. W. 971, was a suit by the mother against the relief association for the \$500 death benefits provided by the rules of the association. The case was decided against her because of the following stipulation in the contract signed by the deceased when he became a member of the relief association, namely: "Should a member or his legal representatives bring suit against the company . . . for damages on account of injury or death of such member, payment of benefits from the relief fund on account of the same shall not be made until such suit is discontinued; and if suit shall proceed to judgment, or shall be compromised, all claims upon the relief fund for benefits on account of such injury or death shall be thereby precluded." That contract does not seek to avoid the liability of the company under the Iowa act, and hence was a perfectly legal contract. As before observed, the other cases involved the question whether such a contract as that now before us was invalid because of its violation of public policy. Without either approving or disapproving of the rule laid down by the Pennsylvania supreme court and our own appellate court, yet the United States circuit court for the district of Colorado decided the question the other way in a strong and able opinion in *Miller v. Chicago, B. & Q. R. Co.* 65 Fed. 305; and we think there is a marked distinction in the rule where a contract is charged with violating public policy and where it contravenes a positive statutory prohibition, and especially where the statute provides that the inhibited contract shall be null and void. In *Barrett v. Carden*, 65 Vt. 431, 36 Am. St. Rep. 876, 26 Atl. 530, the supreme court of Vermont said: "The defendant insists that the alleged undertaking of the plaintiff is contrary to public policy, and that for this reason the bond should be declared void. Courts will not declare contracts void on grounds of public policy except in cases free from doubt, and prejudice to the public interest must clearly appear before a court is justified in pronouncing an instrument void on this account. In *Richmond v. Dubuque & S. C. R. Co.* 26 Iowa, 191, it is said 'that the power of courts to declare a contract void for being in contravention of sound public policy is a very delicate and undefined power, and, like the power to declare a statute unconstitutional, should be exercised only in cases free from doubt.' . . . In *Richardson v. Mellish*, 2 Bing. 229, Sir James Burrough said: 'I protest, as my lord has done, against urging too strongly upon public policy. It is a very unruly horse, and, when once you get astride it, you never know where it will carry you. It may lead

you from the sound law. It is never urged at all but when other points fail.' In *Walsh v. Fussell*, 6 Bing. 169, Lord Chief Justice Tindal, in pronouncing judgment, said: 'It is not contended that the covenant was illegal on the ground of the breach of any direct rule of law, or the direct violation of any statute, and we think, to hold it to be void on the ground of its impolicy or inconvenience, we ought to be clearly satisfied that the performance of it would be necessarily attended with injury or inconvenience to the public.' As was said in *Brooks v. Cooper*, 50 N. J. Eq. 761, 21 L. R. A. 617, 35 Am. St. Rep. 793, 26 Atl. 978: "Where there is no statutory prohibition, the law will not readily pronounce an agreement invalid on the ground of policy or convenience, but is, on the contrary, inclined to leave men free to regulate their affairs as they think proper. . . . Now, the intention of the contract was to contravene the statute, and this intention is revealed in the contract. This renders the contract vicious and unenforceable." An eminent author says: "By public policy is intended that principle of the law which holds that no citizen can lawfully do that which has a tendency to injure the public, or which is against the public good. Courts will not declare contracts void on grounds of public policy, except where the case is free from doubt, and where an injury to the public interest clearly appears. A doubtful matter of public policy is not sufficient to invalidate a contract." 2 Beach, *Modern Law of Contracts*, § 1498, and authorities there cited. It might be difficult to say that such a contract has a tendency to injure, or is against the public good, beyond all doubt. On the other hand, the same author says (§ 1447) that "contracts requiring the performance of acts forbidden by statute, or tending to promote such acts, are void, even though the statute does not declare them void." See the authorities there cited. The same author, in § 1443, says: "Whatever tends to interfere with the beneficial operation of the statute is unlawful, as against the policy of the law. Whatever tends to obstruct duty, by defeating the letter or spirit of the law, is also unlawful, and the courts will not enforce any agreement or contract for the benefit of one through whose direction or assistance the law is violated. . . . The law attempts to close the doors to temptations by refusing such parties recognition in the courts." See authorities there cited. It is laid down in 3 Am. & Eng. Enc. Law, p. 872, that "where a transaction is forbidden by a statute it is void; the grounds of the proposition are immaterial." As we have before said, the contract in question is a re-

lease of appellant's liability under the act upon a certain condition. That it is a conditional release of such liability, dependent upon the happening of the condition, namely, the acceptance of said benefits by appellee, there can be no doubt. If that condition happens, as it did, appellant's liability under the act is released by virtue of the antecedent contract, if it is enforced. If it is enforced, it must be so done in violation of the statute which makes all such contracts null and void. That certainly more than tends to obstruct both the letter and spirit of the statute. Our cases are to like effect in holding that a contract in violation of a statute is void. *State Bank v. Coquillard*, 6 Ind. 232; *Cassaday v. American Ins. Co.* 72 Ind. 95. And the same is true if any part of the contract is in violation of the law and the consideration unseverable. *Daniels v. Barney*, 22 Ind. 207; *Case v. Johnson*, 91 Ind. 477; *Benton v. Hamilton*, 110 Ind. 294, 11 N. E. 238; *Woodford v. Hamilton*, 139 Ind. 481, 39 N. E. 47; *Sandage v. Studabaker Bros. Mfg. Co.* 142 Ind. 148, 34 L. R. A. 363, 51 Am. St. Rep. 165, 41 N. E. 380; *Sullivan v. State*, 121 Ind. 342, 23 N. E. 150.

But the contract is only conditionally in conflict with the statute; that is, if the condition never happens, it does not and never can conflict with the statute. But it is equally true if the condition does happen it will directly conflict with the statute. One of the most learned of law writers upon this topic says: "A condition is a limitation making a contract arbitrarily dependent on an event at the time uncertain." 1 Wharton, Contr. § 545. And in § 548 the same learned author says: "The promisor is not to be bound only in the future. He is bound from the time he makes the promise, and the title he passes vests subject to the condition. Any intermediate disposition of the title, made by the promisor before the happening of the condition, is subject to the condition. . . . The promisor, also, who agrees to convey an estate on a future contingency, is liable in damages if he makes his compliance with his promise impossible, or subjects the property to waste." And in § 551 he further says: "The same may be said of all contracts to be performed on the happening of a certain event. The contract binds from the time it is made, and ceases to bind on the nonoccurrence of a certain event, which is therefore, in this sense, a condition subsequent." To the same effect is Clark, Contr. Hornbook Series, p. 663, § 277.

If we were even mistaken in construing this contract as a conditional one, so as to bring it within the principles above laid down and within the condemnation of the 69 L. R. A.

statute in question, it unquestionably falls within the principle laid down by Wharton, thus: "The prohibition of a statute cannot be evaded by putting a contract in a shape which, while nominally not inconsistent with the statute, virtually contravenes its provisions. This has been frequently held with regard to stipulations evading usury statutes and with regard to assignments evading bankrupt laws. If a contract conflicts with the general policy and spirit of a statute governing it, it will not be enforced, although there may be no literal conflict."

1 Wharton, Contr. § 362. In *State ex rel. Matthews v. Forsythe*, 147 Ind. 466, 33 L. R. A. 221, 44 N. E. 593, it was said: "In chapter 4, § 1, of Maxwell on the Interpretation of Statutes, under the title of 'Construction to Prevent Evasion,' it is accordingly said, at pages 133 and 134: 'It is the duty of the judge to make such construction as shall suppress all invasions for the continuance of the mischief. To carry out effectually the object of a statute, it must be so construed as to defeat all attempts to do or avoid, in an indirect or circuitous manner, that which it has prohibited or enjoined. In fraudem legis facit, qui salvis verbis legis, sententiam ejus circumvenit; and a statute is understood as extending to all such circumventions, and rendering them unavailing. Quando aliquid prohibetur, prohibetur et omne per quod devenitur ad illud. When the acts of the parties are adopted for the purpose of effecting a thing which is prohibited, and the thing prohibited is in consequence effected, the parties have done that which they purposely caused, though they may have done it indirectly. When the thing done is substantially that which was prohibited, it falls within the act simply because, according to the true construction of the statute, it is the thing thereby prohibited. Whenever courts see such attempts at concealment 'they brush away the cobweb varnish,' and show the transaction in its true light. They see things as ordinary men do, and see through them. Whatever might be the form or color of the transaction, the law looks to the substance of it. In all such cases it is, in truth, rather the particular transaction than the statute which is the subject of construction; and, if it is found to be in substance within the statute, it is not suffered to escape from the operation of the law by means of the disguise under which its real character is masked.'" We are therefore of opinion that the contract set up in the second paragraph of the answer is in contravention of the statute, and hence, by force thereof, the contract so set up is null and void; and, that being so, said answer was bad and the circuit court did not err in

sustaining the demurrer thereto for want of sufficient facts.

It is complained, under the motion for a new trial, that the circuit court erred in excusing on its own motion the juror Overholser, who it is alleged was a competent juror, over appellant's objection. But it is not shown that the jury which was finally impaneled was not a fair and impartial jury. In such a case the matter is very much in the discretion of the trial court, and no error is committed where no injury results from the court's action in excusing the juror. *De Pew v. Robinson*, 95 Ind. 109. It is not even claimed that any injury resulted therefrom. We therefore conclude there was no error committed in excusing the juror.

It is further contended that the seventh item in the special verdict is not supported by the evidence. It reads thus: "We further find that, under the rules of the defendant company governing the operation of defendant's freight trains in cases where it became necessary for brakemen to go between defendant's cars, attached to the engine drawing the same, for the purpose of making couplings, it was the duty of the engineer in charge of the engine of said train, after receiving a signal from a brakeman, to stop the engine and train for the purpose of allowing such brakeman to pass between the cars thereof and make a coupling, to obey a signal and stop the engine and train, and so remain until receiving a signal from some member of the train crew to back or pull forward." Counsel say: "The evidence does not sustain this finding. There was no evidence of such a rule." The finding is not that there was such a rule, but that, "under the rules of the defendant," not rule, "it was the duty of the engineer" to do certain things. Those rules might have been such as were adopted by the company, or such as by long usage and custom had become understood as incumbent on appellant's servants. We think there was evidence sufficient to support this finding.

The tenth finding was objected to because the evidence on that branch of the verdict was not sufficient to sustain it, but there was evidence sufficient to support it, though there was strong conflicting evidence. We can only look to that part of the evidence that supports the finding.

It is also complained that the circuit court erred in refusing to require the jury to return to their room and insert in their special verdict certain facts specified. To have sustained the motion would have been an invasion by the court of the province of the jury to determine the facts. If a special verdict fails to find material facts, with-

in the issue, which were established by the evidence the remedy is not by a motion to coerce them into making such finding, but by a motion for a new trial by the party aggrieved. *Brazil Block Coal Co. v. Hoodlet*, 129 Ind. 327, 27 N. E. 741, and cases there cited; *Vinton v. Baldwin*, 95 Ind. 433, and cases there cited; *Lafayette v. Allen*, 81 Ind. 166, and cases cited.

Overruling appellant's objection to the question and answer of the witness Ballard is also urged as error. The appellee's counsel had asked the witness the question what danger there was to appellee's life at the time witness saw him, and he answered: "I considered him in a great deal of danger; a man continuing in that condition could not live many days." Appellee's counsel immediately withdrew the evidence, and the court, at the request of appellant's counsel, instructed the jury not to consider such evidence. There was no available error in the ruling.

Complaint is made of the third instruction given by the court: "That in estimating the plaintiff's damages it is proper . . . that you should take into consideration the plaintiff's physical and mental suffering." In *Wabash & W. R. Co. v. Morgan*, 132 Ind., at page 438, 31 N. E., at page 663, an instruction "that in making such estimate the jury should take into consideration appellee's physical and mental suffering if any were caused by and arising out of the injury," was upheld as not an "erroneous statement of the rule governing the assessment of damages contained in either of the instructions." There was no error in giving the instruction.

The fourth instruction is complained of, reading, as appellant's counsel say in their brief, thus: "The jury are instructed that if they find that the plaintiff had proved by a preponderance of the evidence the injuries he has sustained as charged in the complaint, then every particular and phase of the injury may enter into the consideration of the jury in estimating his damages, loss of time, with reference to his condition and ability to earn money in his business or calling, his loss from permanent improvement of his physical powers, his pain and suffering already endured, and that may be endured, from his injuries in the future, his personal disfigurement; and the jury should give the plaintiff such a sum as will compensate him for the injuries received, taking into consideration all the facts proved in the case." The appellee's counsel have copied the same instruction into their brief, except the word printed "improvement" in appellant's copy of the instruction is printed "impairment" in appellee's copy. Neither brief cites us to the place in the tran-

script where the instruction can be found, and we have spent some time hunting for it without success. Under such circumstances, we are justified in assuming that the word "improvement" in appellant's copy is a clerical or typographical error, and that the real instruction had the word "impairment" in it instead of the word "improvement," as set out in appellant's brief. Indeed, if the word "improvement" were in the transcript, instead of the word "impairment," it is so manifestly a clerical mistake in copying the instructions that we are authorized to read it "impairment" instead of

"improvement." *Landon v. White*, 101 Ind. 249; *Indiana, B. & W. R. Co. v. Dailey*, 110 Ind. 75, 10 N. E. 631. With that reading the instruction is correct. *Wabash & W. R. Co. v. Morgan*, 132 Ind. 438, 31 N. E. 663, 32 N. E. 85. We have thus patiently gone over all the rulings of the circuit court urged and properly presented here as error, and conclude that the circuit court did not err in overruling the motion for a new trial.

The judgment is affirmed.

Petition for rehearing overruled.

MINNESOTA SUPREME COURT.

Jacob SCHUS, *Respt.*,
v.

POWERS-SIMPSON COMPANY, *Appt.*

(85 Minn. 447.)

***1. Defendant is a corporation organized for the purpose of manufacturing and dealing in lumber;** buying, improving, selling, and dealing in real and personal property connected with its lumbering business; and, in addition thereto and in connection therewith, it owns and operates what is called a "logging railroad," which is equipped with four locomotives and a number of logging and box cars, used in carrying logs from the pinneries to the saw mills owned and operated by it. It does not follow the business of a common carrier of passengers and freight, the operation of the road being limited exclusively to its own private business; but its servants and employees engaged in the operation of its trains are exposed to the same dangers and risks as are employees and servants of railroad corporations engaged as common carriers. *Held*, that Gen. Stat. 1894, § 2701, known as the "fellow servant act," applies to defendant, and it is liable to an employee engaged in the operation of such railroad for injuries caused by the negligence of a co-employee or fellow servant.

2. In this action (one to recover damages for personal injuries received by a brakeman in coupling cars on defendant's said railroad) the evidence received on the trial tended to show that there was a general custom in respect to the operation of the road for the engineer, when cars being coupled came together, immediately to stop his engine and hold it stationary until signaled to again move it by the brakeman making the coupling. It further tended to show that, on the occasion complained of, this custom was not observed by defendant's engineer, in consequence of which plaintiff was injured. It is *held* that the evidence was sufficient to require the submission of the

case to the jury, and to sustain their verdict to the effect that such custom existed, and that the engineer's failure to follow and observe it at the time complained of was the proximate cause of plaintiff's injury.

3. Evidence examined and considered, and held to sustain the verdict of the jury to the effect that plaintiff was not guilty of contributory negligence, and did not assume the risks incident to making the coupling in question; also to sustain the verdict that plaintiff's cause of action was not settled and adjusted by an agreement between the parties made and entered into prior to the commencement of the action.

(February 21, 1902.)

A PPEAL by defendant from an order of the District Court for Hennepin County denying judgment *non obstante veredicto*, and denying a new trial after verdict in plaintiff's favor, in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Affirmed*.

The facts are stated in the opinion.

Messrs. Woods, Kingman, & Wallace, for appellant:

In order that plaintiff may recover he is bound to show facts and circumstances from which it can be ascertained with reasonable certainty what particular precaution defendant ought to have taken but did not.

Shearm. & Redf. Neg. 5th ed. § 57 p. 74. *Ellison v. Truesdale*, 49 Minn. 240, 51 N. W. 918; *Johnson v. Walsh*, 83 Minn. 74, 85 N. W. 910.

Plaintiff admits that he did not give the signal, which was the only way the engineer had of knowing when to stop, and which it was his duty to give.

Merritt v. Great Northern R. Co. 81 Minn. 496, 84 N. W. 321; *Ellison v. Truesdale*, 49 Minn. 240, 51 N. W. 918; 1 Shearm. & Redf. Neg. 5th ed. § 110, p. 170.

He must be held to have understood and

*Headnotes by Brown, J.

NOTE.—See preceding case and note thereto.
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appreciated the hazard of making this coupling, and hence, in attempting to make it, assumed all the risks incident thereto.

McLaren v. Williston, 48 Minn. 299, 51 N. W. 373; *Tennessee, Coal, I. & R. Co. v. Kyle*, 93 Ala. 1, 12 L. R. A. 103, 8 So. 764; *Georgia P. R. Co. v. Dooly*, 12 L. R. A. 342, and note, 86 Ga. 294, 12 S. E. 923; *Bailey, Master's Liability for Injuries to Servant*, pp. 150, 170; 1 Shearm. & Redf. Neg. 5th ed. § 185, p. 276; *Cooley, Torts*, pp. 550-553; *Wood, Mast. & S. § 214*, p. 673; *Scharenbroich v. St. Cloud Fiber-Ware Co.* 59 Minn. 116, 60 N. W. 1093; *Smith v. Tromanhauser*, 63 Minn. 98, 65 N. W. 144; *Anderson v. C. N. Nelson Lumber Co.* 67 Minn. 79, 69 N. W. 630; *Swanson v. Great Northern R. Co.* 68 Minn. 184, 70 N. W. 978; *Quick v. Minnesota Iron Co.* 47 Minn. 361, 50 N. W. 244; *Greene v. Minneapolis & St. L. R. Co.* 31 Minn. 248, 47 Am. Rep. 785, 17 N. W. 378; *Woods v. St. Paul & D. R. Co.* 39 Minn. 435, 40 N. W. 510; *Smith v. Winona & St. P. R. Co.* 42 Minn. 87, 43 N. W. 968; *Tuttle v. Detroit, G. H. & M. R. Co.* 122 U. S. 189, 30 L. ed. 1114, 7 Sup. Ct. Rep. 1166; *Southern P. Co. v. Seley*, 152 U. S. 145, 38 L. ed. 391, 14 Sup. Ct. Rep. 530.

Releases for torts stand on the same level as other contracts.

Och v. Missouri, K. & T. R. Co. 130 Mo. 27, 36 L. R. A. 455, 31 S. W. 962; *Pennsylvania R. Co. v. Shay*, 82 Pa. 198; *Squires v. Amherst*, 145 Mass. 192, 13 N. E. 609; *Christianson v. Chicago, St. P. M. & O. R. Co.* 67 Minn. 94, 69 N. W. 640.

Defendant does not own and operate a railroad in the sense that the word "railroad" is used in the statute in question.

23 Am. & Eng. Enc. Law, p. 400; *Shearm. & Redf. Neg. 5th ed. § 241c*, p. 444; *Lavallee v. St. Paul, M. & M. R. Co.* 40 Minn. 249, 41 N. W. 974; *Johnson v. St. Paul & D. R. Co.* 43 Minn. 222, 8 L. R. A. 419, 45 N. W. 156; *Kreuzer v. Great Northern R. Co.* 83 Minn. 385, 86 N. W. 413.

It is impossible that the legislature meant to include logging railroads under the term "railroads," because at the time this statute was passed there was not a logging railroad built in this state.

Funk v. St. Paul City R. Co. 61 Minn. 435, 29 L. R. A. 208, 52 Am. St. Rep. 608, 63 N. W. 1099; *State v. Duluth Street R. Co.* 76 Minn. 96, 57 L. R. A. 63, 78 N. W. 1032; *Fidelity Loan & T. Co. v. Douglas*, 104 Iowa, 536, 73 N. W. 1039; *Massachusetts Loan & T. Co. v. Hamilton*, 32 C. C. A. 46, 59 U. S. App. 403, 88 Fed. 588.

In order to ascertain the subject-matter, scope, and object of an enactment the interpreter should ascertain what is the mischief or defect it is intended to remedy.

23 Am. & Eng. Enc. Law, p. 336; *Beeson* 69 L. R. A.

v. Busenbark, 44 Kan. 669, 10 L. R. A. 839, 25 Pac. 48; *Ellington v. Beaver Dam Lumber Co.* 93 Ga. 53, 19 S. E. 21; *Railey v. Garbutt*, 112 Ga. 288, 37 S. E. 360; *McKnight v. Iowa & M. R. Constr. Co.* 43 Iowa, 406.

Mr. F. D. Larrabee, for respondent:

The defendant in this case, as to this plaintiff, is in truth and fact a railroad corporation.

McLaren v. Williston, 48 Minn. 299, 51 N. W. 373; *Funk v. St. Paul City R. Co.* 61 Minn. 435, 29 L. R. A. 208, 52 Am. St. Rep. 608, 63 N. W. 1099; *Mikkelsen v. Truesdale*, 63 Minn. 137, 65 N. W. 260; *Union Trust Co. v. Kendall*, 20 Kan. 515; *McKnight v. Iowa & M. R. Constr. Co.* 43 Iowa, 406; *Massachusetts Loan & T. Co. v. Hamilton*. 32 C. C. A. 46, 59 U. S. App. 403, 88 Fed. 588.

Because the cars were moved after the coupling was made, contrary to custom, it certainly was a question for the jury to say whether or not the engineer was negligent.

Kelly v. Southern Minnesota R. Co. 28 Minn. 98, 9 N. W. 588; *Kolsti v. Minneapolis & St. L. R. Co.* 32 Minn. 133, 19 N. W. 655; *O'Malley v. St. Paul, M. & M. R. Co.* 43 Minn. 289, 45 N. W. 440; *Larson v. St. Paul, M. & M. R. Co.* 43 Minn. 423, 45 N. W. 722; *Moran v. Eastern R. Co.* 48 Minn. 46, 50 N. W. 930; *Bergquist v. Chandler Iron Co.* 49 Minn. 511, 52 N. W. 136; *Flanders v. Chicago, St. P. M. & O. R. Co.* 51 Minn. 193, 53 N. W. 544; *Chicago, M. & St. P. R. Co. v. Carpenter*, 5 C. C. A. 551, 12 U. S. App. 392, 56 Fed. 451; *Nelson v. Southern P. Co.* 18 Utah, 244, 55 Pac. 364; *Pier v. Chicago, M. & St. P. R. Co.* 94 Wis. 357, 68 N. W. 464; *Chicago, M. & St. P. R. Co. v. O'Sullivan*, 143 Ill. 48, 32 N. E. 398; *Pennsylvania Co. v. McCormack*, 131 Ind. 250, 30 N. E. 27; *O'Mellia v. Kansas City, St. J. & C. B. R. Co.* 115 Mo. 205, 21 S. W. 503; *Whitsett v. Chicago, R. I. & P. R. Co.* 67 Iowa, 150, 25 N. W. 104.

Brown, J., delivered the opinion of the court:

This action was brought to recover damages for personal injuries alleged to have been caused by the negligence of defendant. Plaintiff had a verdict in the court below, and defendant appeals from an order denying its alternative motion for judgment notwithstanding the verdict, or for a new trial. The facts are as follows: Defendant is a corporation organized for the purpose of buying and selling timber land; cutting, hauling, and driving logs and timber; buying, improving, selling, and dealing in real and personal property; and the carrying on of such other business as is con-

veniently and necessarily connected therewith. In addition to its lumbering business, and in connection therewith, it owns and operates what is called a "logging railroad." Its line extends into the pine woods from Hibbing, in St. Louis county, the distance of about 29 miles, including spur tracks and branches. It is equipped with four locomotives and a number of logging and freight cars, which are used in carrying logs from the pineries to the sawmills owned and operated by it. It does not follow the business of a common carrier of passengers or freight, the operation of its road being limited exclusively to its own business. At the time complained of, plaintiff was in the employ of defendant upon this railroad as a brakeman, and was injured while coupling cars. The facts with respect to his injury, the manner in which it was received, and the evidence tending to show negligence on the part of the defendant will be stated further on in this opinion. Four principal questions are presented for our consideration: (1) Whether defendant is a railroad corporation within the meaning, or comes within the operation, of chapter 13, Laws 1887 (Gen. Stat. 1894, § 2701), known as the "fellow servant act;" (2) whether the evidence establishes negligence on the part of defendant, which was the proximate cause of plaintiff's injury; (3) whether plaintiff was guilty of contributory negligence; and (4) whether his cause of action for damages was settled and adjusted, and defendant released and discharged therefrom, by an agreement made and entered into between the parties prior to the commencement of the action.

1. It is contended that defendant is not a railroad corporation, within the intent and meaning of chapter 13, *supra*, and that in consequence it is not liable to one of its servants for injuries caused by the negligence and carelessness of a fellow servant. It is urged that the statute does not apply to defendant, for the reason that it was not organized as a railroad corporation, and for the further reason that it is not engaged as a common carrier of passengers and freight; its railroad business being confined exclusively to its own private affairs. The statute provides, generally, that every railroad corporation owning or operating a railroad in this state shall be liable for all damages sustained by an agent or servant thereof by reason of the negligence of another agent or servant; but railroads under construction and not open to public use are excepted from the operation of the act. The statute has been before the court repeatedly with respect to its validity and its application to particular servants and employees, and has been sustained, not as a law apply-

ing exclusively to railroad corporations as a class,—for, if that were its purpose, it would, as intimated by Judge Mitchell in *Johnson v. St. Paul & D. R. Co.* 43 Minn. 222, 8 L. R. A. 419, 45 N. W. 156, be unconstitutional and void as class legislation,—but as applying to employers whose servants and employees are exposed to the peculiar hazards and dangers incident to the operation of railroads. In that case the court said: "If a distinction is to be made as to the liability of employers to their employees, it must be based upon a difference in the nature of the employment, and not of the employers. One rule of liability cannot be established for railway companies, merely as such, and another rule for other employers, under like circumstances and conditions." Within the reasoning of that decision, and other cases in this court (*Smith v. St. Paul & D. R. Co.* 44 Minn. 17, 46 N. W. 149; *Lavallee v. St. Paul, M. & M. R. Co.* 40 Minn. 249, 41 N. W. 974; *Mikkelsen v. Truesdale*, 63 Minn. 137, 65 N. W. 260). the test in interpreting and construing this statute is not whether the corporation engaged in operating the railroad was organized as a railroad corporation, but whether the road being operated is a railroad, within the ordinary meaning of the term, in and about the operation of which employees are exposed to those dangers and risks against the consequences of which the legislature intended to provide. In *Sutherland, Stat. Constr.* 218, it is said to be indispensable to a correct understanding of a statute to inquire what is the subject of it,—what object is intended to be accomplished by it. When the subject-matter is once clearly ascertained, and its general intent, a key is found to all its intricacies. General words may be restrained to it, and those of narrower import may be expanded to embrace it, to effectuate that intent. When the intention can be collected from the statute, words may be modified, altered, or supplied so as to obviate any repugnancy or inconsistency with such intention. The subject-matter of the statute under consideration, and its intent and purpose, were to protect employees engaged in a dangerous and hazardous employment; and, within the decisions cited, the character of the employer is not of controlling importance. The statute is to be given, if not a liberal, at least a reasonable, interpretation, and one that will carry into effect the intent of the legislature. If the character of the employer, within the meaning of the statute, is not important, and the nature of the employment is the test to be applied in construing the statute, the expression "any railroad corporation engaged in the operation of a railroad" should, within the rule laid

down by Sutherland. be enlarged and expanded so as to include any person, company, or corporation engaged in operating a railroad, incident to which operation are the dangers and hazards from which the legislature intended to protect the employees. *Winters v. Duluth*, 82 Minn. 127, 84 N. W. 788. Defendant was not organized as a railroad corporation, it is true; but it is conceded that it is operating a line of railroad equipped with engines and cars, the operation of which, so far as concerns the running of its trains, is identical with ordinary railroads, except that it is in the interests of its own private affairs. Every purpose intended to be subserved by the statute applies to it. Its servants and employees in the operation of its trains are exposed to the same dangers and hazards, if not greater, as employees of ordinary railroads; and to hold that it does not come within the statute would, in our judgment, be illogical and out of harmony with the prior decisions of the court, against the manifest intent of the legislature, and a cramped and unnecessarily restricted interpretation of the law. The mere fact that it is called a "logging railroad," and came into existence since the passage of that act, is by no means decisive of the question. It is a general rule of statutory construction that legislative enactments in general and comprehensive terms, prospective in operation, apply alike to all persons, subjects, and business within their general purview and scope coming into existence subsequent to their passage. *McAunich v. Mississippi & M. R. Co.* 20 Iowa, 338. And within this rule, even though a defendant is engaged in operating a "logging railroad" only, and exclusively in the interests of its private affairs; and though such railroads were not known at the time of the passage of the statute, and consequently not then in the contemplation of the legislature,—the operation of its road, in respect to the dangers and hazards to which its employees are exposed, brings it squarely within the spirit and purpose of the law; and it must, to effectuate fully the intention of the legislature, be held to be within its scope and operation. In the case of *Mikkelsen v. Truesdale*, 63 Minn. 137, 65 N. W. 260, it was held that the statute applies to a receiver engaged in operating a line of railroad as the representative of the court, in the interests of bondholders and creditors. We are unable to point out any logical distinction between a receiver engaged in operating a railroad and a lumber company similarly engaged, in so far as applicable to this statute. A like conclusion was reached in *Wall v. Platt*, 169 Mass. 398, 48 N. E. 270,—a case involving a similar statute. In *Daniels v. Hart*, 118 Mass. 543, mortgagees

in possession of a railroad and operating it were held to be within the meaning of the statute. These decisions are in line with sound reasoning and the spirit and purpose of such statutes. It was held in *Funk v. St. Paul City R. Co.* 61 Minn. 435, 29 L. R. A. 208, 52 Am. St. Rep. 608, 63 N. W. 1099, that the statute did not apply to street railways. But the reasons for the statute do not in any essential degree apply to such railways. Employees on such roads are not exposed to such hazards, risks, and dangers as are the employees of railroad corporations proper. The spirit and purpose of the statute must be looked to in determining its scope and application; and, as the spirit and purpose of this law was the protection of employees engaged in a hazardous and dangerous work, though the literal language thereof limits its operation to railroad corporations, we hold that it applies to any corporation or person engaged in operating a line of railroad, incident to which operation are the dangers and hazards to employees the legislature intended to provide against.

2. It is contended by appellant that there is no evidence sufficient to support the finding of the jury that plaintiff's injury was caused by defendant's negligence. The accident occurred in the nighttime, when it was very dark. The employees in charge of the logging train had been engaged in hauling car loads of logs from spur tracks to the main track of defendant's road, and plaintiff was injured in coupling two of the cars. The cars so coupled by him were loaded with logs which were so placed thereon that the ends projected over the ends of the cars to such an extent that the first effort to couple them failed, the ends of the logs coming together and preventing the coupling. The impact, however, drove the logs back on the respective cars, so that at the next attempt to couple the drawbars came together, and the coupling was made. The evidence tends to show that it was customary, in making couplings of this kind, for the engineer, when the cars being coupled came together, to stop his engine immediately, and not move it until signals were received from the person making the coupling, and after he had come from between the cars. This custom and practice are not disputed. There is evidence, also, that the brakeman making the coupling usually signaled the engineer for the purpose of guiding the movement of the engine as it approached the car to which the coupling was to be made, and that just prior to the time the cars came together a signal would be given by the brakeman to stop the engine. No such signal was given on this occasion; but plaintiff relies for re-

covery, not upon a failure to obey that signal, but upon a failure on the part of the engineer to observe the usual custom in respect to stopping the engine and train at the time the coupling is made. It is not disputed in the evidence but that the engineer is able to tell from the jar of the train when the cars come together, and, in view of the fact that it appears from his testimony that when they came together on this occasion he did immediately stop his engine, it is not important that the usual signal to stop was not given. The custom being established, it is clear that plaintiff had the right to rely upon its observance, and the failure on the part of the engineer to do so was negligence. *Romic v. Chicago, R. I. & P. R. Co.* 62 Iowa, 167, 17 N. W. 458; *Hooper v. Great Northern R. Co.* 80 Minn. 400, 83 N. W. 440. Besides, it is not claimed that the failure to give the stop signal was the cause of the continued movement of the train after the coupling was made; but it is insisted by appellant that the engine was in fact stopped, and did not move a greater distance than 2 or 3 feet. It is contended by plaintiff that at the time he entered between the cars to make the coupling, instead of observing the usual custom and rule as to stopping the engine when the coupling is made, the engineer continued to move and push the cars forward, in consequence of which plaintiff was injured. Because of the fact that the logs extended over the ends of the cars so being coupled, plaintiff could not enter between them in an erect position, but was compelled to do so in a stooping position. To make the coupling was a dangerous undertaking. He knew of the situation and the manner in which he would be required to go between the cars, and before doing so he called the engineer's attention to the fact, and requested him to move his engine back carefully, so as to avoid any danger. As stated, the specific charge of negligence is that the engineer failed to observe the usual custom in respect to stopping the engine at the time the coupling was made. On this theory the case was sent to the jury. The evidence on the part of the defendant tends to show not only that no signal was given to the engineer to stop his engine at the time plaintiff entered between the cars to make the coupling, but that the engineer did in fact stop it, by shutting off steam and reversing the machinery. It is claimed that the evidence is conclusive that the engineer exercised care and prudence, and was guilty of no failure or neglect in the respects contended for by plaintiff. If this were true, defendant should have judgment; but a careful examination of the evidence satisfies us that a case was fairly made for the jury, and their verdict in

plaintiff's favor cannot be disturbed. Plaintiff's evidence to the effect that the engineer did not stop the engine and cars at the time the coupling was made is corroborated by undisputed evidence tending to show that fact. It appears that there were not more than four cars attached to the engine at the time the coupling was made, and five after it was made. It further appears that, just before making this coupling, plaintiff and his fellow brakeman blocked the wheels of the fifth car with a large stick of timber or wood, about 6 inches in thickness; the testimony is that (and we find nothing in the record to dispute it), after the coupling had been made, the fifth car, to use the language of the witness, "passed clear over the blocks." It is the claim of plaintiff that the train proceeded a distance of a car length and a half after the coupling was made. If defendant's testimony that the engineer did in fact bring the engine and cars to a standstill at the time the coupling was made be true, it is not very clear how the fifth car could have passed over the blocking. The fact that it did tends to show, and to corroborate plaintiff's assertion, that the engine was not stopped. Again, plaintiff was picked up after his injury at the side of the track, about the center of the third car from the engine, and he testified that the coupling was made between the fourth and fifth cars. It is not seriously controverted that plaintiff was found near the track at about the center of the third car though it is claimed by defendant that the coupling was made between the third and fourth. If plaintiff's testimony that the coupling was made between the fourth and fifth cars is true, the fact that he was found immediately after the accident at about the center of the third car tends to corroborate his claim that the engine was not stopped when the coupling was made, but continued to move forward the distance of a car or more. The truthfulness of the several witnesses was for the jury to determine, and we are unable to see our way clear to declare, as a matter of law, that the evidence is conclusive against the contention that the engineer was negligent.

3. It is claimed that plaintiff was guilty of contributory negligence, and that he assumed the risks incident to making the coupling in question. It is true, as a general rule, that, if a person by his own carelessness contributes to his injury, he cannot recover. It is also true that a railroad employee assumes all the ordinary risks and dangers of his employment; but this assumption of risks extends only to such as are, in point of fact, ordinary risks of the employment. He does not assume risks and dangers resulting from the negligence of

his fellow servants. The question of plaintiff's contributory negligence is disposed of, we think, by the decision in *Corbin v. Winona & St. P. R. Co.* 64 Minn. 185, 66 N. W. 271,—a very similar case. There the car was loaded with iron rails, and, as here, they projected over the end of the car; and, in order to make the coupling, it was necessary that the brakeman stoop over in going between the cars for that purpose. He knew the situation, and the condition in which the cars were loaded; and the court held that he was not guilty of contributory negligence, as a matter of law, but that the question was one of fact for the jury to determine. That case is on all fours with the case at bar, so far as this question is concerned, and is decisive and controlling.

4. About a month after plaintiff received his injury, and while he was still at the hospital, an agent of the defendant called upon him and paid him the sum of \$75, obtaining therefor a written release of defendant of all claims for damages arising in plaintiff's favor by reason of this accident. It is claimed by defendant that this payment was made and accepted in full settlement of plaintiff's claim, that an agreement to that effect was entered into by plaintiff understandingly, and that he was fully apprised of the contents of the written release before it was signed by him. Plaintiff claims that the payment to him was stated at the time to be a donation by defendant; that nothing was said to him about the settlement of his claim for damages; that his signature to the written release was obtained by the fraudulent representations of defendant's agent; that he cannot read the English language, and did not read the paper or release

signed by him, but relied wholly upon the statements of defendant's agent as to its contents. A similar situation was presented in the case of *Christianson v. Chicago, St. P. M. & O. R. Co.* 67 Minn. 94, 69 N. W. 640. It was there held, upon evidence similar to that presented in the record in this case, that the question whether the money was paid in satisfaction of plaintiff's damages, and whether the release was signed for the purpose of discharging the railroad company from liability, or whether it was procured by fraud on the part of the company's agent, were questions for the jury to determine. The verdict in that case was to the effect that the release was obtained by fraud, and this court sustained it. We discover no reason, after a careful reading of the evidence, for disturbing the finding of the jury in this case, though there are some items of evidence which tend strongly to corroborate defendant's contention, but it is by no means conclusive in its favor. *Mullen v. Old Colony R. Co.* 127 Mass. 86, 34 Am. Rep. 349. There are circumstances, too, tending to corroborate plaintiff's contention that the money was paid as a donation. If defendant did not deem itself liable to plaintiff on account of his injuries, no reason is apparent why it should donate to him any sum whatever; and, on the other hand, if, in its opinion, a liability in fact existed, and one which, in justice, it ought to settle, it is fair to assume, as the jury probably did, taking into consideration the nature and extent of plaintiff's injuries, that it would have offered him considerably more than the very nominal sum of \$75.

Our conclusion is that the verdict of the jury must be sustained. *Order affirmed.*

TENNESSEE SUPREME COURT.

Barney BLUE, Appt.,

v.

L. F. GUNN.

(.....Tenn.....)

Commercial finishing material, such as doors, mantels, casings, etc., which have

been purchased for an unfinished building and placed therein, but not affixed thereto, does not pass by a sale of the real property under a mortgage foreclosure, where it is not mentioned or deemed a part of the sale.

(May 1, 1905.)

NOTE.—Are things placed on land with the intention of annexing them fixtures, where they are never actually attached?

I. Introduction, 892.

II. Actual annexation, 893.

III. Constructive annexation, 893.

IV. Mere intention to annex.

a. Machinery or parts thereof, 894.

b. Materials for use, repair, or reconstruction of railroads, 897.

c. Building materials, 898.

d. Fencing materials, 901.

e. Fertilizers, 902.

V. Conclusion, 902.

69 L. R. A.

I. Introduction.

It is not intended in this note to include all of the cases bearing upon the question whether an article or thing may become a fixture without actual annexation to real property, as it has generally arisen where the chattels in dispute were in place and actually in use, or, at least, ready for the work, or business, or purpose for which they were designed and made, although not actually annexed or let into the real property. A few leading cases on the general subject will be referred to where it is thought they will be of some help on the point defined in the subject of this note. Cases in which the

APPEAL by plaintiff from a judgment of the Circuit Court for Lawrence County in favor of defendant in an action brought to recover the value of certain building materials alleged to have been wrongfully converted by defendant to his own use. *Reversed.*

The facts are stated in the opinion.

Messrs. Robert B. Williams and L. B. White, for appellant:

The property did not pass under the mortgage.

11 Am. & Eng. Enc. Law, pp. 519-521, note; *Topliff v. Topliff*, 122 U. S. 121, 30 L. ed. 1110, 7 Sup. Ct. Rep. 1057; *Citizens' Fire Ins. Security & Land Co. v. Doll*, 35 Md. 89, 6 Am. Rep. 360; *Philadelphia, W. & B. R. Co. v. Trimble*, 10 Wall. 367, 19 L. ed.

948; *Fogg v. Middlesex Mut. F. Ins. Co.* 10 Cush. 337; *Wromp. v. Moses*, 3 Baxt. 467; *Kirtland v. Montgomery*, 1 Swan, 452; *Jones v. Richardson*, 99 Tenn. 614, 42 S. W. 440; *Philadelphia Mortg. & T. Co. v. Miller*, 20 Wash. 607, 44 L. R. A. 560, 72 Am. St. Rep. 138, 56 Pac. 382.

There is no ambiguity in said mortgage as to its meaning, and no meaning can be read into it, as its terms are plain.

11 Am. & Eng. Enc. Law, p. 519, note 1, p. 520, notes 1, 2, ¶ 2; *Chicago v. Sheldon*, 9 Wall. 50, 19 L. ed. 594; *Stapenhorst v. Wolff*, 3 Jones & S. 25; *Vinton v. Baldwin*, 95 Ind. 433.

Simply being stored on the mortgaged premises, though part of the property may have been used in the building, is not a

issue is whether mechanics' liens reach things not yet annexed to the freehold are omitted, as they turn upon the application of special statutes, rather than upon the law of fixtures.

II. Actual annexation.

In *Capen v. Peckham*, 35 Conn. 88, the court says the great weight of authority is in favor of the doctrine that to constitute a fixture it is necessary that the article should be annexed to the freehold, as the name itself imports; but that there is great diversity of opinion in relation to the degree of annexation which is essential for this purpose.

In *Williamson v. New Jersey Southern R. Co.* 29 N. J. Eq. 311, it is stated that the mere intention of the parties to make a chattel a part of the freehold does not make it a fixture; that to accomplish that result there must be an actual annexation to the freehold, though the strength of the union is not material if in fact it be annexed; that the intent of the party affixing it is only important on the question whether he intended to make the chattel so annexed a temporary or a permanent accession to the freehold.

The rule that actual annexation is necessary before a chattel can be turned into realty is also laid down in *Brown v. Lillie*, 6 Nev. 244. After referring generally to the cases holding that movables of a certain class may be constructively annexed to the realty, the court says: "We do not wish to be understood as indorsing these authorities, except so far as they hold that actual annexation to the soil is necessary. All the cases deserving consideration certainly make that an essential requisite, while others not only require an actual annexation, but something in addition thereto."

And in *Wolford v. Baxter*, 33 Minn. 12, 53 Am. Rep. 1, 21 N. W. 744. It is stated that the authorities, while not agreeing as to the necessity for, or the degree of importance to be attached to the fact of, actual physical annexation, yet that they generally unite in holding that, to constitute a fixture, the thing must be of an accessory character, and must be in some way in actual or constructive union with the principal subject, and not merely brought upon it. "To make a fixture," says the court, "it must not merely be essential to the business of the structure, but it must be attached to it in some way; or, at least, it must be mechanically

fitted so as, in ordinary understanding, to constitute a part of the structure itself. It must be permanently attached to, or the component part of some erection, structure, or machine which is attached to the freehold, and without which the erection, structure or machine would be imperfect or incomplete."

III. Constructive annexation

The criterion of an immovable fixture is the united application of these three requisites: (1) Real or constructive annexation of the article in question to the freehold; (2) appropriation or adaptation to the use or purpose of that part of the realty with which it is connected; (3) the intention of the party making the annexation to make the article a permanent accession to the freehold. *Binkley v. Forkner*, 117 Ind. 176, 3 L. R. A. 33, 19 N. E. 753.

Where the first of these three tests may be satisfied by constructive annexation, the courts are not in harmony as to just how far the doctrine should be carried.

A thing may be said to be constructively attached to realty where it has been annexed, but is separated for a temporary purpose, as in the case of a millstone removed for the purpose of being dressed, or where the thing, although never physically fixed, is an essential part of something which is fixed; as in the case of keys to a door, or the loose cover of a kettle set in brick work. *Wolford v. Baxter*, 33 Minn. 12, 53 Am. Rep. 1, 21 N. W. 744.

Articles held to be constructively annexed are of that class which, although movable, and purely personal property in themselves, yet form a part of, or are essential to the completion of, something which is actually fastened to the soil. As articles embraced in this class, may be mentioned, the doors, windows, locks, keys, rings of a house, and an ordinary Virginia rail fence. *Brown v. Lillie*, 6 Nev. 244.

In *Williamson v. New Jersey Southern R. Co.* 29 N. J. Eq. 311, it is stated that cases of what are called constructive annexation are only apparent exceptions to the general rule requiring actual annexation. The instances of constructive annexation, says the court, such as keys, doors, and windows of a house removed for a temporary purpose, a millstone taken out of the mill to be picked, the saws and leather belting taken to be repaired or laid aside for future use, and the like, are all cases where the chattel,

sufficient altering of its property nature as to convert it into a fixture, or into realty.

8 Am. & Eng. Enc. Law, pp. 41, 43; *Cubbins v. Ayres*, 4 Lea, 329.

Mere intention to put this material into this building without doing so is not sufficient to convert it from a chattel into a fixture.

Wolford v. Baxter, 33 Minn. 12, 53 Am. Rep. 1, 21 N. W. 744; *Arnold v. Crowder*, 81 Ill. 56, 21 Am. Rep. 260; *Treadway v. Sharon*, 7 Nev. 37.

Mr. W. R. King, for appellee:

Nothing but a description of the lot or parcel of land was necessary to carry with it all the improvements on the land, and the appurtenances on the land thereunto belonging.

Shannon's Code, § 3680; *Daly v. Willis*, 5 Lea, 104.

The most controlling test of the question whether property connected with real estate is to be deemed realty or a mere chattel, removable at the pleasure of the owner; is the intention and purpose of the erection.

Johnson v. Patterson, 13 Lea, 631; *McDavid v. Wood*, 5 Heisk. 95; *Hopewell Mills v. Taunton Sav. Bank*, 150 Mass. 519, 6 L. R. A. 249, 15 Am. St. Rep. 235, 23 N. E. 327; *Atchison, T. & S. F. R. Co. v. Morgan*, 42 Kan. 23, 4 L. R. A. 284, 16 Am. St. Rep. 471, 21 Pac. 809.

This material had been purchased, together with other material, for the express pur-

pose of completing the building, and the material had actually been deposited in the building for that purpose at the time of the execution of the trust deed under which the property was sold; and part of it had been used, and was being used, in furnishing the house when the trust deed was executed.

Plaintiff and wife, in the trust deed, expressly covenanted to keep improvements in a good state of repair and preservation. Plaintiff moved out and left this material in the building.

In determining what is a fixture the notion of physical attachment is exploded. It is now to be determined by the character of the act by which the structure is put in place, the policy of the law connected with its purpose, and the intention of those concerned.

Meigs's Appeal, 62 Pa. 28, 1 Am. Rep. 372. Constructive annexation is sufficient.

13 Am. & Eng. Enc. Law, 2d ed. p. 605, note 3.

Articles placed on the ground for the purpose of annexation at once become part of the realty, and will pass as such.

Patton v. Moore, 16 W. Va. 428, 37 Am. Rep. 789; *McFadden v. Crawford*, 36 W. Va. 671, 32 Am. St. Rep. 894, 15 S. E. 408; *Hackett v. Amsden*, 57 Vt. 432; *Conklin v. Parsons*, 2 Pinney, 264; *Palmer v. Forbes*, 23 Ill. 301; *McLaughlin v. Johnson*, 46 Ill. 163; *Daniel v. Weaver*, 5 Lea, 393.

by actual annexation, was once part of the realty, and had been detached for temporary purposes without the intention to sever it from the freehold. Having once been a part of the realty, removal temporarily without intent to sever permanently does not reconvert the chattel into personalty, and destroy its character as a fixture.

The following things have been declared fixtures, although not actually annexed to the freehold: Loom beams in a cotton mill, which are essential parts of the looms,—*Hopewell Mills v. Taunton Sav. Bank*, 150 Mass. 519, 6 L. R. A. 249, 15 Am. St. Rep. 235, 23 N. E. 327; ice in an ice house on premises sold for hotel purposes,—*Hill v. Mundy*, 89 Ky. 36, 4 L. R. A. 674, 11 S. W. 956, detachable chain, which was part of the machinery of a sawmill,—*Farrar v. Stackpole*, 6 Me. 154, 19 Am. Dec. 201; a hayfork, which was part of a plant consisting of a track, a truck, pulleys, and the fork, the track being attached to the realty,—*McCarthy v. McCarthy*, 20 Can. Law Times, 211; machinery, or parts thereof, temporarily severed, but intended to be reannexed to the freehold,—*Wistow's Case of Gray's Inn*, 14 Hen. VIII. 25 b, Cited in report of *Liford's Case*, 11 Coke, 50b; *Grant v. Wilson*, 17 U. C. Q. B. 144; *Wadleigh v. Janvrin*, 41 N. H. 503, 77 Am. Dec. 780; *Security Co. v. Security Co.* 13 Montg. Co. L. Rep. 126; *Voorhis v. Freeman*, 2 Watts & S. 116, 37 Am. Dec. 490, *infra*; *Pyle v. Pennock*, 2 Watts & S. 390, 37 Am. Dec. 517, *infra*; materials from a building which has been torn down, where they are intended to be used in

rebuilding,—*Moore v. Cunningham*, 23 Ill. 328; *Beard v. Duralde*, 23 La. Ann. 284; fence rails or materials accidentally or temporarily detached, but intended to be reannexed to the land,—*Goodrich v. Jones*, 2 Hill, 142; *McLaughlin v. Johnson*, 46 Ill. 163; *Hannibal & St. J. R. Co. v. Crawford*, 68 Mo. 80; hop poles taken down for the purpose of gathering the crop, and piled up with the intention of being used over again,—*Bishop v. Bishop*, 11 N. Y. 123, 62 Am. Dec. 68; (but not as between tenant and grantee of landlord where the poles were put up by tenant for his temporary use. *Wing v. Gray*, 36 Vt. 261); a bell taken from a belfry of an old church, set up on a temporary frame on the lot, and intended to be placed in the tower of a new building,—*Congregational Soc. v. Fleming*, 11 Iowa, 533, 79 Am. Dec. 511; the rolling stock of a railroad,—*Palmer v. Forbes*, 23 Ill. 301. *infra*; *Titus v. Mabee*, 25 Ill. 257; *Michigan C. R. Co. v. Chicago & M. L. S. R. Co.* 1 Ill. App. 399; although the weight of authority as to this last-named class of property is the other way. For cases holding the contrary rule, see *Williamson v. New Jersey Southern R. Co.* 29 N. J. Eq. 311, *supra*; *Randall v. Elwell*, 52 N. Y. 521, 11 Am. Rep. 747; *Hoyle v. Plattsburgh & M. R. Co.* 54 N. Y. 315, 13 Am. Rep. 595; *Coe v. Columbus P. & I. R. Co.* 10 Ohio St. 372, 75 Am. Dec. 518.

IV. Mere intention to annex.

a. Machinery or parts thereof.

The cases are comparatively few in which the

McAlister, J., delivered the opinion of the court:

The question to be solved on this record is whether or not certain doors, mantels, casings, columns, etc., deposited in a building for the purpose of annexation, but which, as a matter of fact, were never physically attached to the building, passed to the purchaser under a mortgage sale of the premises.

The facts revealed in the record are that plaintiff and wife on the 17th day of June, 1901, executed a deed of trust on certain real estate to James T. Dunn, trustee, to secure an indebtedness to one D. E. Rose, for the sum of \$1,000. There was a foreclosure of this trust deed, and the property was purchased by M. S. McDougal for the sum of \$2,100. The latter sold the property in a short time thereafter to the defendant, L. F. Gunn. It appears that when the property was first mortgaged a house had been erected upon the premises, which was not entirely finished. Prior to the sale by the trustee, the plaintiff mortgagor had bought certain finishing material, and deposited it in a room of the building on the second floor. The material consisted of doors, mantels, casings, columns, corner beads, etc., which had been ordered with the intention of being used in this house, but none of it was attached in any way to the building.

It further appears that this finishing ma-

terial was not especially designed for that particular house, but could be utilized in any other residence. The plaintiff lived on the property at the time the trust deed was executed, and continued to occupy it until after the foreclosure sale. It further appears that in the deed from the trustee to the purchaser said material was not mentioned, nor was it mentioned in the trustee's advertisement of the foreclosure sale. There is evidence tending to show that plaintiff at all times claimed this material, and after the first sale gave notice to the purchaser, McDougal, that he claimed it. It is also shown that he notified the trustee before the sale not to sell this material, and claimed it as his property. It further appears that, about a year after L. F. Gunn went into possession of the premises under his purchase from McDougal, he used said material which he found stored in the building for the purpose of completing it. Thereupon the plaintiff, Barney Blue, who was the original mortgagor, and had purchased this material and left it in the building, brought suit to recover the sum of \$148, the value of said material. There was a verdict and judgment in the court below in favor of the defendant. The plaintiff appealed and has assigned errors.

The disputed question of law is whether said material passed, under the mortgage

attempt has been made to have movable articles declared fixtures because of mere intention to annex them to the freehold when they have never been actually attached, as was done in *BLUE v. GUNN*, and *BYRNE v. WERNER*. This has been termed mere ideal annexation, and, if it may be said to be a species of constructive annexation, it marks the utmost limit that doctrine has reached.

The roller-mill cases have furnished an interesting contribution to the subject. In *Voorhis v. Freeman*, 2 Watts & S. 116, 37 Am. Dec. 490, the question was whether a number of detached rolls which were part of the machinery of an iron rolling mill were fixtures. The rolls included among their number several duplicates but all of them had at one time or another been in actual operation, so that it was impossible to say which were proper members of the set and which were supernumeraries. "But even if that could be told," says the court, "all might, nevertheless, be deemed a part of the mill, seeing that they are often broken, and cannot be instantly replaced if they are not kept ready on hand." It was held that even the duplicates were part of the realty. The court gives the following curious reason as the ground for its decision: "In Pennsylvania, where a statute directs that real estate shall not be sold on execution before the rents, issues, and profits shall have been found by an inquest insufficient to satisfy the debt in seven years, not only might this conservative provision be evaded, but a cotton spinner, for instance, whose capital is chiefly invested in loose machinery, might be

suddenly broken up in the midst of a thriving business, by suffering a creditor to gut his mill of everything which happened not to be spiked and riveted to the walls, and sell its bowels, not only separately, but piecemeal."

This is perhaps the first instance, says the court, in *Teaff v. Hewitt*, 1 Ohio St. 530, 59 Am. Dec. 634, *supra*, in which movable property was, by constructive annexation, adjudged parcel of the realty for the avowed reason that it ought to be placed beyond the convenient reach of creditors. Nevertheless a similar reason was advanced in the case of *Patton v. Moore*, 16 W. Va. 428, 37 Am. Rep. 789.

In *Pyle v. Pennock*, 2 Watts & S. 390, 37 Am. Dec. 517, extra rolls of an iron rolling mill, some of which were in housings and some of which had been used, but had been removed from buildings in which they had been accustomed to run, and were not in any way connected therewith, were held to be part of the realty. It does not appear from the report of this case whether any of the detached rolls in question had never been fitted or used in the mill.

In the later case of *Johnson v. Mehaffey*, 43 Pa. 308, 82 Am. Dec. 568, the issue was squarely presented, and it was held that rolls cast for a rolling mill and paid for and delivered beside it, where they had lain for two or three years in a rough, unfinished state, did not pass on a sheriff's sale of the realty. The court said: "Do the rolls go with the mill to the purchaser? The test question is, Were they elementary parts of the mill at the time of the sale? And, as matter of fact, it is quite plain that they were

sale, as fixtures, or whether it remained the personal property of the original mortgagor.

As already stated, said material was not mentioned in any of the various conveyances of the property, and there was no physical attachment of said material to the building; and, while this material was originally purchased to be affixed to this building, it was commercial finishing, carried in stock by dealers, and could have been used on other buildings.

While the question thus presented is of first impression in this state, so far as we are advised, it seems to have been settled as a matter of legal controversy in many other states. The question of what constitutes a fixture has usually arisen in cases where the article, appurtenance, or material has been affixed to the freehold, and the question for determination in that class of cases was whether the fixture could be detached from the freehold; the solution of that question being dependent generally upon the intention of the parties in annexing it, and whether the right of removal had been reserved. This phase of the question was fully considered by this court at the present term in the case of *Union Bank & T. Co. v. Fred W. Wolf Co.* 86 S. W. 310, in an elaborate opinion by Judge Neill.

But, as already observed, the question presented by this record is whether an article which has been deposited upon the premises with a view of annexation, and for the pur-

pose of finishing a building, thereby becomes a part of the realty, in such a sense that it passes under the deed to the purchaser.

The definition of a fixture usually given is, "An article which was a chattel, and which, by being physically annexed or affixed to the realty, becomes accessory to it, and a part and parcel of it." 13 Am. & Eng. Enc. Law, 2d ed. p. 596.

It thus appears that annexation is the controlling element in the very definition of a fixture, and we find, on examination, that the overwhelming weight of authority in this country is that the physical annexation of a chattel to the realty is necessary in order to render it a part of the realty. See cases cited in 13 Am. & Eng. Enc. Law, 2d ed. p. 600.

But the question as to the necessity of actual attachment has also arisen as to articles which have not been annexed to the land, but have merely been brought on or near to the land with the intention of annexing them. The great weight of authority is that such articles are still to be considered as chattels. Rails lying on the land, and not yet placed in a fence, have been held to be personalty. *Thweat v. Stamps*, 67 Ala. 96; *Robertson v. Phillips*, 3 G. Greene, 220; *Harris v. Scoovel*, 85 Mich. 32, 48 N. W. 173. So of lumber intended for a building. *Carlin v. Babbitt*, 58 N. H. 579. So windows and window blinds made to be used in a house, but not actually put in place and

not; for the mill had always run without them. No doubt they were intended to be made a part of the mill; but we do not see how we can take the intention, without fact, in order to declare what constitutes the mill. . . . And, if mere intention could affix such articles to the realty, then a mere change of intention would unfix them, or prevent their becoming affixed, and we should thus be without any rule at all to guide us. Besides, it is rather a contradiction in terms to say, at the same time, that they are parts of the structure, and are intended to be made so. That these rolls will fit no other mill does not make them part of this one, or prove them so. . . . The rolling mill, consisting of all its constituent parts, as it was actually constructed and used at the time of the sale, is all that passed by the sale; and therefore these rolls were not included."

The two earlier cases in the state were not referred to in the opinion.

So, in England loose duplicate rolls of a fixed rolling mill machine and detached rolls of different sizes for use in the machine, and which had been actually fitted to it, are essential parts of the machine; but rolls that have never been used in, or fitted to, the machine, which require something more to be done to them before they are fitted, are not essential parts of it. *Ex parte Astbury*, L. R. 4 Ch. 630.

As to other machinery, it was held, in *Patton v. Moore*, 16 W. Va. 428, 37 Am. Rep. 789, that an engine and boiler, bought by the owner of a mill, and hauled into the yard with the bona fide intention of attaching them to the

mill, and which were necessary for the purpose for which they were to be used, must be regarded as part of the realty, and not liable to the levy of an execution as personal property. The reason given for the decision was that persons involved in any degree would not have much encouragement to erect permanent improvements; that they might have all their arrangements made to build, their contracts made, the material all on the ground, and that the whole scheme might then be frustrated, and irreparable loss be inflicted by the levy of an execution on the materials thus collected on the ground.

The Patton Case was cited and followed in *McFadden v. Crawford*, 36 W. Va. 671, 32 Am. St. Rep. 894, 15 S. E. 408. In the latter case a rolling mill company had purchased two railroad spike machines to be attached to its mills. The machines had been shipped on a car which had been run in on a railroad switch belonging to the mill company upon its grounds. The foundation had been prepared to receive the machines, and one of them had been unloaded, and the other was still on the car, but had been partially moved, when they were levied on as personal property. The court held that they were not liable to seizure and sale as personal property.

In Iowa a steam engine and other machinery for a mill do not become a fixture so as to defeat the lien of a chattel mortgagee as against a holder of a prior vendor's lien on the land, although it was purchased to be annexed, and it was the intention to annex it, and it was

fastened, nor otherwise annexed to it, are articles held not to be a part of the realty. *Peck v. Batchelder*, 40 Vt. 233, 94 Am. Dec. 392. So of a stone brought within a doorway to be placed as a doorstep. *Woodman v. Pease*, 17 N. H. 282. And so of machinery and parts thereof. *Miller v. Wilson*, 71 Iowa, 610, 33 N. W. 128; *Burnside v. Twitchell*, 43 N. H. 390. So the rolling stock of a railroad is held not to be treated as realty. In *Williamson v. New Jersey Southern R. Co.* 29 N. J. Eq. 311, it was said: "The criterion above stated, of actual annexation to the freehold as a rule for determining when chattels become part of the realty, is as well settled in this state as any other rule of property. Exceptions founded on financial and groundless distinctions only tend to produce uncertainty and confusion in the rules of property, which should be permanent and uniform. . . . Tested by the foregoing criterion, it is manifest that the rolling stock of a railroad must be regarded as chattels which have not lost their distinctive character as personality by being affixed to and incorporated in the realty."

There are authorities which hold a contrary doctrine, being based on the theory that material deposited on the land for the purpose of becoming a part thereof, or machinery deposited in a house for the purpose of being attached thereto, is, in the eye of the law, constructively attached thereto. But, as said by the author in 13 Am. &

Eng. Enc. Law, 2d ed. p. 605: "Of the cases treated as illustrations of constructive annexation, some are merely cases of temporary severance, in which the articles, though not at the time actually attached, are treated as still annexed and part of the realty; and the term has been at times applied to deer in a park, fish in a pond, and doves in a dove-cote, which passed to the heir, and not to the executor."

This class of cases was discussed in *Williamson v. New Jersey Southern R. Co.* 29 N. J. Eq. 311, in which it was said: "The illustrations of doves in a cote, deer in a park, and fishes in a pond are entirely inapplicable to the present subject. They go with the inheritance, for special and peculiar reasons. In *Amos & Ferard on Fixtures*, they are classified under the head of heirlooms,—a class of property entirely distinct from fixtures." See also *Hoyle v. Plattsburgh & M. R. Co.* 54 N. Y. 315, 13 Am. Rep. 595.

It remains to notice several cases decided by this court which are supposed to illustrate the policy of our laws upon this subject. They are cases in which furnishers of material for a building are allowed a lien on the lot upon which the building is to be erected, whether the material was ever actually used or not. In *Daniel v. Weaver*, 5 Lea, 393, this court said it is not the actual use of the lumber in repairs to a building by the owner that gives the furnisher a lien, but

delivered on the ground for that purpose, and although work had been begun for the purpose and with the intention of annexation; where all the machinery was lying on the ground near the mill, or in it, but where none of it had been put in place. *Miller v. Wilson*, 71 Iowa, 610, 33 N. W. 128.

And in New Hampshire the mere fact that saws which have been kept in a mill for a year or more, and never attached, were purchased with the intention to be used as a part of the mill, is not sufficient to make them fixtures; but other saws, which have been set and used in the mill, are part of the real estate. *Burnside v. Twitchell*, 43 N. H. 390.

b. Materials for use, repair, or reconstruction of railroads.

In Illinois materials provided for and designed to be attached to a railroad are, for the purpose of a mortgage or conveyance, a part of the real estate itself. *Palmer v. Forbes*, 23 Ill. 301. In this case the controversy was between mortgagee and execution creditor, and the property in dispute was certain car wheels, car axles, a quantity of locomotive ties, and miscellaneous iron and fuel oil. The court said: "We are of opinion that the rolling stock, rails, ties, chairs, spikes, and all other material brought upon the ground of the company encumbered by the mortgage, and designed to be attached to the realty, should be considered as a part of the realty, and encumbered by the mortgage as such; but fuel oil, and the like,

which are designed for consumption in the use and which may be sold and carried away, and used as well for other purposes, as in the operation of the road, and, when taken away, have no distinguishing marks to show that they were designed for railroad uses, cannot, we think, with any propriety, be treated or considered as anything but personal property, and subject to, and governed by, the law applicable to such property." One of the judges of the court dissented as to the opinion that rails, chairs, spikes, and ties, drawn upon and not attached to the road, but intended to be so, savored of the realty, or passed with it, by conveyance.

In *Wyatt v. Levis & K. R. Co.* 6 Quebec Law Rep. 213, it was held that railroad fastenings and sleepers on hand for the repair of the road were not immovables by destination under article 379 of the Code, which reads as follows:

"Movable things which a proprietor has placed on his real property, for a permanency, or which he has incorporated therewith, are immovable by their destination so long as they remain there. Thus within these restrictions, the following and other like objects are immovable: (1) Presses, boilers, stills, vats, and tuns; (2) all utensils necessary for working forges, paper mills, and other manufactories; manure, and the straw and other substances intended for manure, are likewise immovable by destination."

In *Covey v. Pittsburg, Ft. W. & C. R. Co.* 8 Phila. 173, the question whether old and new rails, and rail chairs, lying along the track

the furnishing under the contract for that use; and the lien exists whether the lumber was used or not. That case involved a construction of Shannon's Code, § 3531, establishing a mechanic's lien and furnisher's lien on any lot of ground or tract of land upon which a house had been erected, built, or repaired, or fixtures or machinery furnished or erected, or improvements made by special contract with the owner or his agent, in favor of the mechanic or undertaker, founder, or machinist who does the work, or any part of the work, or furnishes the materials, or any part of the materials, or puts thereon any fixtures, machinery, or material, either of wood or metal, and in favor of all persons who did any portion of the work or furnished any portion of the material for the building contemplated in this section. Section 3539 provides: "The lien shall include the building, fixture, or improvement, as well as the lot or land, and continue for one year after the work is finished or materials are furnished." The court, in dealing with these two sections, held that it is the furnishing of the lumber for repairs, etc., that creates the lien; and that it does not depend upon the use of it by the purchaser whether the seller shall have a lien. Otherwise, by not using it for a year, the owner could entirely defeat the lien of the purchaser. Such is not the proper construction of said acts, and this is made more clear by the provision in § 3539 that the lien shall continue for one year "after

the work is finished," in favor of the workman, or "materials are furnished," as to the furnisher. The furnisher may, therefore, within one year after he has delivered the materials contracted for, have his remedy by attachment to enforce his lien.

The case of *Halley v. Alloway*, 10 Lea, 523, was another case involving the furnisher's lien for repairing and furnishing the Grand Opera House in the city of Nashville. The question presented for determination in that case was whether the things claimed to have been furnished entitled the furnisher to a lien on the house and lot. The material furnished consisted of stage machinery, such as pulleys, rollers for cylinders, etc., used for fitting up the stage,—some attached and some not,—chairs furnished and fitted to the floor, and seats for the accommodation of the audience, painting the scenery, curtains, and the like. The court held the nature of the thing done and the character of the house repaired, and for which the materials were furnished, as well as the intent of the party building, served to guide to the correct conclusion as to whether the work done was work done on the house, and became part of it. These elements are better guides than the old idea as to fixtures, which was whether the thing was permanently attached and fixed in or to the freehold. In getting up a theater, the whole building, considered in reference to its use, makes the house contracted for. All that serves to complete and furnish such house for the purpose designed

in readiness for repairs or reconstruction, are fixtures, was raised, but not decided; the court taking the position that such property is not liable to seizure and sale on execution for an ordinary debt on the ground of public policy. But the court said that, independently of the public purpose for which they were used, doubtless they were liable to seizure.

c. Building materials.

The attempt to have building materials that have never been attached to the freehold declared fixtures seems to have been generally unsuccessful.

In *Tripp v. Armitage*, 4 Mees. & W. 687, it appeared that wooden sash frames intended to be annexed to a hotel building were delivered on the premises by the contractor, where they were duly approved and returned to him for the purpose of having iron pulleys belonging to the hotel owners affixed. While the frames were in his shop he went into bankruptcy. The owners of the hotel claimed the property under the terms of their contract with the builder as work actually done and fixed, but it was held that it passed to the assignee.

In *King v. Hedges*, 1 Leach, C. L. 201, a prisoner was indicted for stealing six light, glazed window sashes. The window frames from which they were taken were fixed in their proper places, but the sashes were neither hung nor headed in the frames, but were fastened in by laths nailed across the frames to prevent

their falling out. The court held that they were not fixed to the freehold.

In *Cook v. Whiting*, 16 Ill. 480, it was held that hewed timbers provided and intended for a granary, and lying on the ground at the time it was sold, did not pass to the vendee. The court, conceding the vendee to be strictly protected and entitled to all that in law belongs to the land, said that, after doing this in the most extended sense, it was unable to include these timbers as fixtures becoming part of the land.

In *Bandall v. Twyman*, 71 Ill. App. 253, Affirmed in 172 Ill. 123, 49 N. E. 985, it appeared that a purchaser of land at sheriff's sale claimed a quantity of brick and other building materials that had been brought upon the premises for the purpose of replacing a building destroyed by fire. Operations having been suspended by the financial embarrassment of the owner of the land, the materials in question had previously been sold by the sheriff under an execution as personal property. The purchaser of the premises claimed the materials as constructively annexed to the land, but the evidence showed that he had impliedly consented to the prior sale. The court said that it might be assumed that, where one brings a quantity of material on his land for the purpose of building a permanent structure, there is, constructively, an annexation of the chattels to the realty, and that, were the owner to sell the land while matters were in that stage, the buyer would take the whole; but held that

makes up the house, and is part of it when completed. Scenery, seats, pulleys, etc., and the like, make up a necessary part of a building designed for theatrical exhibitions. as much as do the counters on which goods are exposed for sale in a retail mercantile store. It is probable the scenery and other articles herein mentioned are as permanently attached to and were a part of the building as such counters.

In *Steger v. Arctic Refrigerating Co.* 89 Tenn. 453, 11 L. R. A. 580, 14 S. W. 1087, it was held that statutes creating liens upon real estate in favor of those who, under contract with the owners, have furnished lumber or materials for erection of buildings, machinery, etc., thereon, are construed liberally in favor of lienholders, as regards the subject-matter to which the lien should attach. In that case it appears that the Arctic Refrigerating Company erected a factory on a lot in Nashville for the manufacture of vapor for cold storage. By permission of the city this company laid subterranean pipes in the streets, connecting with its factory, to convey the vapor to its customers. P. supplied labor and materials in the erection of the factory, and also furnished and laid down the pipes in the streets. It was held that the plant, including lot, factory, pipes, etc., is an entirety, and P.'s lien for materials furnished or labor done upon any part of it attached to the whole.

The case last cited, it will be observed, does not even remotely touch the question

with which we are dealing in the present case.

In the case of *Grosvenor v. Bethell*, 93 Tenn. 579, 26 S. W. 1090, one of the objects of the bill was to determine whether or not Bethell, the purchaser at first mortgage sale, thereby acquired title to all the theater furniture and fixtures; the same not having been specifically mentioned. It was held that a mortgage by an incorporated opera house company, made after the purchase of lot, and while the theater buildings were in course of erection thereon, conveying the lot and "all the buildings and improvements thereon or to be erected thereon," operates to pass all furniture, fixtures, and furnishings then or thereafter placed in the theater building, and essential to its successful operation; citing *Halley v. Alloway*, 10 Lea, 523, as settling this question.

In *Grewar v. Alloway*, 3 Tenn. Ch. 584, it was held that the rollers, pulleys, etc., for shifting scenery, and other stage properties, were fixtures or machinery, within the meaning of the mechanic's and furnisher's lien act. It was further said that the movable machinery and flying stages of a theater, necessary for the purpose of theatrical exhibitions, are trade fixtures, and removable by the tenant, as between him and his landlord, but, as between the owner and mechanic, are subject to the mechanic's lien law. The question whether a thing is a fixture or not, as between owner and mechanic, depends little upon the mode of annexation. Its fit-

the plaintiff could not recover because there had been a severance of the property by legal proceedings, with the implied consent of the parties themselves.

In *Indiana* clapboards, piled upon land at the time it is sold and intended for general repairs, do not pass with a deed to the land. *Hinkle v. Hinkle*, 69 Ind. 134.

In *Woodman v. Pease*, 17 N. H. 282, the court held that a chattel fit to be annexed to the freehold, and which has been brought upon it with the intention on the part of the possessor to annex it, does not become a fixture, unless actually annexed or placed in position in which it is intended to be used, and in which it is adapted for use. The court, however, did not take the position that actual annexation is necessary to constitute a fixture, stating that the term might embrace other things than such as are denoted by the word in its strict etymological sense. The question in the case was whether a stone which had been quarried and brought onto the land for the purpose of being fitted and used at some future time in a doorstep passed, while in this condition, to the vendee upon a sale of the land. The court decided that it did not.

Blinds intended for a house, but not painted, and not hung on the house to remain as part of it, do not become annexed to the house so as not to be liable to seizure under an execution against the property of the builder by whom they were furnished, although the blinds have been fitted to the windows, marked with 69 L. R. A.

the number corresponding with their respective windows, and the work of painting them has been actually begun. *Manchester Mills v. Rundlett*, 23 N. H. 271.

In *Louisiana* bricks and lumber, lying on the premises and intended to be used for a new building, do not form part of the realty under article 468 of the Civil Code, which provides that "materials arising from the demolition of a building, those which are collected for the purpose of raising a new building, are movables until they have been made use of in raising a new building. But if the materials have been separated from the house or other edifice only for the purpose of having it repaired or added to, and with the intention of replacing them, they preserve the nature of immovables, and are considered as such." *Beard v. Duralde*, 23 La. Ann. 284.

In *Maxwell v. Willard*, 1 W. N. C. 355, it is held that lumber, mill work, sashes, etc., delivered on the premises for the purpose of being used in a building, are not fixtures. The court stated that it did not know of any decision which treated materials or machinery in such condition as fixtures. The roller mill cases (*Voorhis v. Freeman*, 2 Watts & S. 116, 37 Am. Dec. 490, and *Pyle v. Pennock*, 2 Watts & S. 390, 37 Am. Dec. 517, *supra*) were the nearest to it; but neither of them, the court said, went so far as to include raw materials not yet used at all in the building.

In *Peck v. Batchelder*, 40 Vt. 233, 94 Am. Dec. 392, a vendee claimed certain double win-

ness for the particular place where it is annexed, its being connected with the general business conducted there, and other facts going to show the intent of the owner to make one thing of the land and chattels to carry out a general purpose, would have more effect upon the question than the mode or permanence of the annexation. It appeared in that case that the chairs had been fastened to the floor, and it is to be inferred

that the other property was also in some way attached to the building.

It is unnecessary to pursue this line of cases any further, since we deem the question settled by the great weight of authority in favor of the contention that such materials are not fixtures, and are removable by the mortgagor.

It results from this that *the judgment of the Circuit Court must be reversed.*

MICHIGAN SUPREME COURT.

Samuel E. BYRNE, Jr.,

v.

Jacob P. WERNER *et al.*, *Plffs. in Err.*

(.....Mich.....)

A mortgage of a lot on which stands a partially completed building will pass cut stone and structural iron prepared for the building and located on the lot mortgaged and that adjoining, if the intention of the parties is that the building shall be speedily completed with the material at hand.

(*Moore, Ch. J., and Hooker, J., dissent.*)

(December 7, 1904.)

ERROR to the Circuit Court for Marquette County to review a judgment in

dows and blinds as part of the real estate bought from the vendor, who was a sash and door maker. The windows had been fitted to the window casings of the house, but had not been fastened in place when the house was sold. The blinds were made for the house, but were never fitted or put on. The vendor hid this property at the time the premises were sold, and the vendee did not learn of its existence until some time afterwards. The court held that neither the blinds nor the windows passed to the vendee. "The mere fact," says the court, "that the defendant had made some sash, painted them, and set glass in them, intending to use them, at some future time, in the construction of double windows for the house, does not constitute even constructive annexation. In order to make such windows a part of the realty, they must have been so annexed or attached to, or used upon, the building, as to indicate that the owner intended, by such annexation or use, to make them a part of the building." The court was of the opinion that the manner in which the windows had been put in showed that the owner did not intend to make them a part of the building.

In an early New York case it appeared that a builder contracted to build a house and furnish materials for it. As the work progressed plank was worked up on the premises into columns for a piazza. These columns were afterwards removed for convenience to other premises. The contractor also procured for the

favor of plaintiff in an action brought to recover for the alleged wrongful conversion of certain cut stone and structural iron. *Reversed.*

The facts are stated in the opinion.

Messrs. Ball & Ball, for plaintiffs in error:

Samuel E. Byrne, Sr., was estopped by his words and acts from claiming ownership of the material as against Mr. White, after his purchase from Thurber.

Eureka Iron & Steel Works v. Breenahan, 66 Mich. 493, 33 N. W. 834; *Thomas v. Watt*, 104 Mich. 206, 62 N. W. 345; *Rogers v. Robinson*, 104 Mich. 329, 62 N. W. 402.

If the plaintiff or his grantor ever had any right of action, it was barred by lapse of time before this suit was commenced.

Scudder v. Anderson, 54 Mich. 122, 19 N. W. 775.

building a number of carved capitals, bases for the columns, and carved window and door caps. Before any of these materials was attached they were levied on under an execution against the builder. The owner of the building claimed and sued to recover the property, but the question was not raised whether it had become part of the real estate by constructive annexation, it seeming to be assumed that it was personal property; the only question being whether title had passed under the terms of the building contract. The court stated that the house standing on the plaintiff's ground became his as fast as the parts added to it became attached so as to become part of the freehold; that the house in question was real property, but that the materials of which it was composed were personal property, and did not pass to the plaintiff until delivery, or until they became affixed to the freehold. The court held under the evidence, therefore, that title was not in plaintiff. *Johnson v. Hunt*, 11 Wend. 135.

Lumber placed on a homestead lot, and intended to be made part of the homestead dwelling, is liable, in New Hampshire, to seizure under attachment. Until it becomes part of the homestead it is not within the protection of the homestead law. *Carkin v. Babbitt*, 58 N. H. 579.

But, under the homestead laws of Wisconsin, lath, shingles, and lumber obtained for the purpose of repairing a house occupied as a dwell-

This structural iron and stone became a part of the realty.

Manwaring v. Jenison, 61 Mich. 117, 27 N. W. 899.

The question of fixture or no fixture must depend upon the intention of the parties.

Morrison v. Berry, 42 Mich. 397, 36 Am. Rep. 446, 4 N. W. 731; *Wheeler v. Bedell*, 40 Mich. 696; *Patton v. Moore*, 16 W. Va. 428, 37 Am. Rep. 789; *McFadden v. Crawford*, 36 W. Va. 671, 32 Am. St. Rep. 894, 15 S. E. 408.

The idea that there must be an actual physical annexation before property, originally chattels, can become part of the realty, has in the modern decisions been gradually abandoned, and the intent of the parties is now the real criterion.

Snedeker v. Warring, 12 N. Y. 175; *Farrar v. Stackpole*, 6 Me. 154, 19 Am. Dec. 201; *Voorhis v. Freeman*, 2 Watts & S. 116, 37 Am. Dec. 490; *Carey v. Bright*, 58 Pa. 85; *Hill v. Sewald*, 53 Pa. 274, 91 Am. Dec. 209; *Overton v. Williston*, 31 Pa. 155; *Pyle v. Pennock*, 2 Watts & S. 390, 37 Am. Dec. 517; *Covey v. Pittsburg, Ft. W. & C. R. Co.* 3 Phila. 173.

Rails placed along the line of a contemplated fence for the purpose and with the intention of being used to build the fence constitute a part of the realty, and pass by conveyance of the land.

Conklin v. Parsons, 1 Chand. (Wis.) 240; *Ripley v. Paige*, 12 Vt. 353; *Noble v. Sylvester*, 42 Vt. 146; *Palmer v. Forbes*, 23 Ill. 301; *McLaughlin v. Johnson*, 46 Ill. 163.

ing, and actually deposited upon the land, are exempt from seizure under an attachment as personalty, irrespective of the question whether such materials, deposited on the lot, become part of the realty. *Krueger v. Pierce*, 37 Wis. 269.

d. Fencing materials.

It seems to be settled in Vermont that suitable materials, deposited upon a farm for the purpose and with the intention of building necessary fences, pass by a conveyance of the land as a part of the realty, and are not attachable as personal property. *Hackett v. Amsden*, 57 Vt. 432.

In an earlier case in the same state it was held that posts and rails on a farm, distributed in piles along the roadside, and intended for immediate fencing of the land, pass with the realty. *Ripley v. Paige*, 12 Vt. 353.

In Wisconsin this is also held to be the better opinion. The court says that, where rails have been placed along the line of an intended fence, for the purpose of being laid into the fence, though not actually applied to that use, they pass by a deed of the land, there having been a manifest appropriation to the use of the land. *Conklin v. Parsons*, 2 Pinney (Wis.) 264.

In Illinois, on the contrary, it is held that posts lying on the ground, and intended by the vendor for use in fences on the land, do not

Messrs. Button & Culver, for defendant in error:

The materials were not real estate.

Crippen v. Morrison, 13 Mich. 23; *Harris v. Scovel*, 85 Mich. 32, 48 N. W. 173; *Curtis v. Leasia*, 78 Mich. 483, 44 N. W. 500; *Palmer v. Forbes*, 23 Ill. 301.

Personal property does not become a fixture until actually in some form annexed, or put to some use, beneficial and permanent in its nature in connection with realty.

Johnson v. Mehaffey, 43 Pa. 308, 82 Am. Dec. 568; *Woodman v. Pease*, 17 N. H. 282; *Peck v. Batchelder*, 40 Vt. 233, 94 Am. Dec. 392; *Carkin v. Babbitt*, 58 N. H. 579; *Cook v. Whiting*, 16 Ill. 480.

The question of estoppel is a mixed one of fact and law, and conclusions from the evidence must be drawn by the jury, and not by the court.

Maxwell v. Bay City Bridge Co. 41 Mich. 468, 2 N. W. 639.

On motion for rehearing.

Messrs. Button & Heffernan, also for defendant in error:

If it was intended to have the materials covered by the mortgage before actual annexation, the better reasoning would require their specific description in the mortgage, as such, because ordinarily they would not be included in the mortgage security until after actual annexation.

Jones, Mortg. 4th ed. § 436.

It is only in cases of uncertainty that

pass to the vendee as fixtures. *Cook v. Whiting*, 16 Ill. 480.

So, in Texas loose cedar pickets on land at the time it was sold do not pass to the vendee, the decision being in flat conflict with the Vermont and Wisconsin cases. The court said: "No matter if the posts had been cut off the land bought by appellants [vendees], the moment they were severed from the soil they became personalty, and did not pass by a deed to the land, although they may have been cut to build a fence on the land." *Longino v. Wester* (Tex. Civ. App.) 88 S. W. 445.

In Indiana fence stakes, piled on the land and intended for general repairs, do not pass with a deed to the realty. *Hinkle v. Hinkle*, 69 Ind. 134.

The question whether fencing material passes to a vendee of the land on which it is placed as part of the realty was touched upon in *McCarthy v. McCarthy*, 20 Can. Law Times, 211. The court, in holding that certain unattached rails did not pass with the land, stated that, while it might be that fence rails, piled along the line of a fence, but not used because the fence was not completed, belong to the freehold, it placed its decision on the ground that, so far as the evidence showed, there was an entire absence of intent to erect them into a fence.

The subject was likewise indirectly alluded to in *Wincher v. Shrewsbury*, 3 Ill. 283, 35 Am. Dec. 108, a case which holds that fence

the subject-matter and surrounding circumstances are ever permitted to be gone into.

17 Am. & Eng. Enc. Law, 2d ed. p. 23.

Unless this court can say that, under the testimony, the building materials became an integral part of the real estate, they could not be considered as covered by this mortgage deed.

Ripley v. Paige, 12 Vt. 354.

Carpenter, J., delivered the opinion of the court:

Plaintiff brings the suit to recover for the conversion of certain cut stone and structural iron. The property originally belonged to plaintiff's father, Samuel E. Byrne. Both parties claim to have acquired his title. Plaintiff claims to have acquired it by a bill of sale executed in 1896. It is defendants' claim that in 1887 the property in controversy was transferred by Samuel E. Byrne to Henry C. Thurber, and that they have acquired Thurber's rights. It is clear that defendants have acquired the rights of Thurber, and that, therefore, the validity of their claim depends upon whether Byrne transferred the property to Thurber. The facts respecting the transfer are as follows: In 1887 Byrne conveyed to Thurber by a warranty deed (intended to be a mortgage) lots 4 and 5 of block 17 in the city of Marquette. At that time there was situated upon these lots a partially completed building in the process of erection. There was also situated on the land conveyed and on an adjoining lot the cut stone and structural iron in-

volved in this case, which was intended to be used in the completion of the building. The stone had been cut and dressed for the front of the building. Each piece of the structural iron was of the dimensions provided in the plan of the building, and fit for the place where it was to go. At that time it was intended that the building would be completed. The plan of completing the building was, for some reason, abandoned, and defendants used the stone and iron for another purpose. Did the title to that material pass to Thurber by his deed? The learned trial judge held that it did not. It is urged that the building material had not become a part of the land, and was, therefore, in a legal sense, personalty at the time of the conveyance to Thurber. If this be true, it is not, in my judgment, decisive of this controversy. Though the building material was personalty, it is our duty to declare that it passed with the partially completed building, if the parties so intended, and if that intent may be ascertained from a proper construction of the conveyance of the land upon which said building stood. The question is, then, not whether the building material was in fact personalty, but whether it was intended to transfer it with the conveyance of the partially completed building. And this intent is to be determined by a proper construction of the conveyance; that is (See *Norris v. Shoverman*, 2 Dougl. [Mich.] 16; *Davis v. Belford*, 70 Mich. 120, 37 N. W. 919), by applying the language of the conveyance to its subject-matter. No uncertainty results

ralls, lying on the ground and cut by a trespasser from timber growing on government land, do not pass with the land; the court stating that fence rails, when not put into a fence or evidently intended to be so used on the land (which could not be inferred if made by a stranger), did not pass with it.

And in *Noble v. Sylvester*, 42 Vt. 146, the court, in holding that a stone hewn from a quarry, and intended to be used in a tomb elsewhere, did not pass to a vendee of the land from which it was cut, and upon which it was suffered to lie after severance, declared that the question was analogous to that passed upon in the fence rail cases. Said the court: "The stone may be regarded as being governed by the same principles that are applicable to timber, fence rails, and the like, that have been removed from the freehold in fact, but remain upon the premises for the purpose of being used there in the construction of fences, etc.; and, if on the land at the time the premises are conveyed, they will pass by the deed; but if they are there, not for the purpose of being used on the premises, but to be removed elsewhere, then they do not pass by the deed."

e. Fertilizers.

Under the Constitution of Georgia, requiring all property, with specified exceptions, to be taxed, it was held that commercial fertilizers were subject to be taxed, although at the 69 L. R. A.

time it was the purpose of the owner to apply the same to his land, which was also taxed. *Joiner v. Adams*, 114 Ga. 389, 40 S. E. 281.

On the contrary, it was held in Massachusetts that manure from the barnyard of a homestead, and standing in a pile on the land, is not assets in the hands of an administrator, although not broken up or rotten, and not in fit condition for incorporation into the soil. *Fay v. Muzzey*, 13 Gray, 53, 74 Am. Dec. 619. But the decision was placed on the ground that manure made in the course of husbandry upon a farm is so attached to and connected with the realty that, in the absence of any express stipulation to the contrary, it passes as appurtenant.

V. Conclusion.

From an examination of the cases, the weight of authority seems to be that things placed on land with the intention of annexing them are not fixtures, where they are never actually attached. Even in *Byrne v. Werner*, which holds that the building material in question passed by the deed, it will be observed that the question does not turn upon whether the building material was in fact personalty, "but whether it was intended to transfer it with the conveyance of the partially completed building;" which intent the court determined by a construction of the language of the conveyance.

from this rule. Upon the land conveyed to Thurber was an incomplete building in the process of erection. Situated upon that land and upon the adjoining land was building material designed to be used for the completion of the building. It was surely intended that the incomplete building should be transferred to Thurber. It was surely intended that the building would be speedily completed with the building material at hand. And I think it therefore equally certain that it was intended that such material should pass with the conveyance. In my judgment, there is no sound principle of law which compels us to defeat this intention. On the contrary, I maintain that it is our clear legal duty to give it effect. I think, therefore, that the building material became the property of Thurber. This conclusion is sustained by authority.

In *Wistow's Case of Gary's Inn* (14 Hen. VIII.), cited in 11 Coke, 50b, it was resolved that a millstone temporarily severed from the mill, with the intention that it should be replaced, passed with the conveyance of the mill. "So of doors, windows, rings, etc. The same law of keys, although they are distinct things, yet they shall pass with the house." In *Conklin v. Parsons*, 1 Chand. (Wis.) 240, it was held that rails placed along the boundary line, "not laid up into a fence, but which had been placed on the land for the purpose of building the fence," passed with the conveyance of the land. In *Ripley v. Paige*, 12 Vt. 354, there was a controversy as to whether certain rails passed with the conveyance of land from plaintiff to defendant. Defendant offered to prove that when the conveyance was made the rails were distributed upon the farm for the purpose of being there erected into a fence. The court said: "Upon this branch of the case we are inclined to regard the rails, if it was evident from the manner of their distribution upon the land, and other appearances, that they were designed for immediate use in fencing the land, as we should the materials of a fence accidentally fallen down, or of one purposely taken down to be immediately reconstructed, or those of an intended wall distributed in like manner. As fences always pass by a deed of the soil on which they stand if the grantor has an unrestricted right to convey both, so we are disposed to think that such materials for a fence may, in all these cases, as against the grantor, be treated as being within the operation of his deed." In *Hackett v. Amsden*, 57 Vt. 432, it was held that stone posts, which it seems were deposited on a farm for the purpose and with the intention of building necessary fences,

could not be seized and sold as personalty; the court saying: "Whatever the rule may be elsewhere, it seems to be settled in this state that suitable materials, deposited upon a farm for the purpose and with the intention of building necessary fences with them thereon, pass by a conveyance of the land as a part of the realty." In *Wadleigh v. Janvrin*, 41 N. H. 503, 77 Am. Dec. 780, it was held that certain stanchion timbers, staples, tie chains, and planks, which had been removed from a barn for the purpose of making repairs, passed to plaintiff by a conveyance from defendant of the land upon which the barn stood, notwithstanding the fact that the latter had formed a plan unknown to the former to make changes in the barn and to dispense with their use. The court said: "It was entirely immaterial what purpose the defendant had formed, so long as he had not carried it out. By the conveyance the barn passed to the plaintiff just as it then was, with the portions afterwards carried off by the defendant dis severed from the rest. The plaintiff saw the barn in the process of repair. He had a right to infer, and to act upon the inference, that the dis severed portions constituted an integral portion of the edifice." In *Palmer v. Forbes*, 23 Ill. 301, it was held that the title to rolling stock and the material provided for the repair of tracks was transferred by a mortgage of the real estate of a railroad company; the court saying: "It is a familiar principle to all that rails hauled onto the land designed to be laid into a fence, or timber for a building, although not yet raised, by lying around loose and in no way attached to the soil, are treated as a part of the realty, and pass with the land as appurtenances." (This decision and reasoning go farther than it is necessary for us to go in the case at bar.) In *McLaughlin v. Johnson*, 46 Ill. 163, it was held that rails which had once been and which were intended to again be used for a fence passed with the conveyance of the land notwithstanding the fact that at the time of such conveyance they were actually in temporary use on adjoining land. See also *Curtis v. Leasia*, 78 Mich. 480, 44 N. W. 500. *Harris v. Scovel*, 85 Mich. 32, 48 N. W. 173, is not inconsistent with these views. There it was held that rails piled on land did not pass with its conveyance. The rails had once formed part of a fence. The grantor had taken down the fence because it was no longer needed, intending to use the rails elsewhere. It is clear that there was no ground upon which the grantee could assert that it was intended that the rails should pass with the land. *John-*

son v. *McHaffey*, 43 Pa. 308, 82 Am. Dec. 568, relied upon by plaintiff and the learned trial judge, is, in my judgment, clearly distinguishable from the case at bar. In that case it was held that rolls originally purchased to be put in a mill did not pass upon a conveyance of the mill. At the time of the sale these rolls had for nearly three years remained on the property, unused, and in a rough, unfinished state. They were not necessary to the operation of the mill, for the mill had always run without them. This afforded a ground for saying that it was not intended that the rolls should pass to the purchaser of the mill. That ground does not exist in this case, for the building material in question was necessary for the completion of the building. *Woodman v. Pease*, 17 N. H. 282, cited by plaintiff, is very similar to *Johnson v. McHaffey*, 43 Pa. 308, 82 Am. Dec. 568, and is likewise distinguishable from the case at bar. It is true that the court, in deciding each of these cases, stated that personalty does not become a part of real estate until actually annexed thereto. If by this it was intended to assert that, notwithstanding the obvious intent of the parties, property originally personalty, will not, unless actually annexed thereto, pass on a conveyance of real estate, the court made a statement not necessary to its decision,—which might have rested upon the intention of the parties concerned,—and which, as already indicated, I cannot approve. Other cases cited by plaintiff are even more easily distinguishable. In *Cook v. Whiting*, 16 Ill. 480, it was held that the "simple intention" of the vendor, before he sold his farm, to erect posts into a fence and hewed timber into a granary, without having done anything towards those objects more than to haul said posts and timber onto the farm, "is not sufficient to pass the property in said posts and timber." In *Peck v. Batchelder*, 40 Vt. 233, 94 Am. Dec. 392, the court gave effect to the obvious intention of the parties in deciding that certain property, viz., detached extra blinds and windows, did not pass with the sale of the house. It was held in *Carkin v. Babbitt*, 58 N. H. 579, where the controversy arose between the owner and an attaching creditor, that lumber designed for the erection of a house was personalty. The facts in that case were very unlike those in the case at bar. The lumber was "neither in form nor position as it was designed to be permanently used." There was nothing "to distinguish it from ordinary lumber suitable for building purposes." Nor could the court apply in that case the principles applicable to a controversy between mortgagor and mortgagee.

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I think, therefore, that the defendants were entitled to a verdict, and that the judgment should be reversed, with costs, and a new trial ordered.

Grant and Montgomery, JJ., concur.

Moore, Ch. J., dissenting.

In 1886, Samuel E. Byrne, father of the plaintiff, was the owner of part of lots 4 "and 5 of block 17 in Marquette, and commenced the erection of a building thereon. He had plans and specifications drawn, specifying each piece of structural iron to go into the building, with the size and length of each piece. He ordered a considerable quantity of structural iron, each piece of which was of the dimensions provided in his plans, and fitted for the place where it was to go. After commencing to lay the foundation, he bought some of the structural iron upon the premises and some on an adjoining lot, where it would be most convenient to put into the building. He also purchased some building stone, which was cut and dressed for the front of the building by the masons hired by him, some of which were on the premises and some on the adjoining lot. He continued the work of building until the following year. A considerable quantity of the structural iron was built into the structure and some of the stone was used. After finishing the basement story, the work was suspended, but Mr. Byrne intended to go on with the work, and the iron and stone were left there for that purpose. Mr. Byrne gave Mr. Thurber a warranty deed of the premises April 20, 1887, and no work was done on the building after that time. The deed was intended to operate as a mortgage, and Byrne expected, notwithstanding the deed, to complete the building. Mr. Byrne had, in 1883, mortgaged the premises to one Michael Hagerty to secure the payment of \$2,500, which remained unpaid. He also executed mortgages on the property,—one to Campbell & Wilkinson, February 14, 1885, for \$1,100, and one to James Dwyer, July 20, 1887, for \$1,400. The Thurber title was sold on execution July 13, 1889, for \$2,000. Henry C. Thurber, by warranty deed dated April 23, 1889, acknowledged February 4, 1890, conveyed the premises to Peter White for \$4,000. After making this purchase from Thurber, Mr. White purchased all these other mortgages and the execution lien. The several deeds and mortgage above enumerated covered the real estate, and made no mention of building material. The structural iron and stone remained on the premises as they were left at the suspension of building operations. April 15, 1902.

Mr. White, by warranty deed, conveyed the premises to the defendants. The deed, when first drawn, included the building material on the premises, for which this suit was brought; but, at the request of the defendants, it was stricken out of the deed, and a separate bill of sale was given for it. Defendants moved the material out of the way, and proceeded to put up a business building on the premises, using therein a small portion of the material involved in this suit, and disposing of the rest. Samuel E. Byrne executed a bill of sale of the said building material to the plaintiff May, 20, 1896. The plaintiff brought an action of trover for this building material, and recovered judgment. A motion for a new trial was made, which was overruled. The case is brought here by writ of error.

In overruling the motion for a new trial the circuit judge filed a written statement, which states so admirably the questions involved that we produce it here:

"(1) The first reason assigned for the motion is that the court erred in refusing to charge the jury as requested by defendants' counsel in the first request. This request related to the subject of fixtures, and was to the effect that the property which was the subject-matter of this suit passed by virtue of the deed from Samuel E. Byrne, Sr., to Thurber. This deed was in the usual form of a deed of lands. There was evidence tending to show that it was intended by the parties thereto to be a mortgage. But as the rule, when applied to mortgages, is no more favorable to the plaintiff than when applied to a deed, it is not very material here. I refused this request at the trial upon a somewhat hasty examination of such authorities as were at hand. A more careful examination of the authorities has confirmed my position at the trial. The evidence was undisputed that Samuel E. Byrne, Sr., had as early as 1886 or 1887 commenced the erection of a building, and had purchased the structural iron and stone in question to go into the building, and that the same had been prepared for the building, and had been delivered upon or near the premises, with the intention to place the same in the structure. My recollection of the evidence is that work on the building had ceased for want of funds at the time of the deed to Thurber, but of this I am not positive. It certainly had ceased before the deed to White. These were articles to be annexed to the land. 'The question as to the necessity of actual annexation also arises as to articles which have not yet been annexed to the land, but have merely been brought on or near the land with the intention of annexing them. Such articles

are, by the weight of authority, perhaps to be considered as still personalty, though the contrary has quite frequently been decided.' 13 Am. & Eng. Enc. Law, 2d ed. pp. 601, 602, and cases there cited. It seems to me that it cannot be said that this iron and stone formed or constituted a necessary accessory to the enjoyment of the land, which seems to be the rule laid down by some of the courts as the true test where annexation had not actually taken place. Much of the iron in question never went into the building since erected by the defendants, but was exchanged for that more modern and suitable. The old rule seems to have been that there must be physical annexation, but under some circumstances that rule has been relaxed where the article is shown to be a necessary accessory to the enjoyment of the land. The fact that a place was prepared in which to put an article does not necessarily make the article part of the realty. 1d. pp. 608, 610. Notwithstanding the language of our supreme court in the case of *Curtis v. Leasia*, 78 Mich., at page 483, 44 N. W. 500, I understand that in a case like the one under consideration the question may be said to be an open one in this state.

"Having ruled as I did upon the trial, and finding upon further examination no reason to change the ruling, I feel like adhering to the ruling, and must refuse a new trial upon this ground. Upon this subject I refer to the following case: The reasoning of Lowrie, Ch. J., speaking for the court, in *Johnson v. McHaffey*, 43 Pa. 308, 82 Am. Dec. 568, is very satisfactory. The action was replevin for two rolls which had been cast for a certain rolling mill. The mill was sold to the plaintiff, who claimed the rolls. The rolls had been sold on execution as the personal property of the grantor. The rolls had been paid for and delivered at the mill, where they remained for about three years, in a rough and unfinished condition, without having been put into the mill. After stating these facts, the court said: 'These rolls were cast for this rolling mill, and paid for and delivered beside it, and lay there two or three years without being turned or finished off or put into the mill, and then the mill was sold by the sheriff. Do the rolls go with the mill to the purchaser? The test question is, Were they elementary parts of the mill at the time of the sale? And as matter of fact it is quite plain that they were not, for the mill had always run without them. No doubt they were intended to be made part of the mill, but we do not see how we can take the intention, without fact, in order to declare what constitutes the mill. If we do, then the

sale of a half-built or half-ruined house would include all the materials provided for its completion or repair. A very provident man is quite sure to have on hand materials which he sees will some time be necessary for repair of his works or for supplying deficiencies in them; but his having them with this intention does not make them constituent parts of his works. Thus, he will provide extra saws for a sawmill, or bolting cloth for a flour mill, or extra castings for the running gear, or lumber, nails, screws, and other materials, to make improvements or repairs; but this prudence does not convert personal into real property, so long as the fact remains that they are not yet made constituent elements of the mill or other structure. That fact we can ascertain and define with reasonable certainty; but we can have no measure for the ever-varying degrees of prudent forethought. And, if mere intention could affix such articles to the realty, then a mere change of intention would unfix them, or prevent their becoming affixed, and we should thus be without any rule at all to guide us. Besides, it is rather a contradiction in terms to say at the same time that they are parts of the structure, and are intended to be made so. That these rolls will fit no other mill does not make them part of this one, or prove them so. Furniture for a dwelling house, shelving and drawers for a store, boilers and flywheel for an engine, the frame for an addition to a house, have often this very peculiarity, and great loss would arise if they should not be applied according to the intention with which they were made; yet they cannot be a part of the real estate without a purpose of annexation actually effectuated, though this peculiarity of adoption may, by inference or corroboration, supply the want or the weakness of direct evidence of annexation, whenever this fact can be reasonably said to be left in doubt by the other evidence.

"(2) It will be borne in mind that defendants' requests upon the subject of abandonment were all given. The second reason for the motion is that the jury disregarded the clear weight of evidence and the charge of the court upon this subject. The jury was charged that abandonment is the relinquishment or surrender of rights or property by one person to another; that it includes both the intention to abandon and the external act by which the intention is carried into effect; that to constitute an abandonment there must be the concurrence of the intention to abandon and the actual relinquishment of the property, so that it may be appropriated by the next comer. In view of the fact that Samuel E. Byrne, Sr.,

had in 1896 made a bill of sale of this property to the plaintiff, and that both the plaintiff and his vendor testified that they never intended to abandon it, I cannot say that the verdict was against the clear weight of the evidence upon this subject.

"(3) Upon the question of adverse possession or the statute of limitations the jury were charged as requested by defendants' counsel. Now for the first time defendants' counsel take the position that 'the uncontradicted evidence of the case showed continued adverse possession of the property by the defendants and their grantor for more than six years prior to the beginning of the suit.' The evidence showed that the lot and real estate, with a partially constructed wall, had been unoccupied for a long term of years before the defendants commenced the erection of their building in 1902. The premises near the sidewalk were in a somewhat dangerous condition, as they were upon a level with the walk, and Mr. White had placed guards there to prevent persons from going upon the wall, and a small candy store had stood there for a short time. I do not think that there was any evidence that Mr. White had done or performed any act that would indicate that he claimed to own the structural iron and stone that lay loosely scattered about, upon, and near the premises covered by his deed. In fact, all of his acts were more consistent with assertion of ownership of the real estate, than with an open, adverse claim of the ownership of this personal property, until he sold the same by bill of sale to the defendants in 1902. So I cannot agree with defendants' counsel that the verdict was even against the weight of the evidence upon this subject.

"(4) The court, upon its own motion, and without request from defendants' counsel, fully charged the jury upon the subject of estoppel. Defendants' counsel claim that the jury disregarded the evidence in the case and the charge of the court, and that defendants were entitled to a verdict upon that ground." In the light of the testimony of Samuel E. Byrne, Sr., it is not fair to say that the evidence upon this subject was undisputed. A question of fact was raised by the testimony of Mr. White and Mr. Byrne, which was for the jury to consider. Mr. White had testified to the representations claimed to have been made by Byrne that all of the material went with the premises, and that relying upon that, he purchased from Mr. Thurber, in the spring of 1889, and that he and Thurber, walked upon the premises, and that he then took possession of this personal property. It appeared by reference to the deed from Thurber that it was executed in Washing-

ton, D. C. some time after its date. There is no doubt that this fact may have influenced the jury. It was unexplained by Mr. White. It also appeared that at the time Mr. Byrne, Sr., had a talk with Mr. White about his getting a deed from Thurber, he, Byrne, contemplated finishing the building. Had the building been completed, this material would, in all probability, have gone into it, and the security or value of the property would have been increased. So there was some force in Mr. Byrne's claim in his testimony that, while he did refer to the material as possessing a value, he did not say that it went with the land. I simply refer to this to show that there was here a question of fact for the jury, and that I cannot say, as matter of law, that the defendants were entitled to a verdict upon the ground of estoppel.

It is said the court erred in admitting the testimony of Byrne as to the gross cost of the structural iron. Mr. Byrne had testified that the structural iron cost him \$62 a ton; that it had remained about the same price from then until now, and that he did not think over a fourth was affixed to the structure; that he was positive not more than a third was affixed. He was then asked for its gross purchase price, and the judge said that in connection with his other testimony, where he stated he thinks there has been no change, he would, for that reason only, permit the answer. We think this ruling was not error. See *Kendrick v. Beard*, 90 Mich. 589, 51 N. W. 645; *Johnston v. Farmers' F. Ins. Co.* 106 Mich. 96, 64 N. W. 5.

It is said the evidence did not warrant a verdict for the plaintiff, and the court erred in submitting the case to the jury.

(1) Samuel E. Byrne, Sr., was estopped by his words and acts from claiming ownership of the materials as against Mr. White after his purchase from Thurber. (2) If the plaintiff, or his grantor, ever had any right of action, it was barred by lapse of time before this suit was commenced. There is nothing in the record to show the judge was requested to take the case from the jury. Upon the question of estoppel the jury was charged: "I first call your attention to this question of estoppel that is claimed here by the defendants in this case. It seems that at one time this property had been deeded by Mr. Byrne, Sr., to Mr. Thurber, of this city, and subsequently Mr. White obtained the interest that Mr. Thurber had by a deed of conveyance made in 1889, as I remember it. The claim of Mr. White here is that before he made the purchase from Mr. Thurber of the land or any of this property that he had certain conver-

sations with Mr. Byrne, Sr., at a time when Mr. Byrne had not yet parted with this property by his bill of sale to his son, and the claim of Mr. White is that at an interview had between him and Mr. Byrne, at which Mr. Byrne desired him (White) to obtain the interest of Mr. Thurber, that Mr. White expressed the belief that the property was not worth the amount he would have to pay Mr. Thurber, together with the mortgages that were upon the property,—referring to the Campbell & Wilkinson mortgage, the Dwyer mortgage, and the Hagerty mortgage; and Mr. White claims before you in his testimony that Mr. Byrne said to him: 'There is a great deal there you don't see, that you don't count. There is material enough to almost finish the building. It all goes with it.' And Mr. White claims that in many talks had with Mr. Byrne before he (White) became interested by purchasing from Mr. Thurber, Mr. Byrne said to him that the property would all pass if he dealt with Thurber, and belonged to the property, and would go into and with the lot or the building. Now, gentlemen, the first question that arises is, Was this statement made by Mr. Byrne to Mr. White? While the court advises you that this personal property, consisting of this structural iron and stone, would not pass by a deed of the realty simply to Mr. Thurber, whether that was a mortgage or a deed, it would not pass by virtue of the instrument, it would have been perfectly competent for Mr. Byrne by an oral arrangement—by a verbal agreement—with Mr. Thurber at that time to have passed over and conveyed to him this personal property. And if, before Mr. White purchased this real estate of Thurber, and took, as he claims, Mr. Thurber's interest in this personal property,—for I understand that it is claimed that accompanying this transaction of the deed from Thurber, he took, by virtue of a verbal arrangement with Thurber, the right to receive this personal property, and claims that it was pointed out to him and delivered to him by Mr. Thurber; and it is for you to weigh this evidence and say whether Mr. White is correct or not; that being his claim,—I say that, if Mr. Byrne gave him to understand by any conversations with him that Mr. Thurber owned not only the real estate, but also owned the personal property there; that it belonged to him, would pass to him (White) if he dealt with Thurber,—then Mr. Byrne is estopped, and his vendee, his son, is estopped from claiming any interest in this property. For a man cannot stand by, or cannot induce another to purchase property in which he claims an

interest, if he gives such purchaser to understand that he will get a good title if he deals with somebody else with reference to it. He is estopped from asserting any such claim. If you stand by while I am purchasing a horse of your neighbor, and say that your neighbor owns that horse, and, if I buy him, I will get a good title, and I purchase the horse and pay my money for it, you are estopped—your mouth is closed—from ever afterwards claiming that you owned the horse at that time; because you have by your conduct and language induced me to part with my money, and it is inequitable and unjust for you to make a claim inconsistent with that. The doctrine is a familiar one in the books. When a person by his words or conduct voluntarily causes another to believe in the existence of a certain state of things, and thereby induces him to act upon that belief, so as to change his previous condition, the person inducing such belief will be estopped from afterwards denying the existence of such state of things to the prejudice of the person so acting. In other words, if a person knowingly and voluntarily so conducts himself in relation to his business as to justify persons dealing with him in supposing and believing that a certain state of facts exists, and such person so dealing with him relies upon that inference and belief, the person so conducting himself will not afterwards be permitted to deny that such state of facts did exist, to the prejudice of the person acting upon such belief. You will remember that in the conduct of the trial yesterday, and while Mr. White was upon the stand, the court asked him this question: 'You may state whether the fact that Mr. Byrne, Sr., stated to you that this material was to go with the building, and the other conversations you have referred to, had any influence upon you in purchasing the property.' And you remember that Mr. White claimed and said in answer to that: 'Most decidedly. I wouldn't have touched it—I wouldn't have paid him \$4,000—without the complete understanding that all the material there belonged to or went with the building. Mr. Byrne's own argument was that it was ample to cover the \$4,000.' I do not wish to emphasize this language by calling your attention to that; more than to call your attention to the point involved. You will weigh the testimony of Mr. Byrne upon the opposite side of the question, in which he denies that he said to Mr. White that it would go with the building, or with the transaction or trade with Thurber. Now, who is right about this, gentleman? If you shall say that Mr. Byrne used this language, it having been 60 L. R. A.

perfectly competent and proper for Mr. Byrne to have conveyed this property by oral arrangement to Mr. Thurber, if you shall say that he did do that, or, even if he didn't do that at all, but gave Mr. White to understand by language that a reasonable man would believe and be induced to act upon, that he had so conveyed it over to him, by a verbal or other arrangement, so that if he (White) did deal with Thurber he obtained the interest in this personal property,—then I say Mr. Byrne is estopped from claiming this property; and his son, who afterwards became the alleged owner of it by virtue of a bill of sale, could take no greater title than his father had; and, if his father had parted with his title to that property, then he could convey no interest in it. So much for this doctrine or claim of estoppel on the part of the defendants." Mr. Byrne denied most emphatically Mr. White's testimony as to Byrne's telling him the title to the iron and stone passed to Thurber by the deed. In *Maxwell v. Bay City Bridge Co.* 41 Mich. 453, 2 N. W. 639, the court said: "The doctrine of estoppel rests upon a party having directly or indirectly made assertions, promises, or assurances upon which another has acted under such circumstances that he would be seriously prejudiced if the assertions were suffered to be disproved or the promises or assurances to be withdrawn. But as the doctrine, when applied, operates to take away legal rights, it is no more than common justice to require that the facts which are supposed to call for its application shall be unquestionable, and the wrong which is to be prevented shall be undoubted. *Fredenburg v. Lyon Lake M. E. Church*, 37 Mich. 476; *Cronin v. Gore*, 38 Mich. 381. Moreover, the question of its application in any case is a mixed question of law and fact, and in cases of jury trial must be submitted to the jury under proper instructions. Now, however clear the facts in support of the estoppel may seem to be, it is always possible that there may be qualifying or overruling facts; and the conclusions from the evidence must be drawn by the jury, not by the court."

In relation to the claim of plaintiff being barred by lapse of time, we think it sufficient to refer to what was said by the learned trial judge in overruling the motion for a new trial.

We now come to the most difficult question in the case; that is, whether, as claimed by defendants, the court erred in the instruction given to the jury that the structural iron and stone did not become a part of the realty, and refusing the request of defendants, counsel on that subject. It must be confessed there is a good deal of

conflict in the authorities. They are collated at length in 13 Am. & Eng. Enc. Law, 2d ed., at pages 601-610, and in the notes thereto. We are impressed with the reasoning of Chief Justice Lowrie in *Johnson v. Mehaffey*, 43 Pa. 308, 82 Am. Dec. 568, from whose opinion Judge Stone quoted so copiously. There is an expression used in *Curtis v. Leasia*, by Justice Sherwood, that tends to support the claim of defendants, but it is *obiter dictum*. The court held in the case that the rails which were claimed to be realty were not realty, but were personal property. See *Harris v. Scovel*, 85 Mich. 32, 48 N. W. 173. In this case it appears the defendants made new plans for a building, which rendered the

structural iron and the dressed stone unfitted for use therein. Was this material up to that time real estate, and from that time on personal property? If so, would the same result have followed had Mr. Byrne changed the plan of the building while he owned the property?

We are inclined to agree with the trial judge as to the weight of authority, and that the judgment should be affirmed.

Hooker, J., concurred with the Chief Justice.

Petition for rehearing denied January 30, 1905.

MARYLAND COURT OF APPEALS.

AMERICAN TOBACCO COMPANY, *Appt.*,
v.

Jessie May STRICKLING.

(88 Md. 500.)

1. The failure to box or otherwise protect a rapidly revolving upright shaft coming up through the floor in an alley or passageway where an inexperienced girl is required to sweep, and who is not warned of the danger, may be found by the jury to constitute negligence which will render the employer liable for injuries to her when her clothing is caught and wound upon the shaft.
2. Sundays cannot be excluded in computing the time for signing of bills of exception under Code Pub. Loc. Laws, art. 4, § 170, allowing it to be done "at any time within thirty days" after verdict or finding of fact.

(December 20, 1898.)

APPEAL by defendant from a judgment of the Court of Common Pleas in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Appeal dismissed.*

The facts are stated in the opinion.

Messrs. Carroll T. Bond and William L. Marbury, for appellant:

It is not the duty of an employer to provide against all possible injuries to his employees, but only against such as are "likely to occur" in case of his failure to take certain

precautions, or, in other words, such as would probably result therefrom.

Bailey, Personal Injuries Relating to Master & Servant, pp. 18, 19, and cases cited.

By thirty days is meant thirty working days, or thirty judicial days.

The right of appeal being a valuable one, itself expressly conferred by statute, and allowed to be exercised at any time within sixty days from the entry of the judgment, any statute operating as a practical forfeiture of that right will be construed as liberally as possible to prevent its working such a forfeiture.

Murphy v. McGuire (Md.) 20 Atl. 726.

In the case at bar three Sundays intervened, so that, under a literal interpretation of this statute, the appellant would have had only twenty-seven, instead of thirty, days in which to do the necessary work, about the most tedious vexatious, and responsible that a trial lawyer is called upon to perform.

A statute will be construed liberally, so far as it reasonably may, to effectuate the suppression of the mischief it is intended to remedy.

State v. Harris, 121 Mo. 445, 26 S. W. 558; *McChesney v. People*, 145 Ill. 614, 34 N. E. 431.

The statute expressly says that the bill of exceptions "may be signed at any time within thirty days from the rendition of the verdict;" that is to say, on any one of those thirty days. Surely the legislature will not be considered to have intended to au- a Sunday,—to give express legislative recognition to Sunday as "a day appropriate to business of this character." The only construction which can prevent this result, a

NOTE.—As to the duty of a master to warn his servants of danger, see note to *James v. Rapides Lumber Co.* 44 L. R. A. 33.

As to exclusion of Sunday in computation of time, see note to *Brown v. Valles*, 14 L. R. A. 120.

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result certainly not intended by the legislature, is the construction which excludes Sundays—all Sundays—in the computation of the thirty days.

Sunday is not a day for the transaction of judicial business.

Bass v. Irvin, 49 Ga. 436; *Neal v. Crew*, 12 Ga. 93; *Cheeseborough v. Van Ness*, 12 Ga. 380; *Ecker v. First Nat. Bank*, 64 Md. 292, 1 Atl. 849; *Blaney v. State*, 74 Md. 157, 21 Atl. 547; *Shepard v. Hull*, 42 Me. 577; *Conrow v. Schloss*, 55 Pa. 28; *Drexel v. Mann*, 6 Watts & S. 397, 40 Am. Dec. 573; *Marsh v. Hand*, 35 Md. 123.

The fact, if fact it were, that the signing of a bill of exceptions on Sunday would not be a void act irrespective of this statute, affords no reason whatever for the presumption that this statute was intended to encourage or promote the doing of such secular work on the Sabbath.

Louisville & N. R. Co. v. Turner, 81 Ky. 599; *Lewis v. Schwenn*, 15 Mo. App. 342; *National Bank v. Williams*, 46 Mo. 19; *Michie v. Michie*, 17 Gratt. 109; *Burton v. Chicago*, 53 Ill. 87; *Carothers v. Wheeler*, 1 Or. 194; *Meng v. Winkelman*, 43 Wis. 41; *Neal v. Crew*, 12 Ga. 93; *Kellogg v. Carrico*, 47 Mo. 157; *Johnson v. Dorsey*, 7 Gill. 269; *Leffler v. Armstrong*, 4 Iowa, 482, 68 Am. Dec. 672; *Marks v. Russell*, 40 Pa. 372; *Simmonson v. Durfee*, 50 Mich. 80, 14 N. W. 706; *Comingsby's Case*, 8 Mod. 46; *Lee v. Carlton*, 3 T. R. 642.

The question is, What was the probable intention of the legislature?

Thayer v. Felt, 4 Pick. 354.

The intention of the legislature to exclude Sundays from the thirty days allowed for the signing of bills of exceptions is manifest.

Messrs. Thomas G. Hayes, Daniel B. Chambers and James A. Fechtig, Jr., for appellee:

The appellant owed a duty to the female appellee to provide a reasonably safe place for her to perform the work for which she was employed.

Norman v. Wabash R. Co. 10 C. C. A. 617, 22 U. S. App. 505, 62 Fed. 727; *Gowen v. Bush*, 22 C. C. A. 196, 40 U. S. App. 349, 76 Fed. 349; *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368, 37 L. ed. 772, 10 Sup. Ct. Rep. 914.

The vertical shaft in question, under the circumstances and conditions shown in the case at bar, was dangerous machinery, and its danger was hidden and unknown to the female appellee, and to all other persons except those persons experienced in machinery; and it was the duty of the appellant, which it owed to the female appellee, before permitting her to sweep around said shaft, or come in proximity to it, either to have warned her of the hidden danger, or to have guarded it

by boxing or otherwise; neither of which things the appellant did.

Pullman's Palace-Car Co. v. Harkins, 5 C. C. A. 328, 17 U. S. App. 22, 55 Fed. 932; *Fairbank v. Haentzsch*, 73 Ill. 236; *Osage City v. Larkin*, 40 Kan. 206, 2 L. R. A. 56, 10 Am. St. Rep. 186, 19 Pac. 658; *Kinchlow v. Midland Elevator Co.* 57 Kan. 375, 46 Pac. 703; *Caswell v. Worth*, 5 El. & Bl. 849; *Doel v. Sheppard*, 5 El. & Bl. 856; *Bolch v. Smith*, 7 Hurlst. & N. 736.

The appellant could or ought to have known, if it did not know, by the exercise of ordinary care, of the hidden danger attendant upon the sweeping by the female appellee in proximity to the shaft in question. The fact is that the appellant had actual notice of the danger of such unguarded shafting.

Wood v. Heiges, 83 Md. 257, 34 Atl. 872; *Baltimore v. Whittington*, 78 Md. 231, 27 Atl. 984.

General custom or usage to guard, or not to guard, smooth shafting is an immaterial inquiry, and is not admissible in evidence in this case.

Wood v. Heiges, 83 Md. 257, 34 Atl. 872; *Reed v. Stockmeyer*, 20 C. C. A. 381, 34 U. S. App. 727, 74 Fed. 186; *Ryan v. Los Angeles Ice & Cold Storage Co.* 112 Cal. 244, 32 L. R. A. 524, 44 Pac. 471; *Jones v. Florence Min. Co.* 66 Wis. 277, 57 Am. Rep. 269, 28 N. W. 207.

The question under the inquiry as to general usage or customs of others is, What would a reasonably prudent employer do under similar circumstances and conditions?

Bertha Zino Co. v. Martin, 93 Va. 791, 22 S. E. 869; *Titus v. Bradford, B. & K. R. Co.* 136 Pa. 618, 20 Am. St. Rep. 944, 20 Atl. 517.

The injury which happened to the female appellee was most reasonable and probable under the circumstances and conditions of the case.

Milwaukee & St. P. R. Co. v. Kellogg, 94 U. S. 469, 24 L. ed. 256; *Greenland v. Chaplin*, 5 Exch. 248; *Ryan v. Los Angeles Ice & Cold Storage Co.* 112 Cal. 244, 32 L. R. A. 524, 44 Pac. 471; *Lane v. Atlantic Works*, 111 Mass. 139.

Where an act is required to be done in any certain number of days after or before a fixed time, Sunday is to be included in computing the number of days when it exceeds seven.

26 Am. & Eng. Enc. Law, p. 10.

There is no reason, as might be the case in other statutes, for excluding Sunday, for Sunday, as to the ministerial act of signing a bill of exceptions, is not a *dies non*.

Blaney v. State, 74 Md. 153, 21 Atl. 547; *Marsh v. Hand*, 35 Md. 123.

In the computation of statutory time Sunday is always to be reckoned.

Harris, Sunday Laws, §§ 37, 54; *Sutherland*, Stat. Constr. § 115; *Cunningham v. Mahan*, 112 Mass. 58; *Brown v. Johnson*, 10 Mees. & W. 331; *Ex parte Dodge*, 7 Cow. 147; *King v. Dordall*, 2 Sandf. 131; *Neal v. Crew*, 12 Ga. 93; *Adams v. Dohrmann*, 63 Cal. 417.

Though some of the cases hold that where Sunday is the last day it is to be excluded, yet some go so far as to say that, even if it is the last, it should be counted.

Brown v. Vailes, 16 Colo. 462, 14 L. R. A. 120, 27 Pac. 945; *Cooley v. Cook*, 125 Mass. 406.

A few of the cases, especially those in Massachusetts, draw the distinction between long and short time; holding that, when the period is less than a week, Sunday is not to be counted when an intervening day, but, when longer than a week, it must be counted.

Cunningham v. Mahan, 112 Mass. 58; *Caulfield v. Cook*, 92 Mich. 626, 52 N. W. 1031.

Generally the cases bear out the contention that Sunday must be computed.

Peacock v. Queen, 4 C. B. N. S. 264; *Cressey v. Parks*, 75 Me. 387, 46 Am. Rep. 406; *Haley v. Young*, 134 Mass. 366; *English v. Dickey*, 128 Ind. 174, 13 L. R. A. 40, 27 N. E. 495; *Cattell v. Despatch Pub. Co.* 88 Mo. 356; *State v. Green*, 66 Mo. 631; *Franklin v. Holden*, 7 R. I. 215; *Hanover F. Ins. Co. v. Shrader*, 89 Tex. 35, 30 L. R. A. 498, 50 Am. St. Rep. 25, 32 S. W. 872, 33 S. W. 112; *Taylor v. Palmer*, 31 Cal. 241; *Edelhoff v. Horner-Miller Mfg. Co.* 86 Md. 595, 39 Atl. 314.

Boyd, J., delivered the opinion of the court:

The appellee, Jessie May Strickling, was employed by the American Tobacco Company, the appellant, in one of its factories in Baltimore, and whilst engaged in her regular work was seriously injured by reason, as she claims, of the negligence of the company. When she first went into the company's employ, in January, 1897, she worked on a sieve,—putting tobacco in a sieve,—but her employment was subsequently changed to sweeping the floors of the factory and she was so engaged in May, 1897, when she was injured. Amongst other places, she was required to sweep, was a room in which there was a smooth, revolving, vertical shaft, which ran from the floor to the ceiling, and which was in an aisle or passageway between the wall and a stationary machine, being about 26 inches from the former and 16 inches from the latter. The shaft is 3 inches in diameter, and at the

time of the accident it made about 170 revolutions a minute. It was the duty of the plaintiff to sweep around this shaft as well as other places where the dust collected on the floor, and in doing so on the morning of the accident her apron was caught in some way and drawn around the shaft. She was whirled around, and, violently striking such objects as were in her way, probably the wall and machinery, had her clothing torn from her, and received injuries which confined her in a hospital for nine weeks. The shaft was not boxed, or otherwise protected, and it is not pretended that the plaintiff, who was seventeen years of age and altogether inexperienced in the use of machinery, was ever warned as to any danger from it. She sued the company, and recovered a judgment for \$6,000, and, a motion for a new trial having been overruled, an appeal was taken to this court. A motion to dismiss the appeal has been made on the ground that the bill of exceptions was not signed within the time allowed by the statute. That motion must prevail for the reasons hereinafter given; but, as the case was fully argued and we understood counsel to say that a case was pending in which the father of the plaintiff was suing the defendant for loss of services of his daughter as the result of this accident, we will first pass upon the merits of the case.

Cases between master and servant have been so numerous in this state, as well as elsewhere, that it is generally difficult to discuss one of that class without simply repeating what has been already said and announced as the law applicable to them. The precise question whether a master can be held liable for leaving unprotected and unguarded a smooth shaft in a place where one inexperienced in machinery and shafting will be called in the line of her duty, without warning to her, has not been before, this court, but the principles applicable to it have been frequently stated. We are not called upon to discuss some of the questions that frequently arise in cases of this character, as it is not pretended there was any contributory negligence on the part of the plaintiff, nor can it be said that the danger was so obvious or apparent to her as in anywise to interfere with her right of recovery. On the contrary, the evidence not only shows that she was inexperienced and knew of no danger lurking in that rapidly revolving shaft, but the appellant bases its defense mainly on the fact that its agents did not, and could not by the use of reasonable care, have known that there was any danger in leaving the shaft unprotected.

In referring to the law of the case, we may very properly begin with the proposi-

tion stated in the plaintiff's first prayer, that it was the duty of the defendant to exercise ordinary care to provide a reasonably safe place in which the plaintiff might perform the services which she was employed to perform for the defendant. In the case of *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368, 37 L. ed. 772, 13 Sup. Ct. Rep. 914, the Supreme Court of the United States thus announced that principle: "A master employing a servant impliedly engages with him that the place in which he is to work, and the tools or machinery with which he is to work, or by which he is to be surrounded, shall be reasonably safe. It is the master who is to provide the place and the tools and machinery, and when he employs one to enter into his service he impliedly says to him that there is no other danger in the place, the tools, and the machinery than such as is obvious and necessary." It is true, however, and the court below so instructed the jury, that the law does not require persons owning and operating factories containing machinery to guard against every accident that may possibly happen to their employees, but only against such as in the ordinary experience of persons using machinery are known to be likely to occur.

The plaintiff's third prayer is the one that is most objected to. It submitted to the finding of the jury the employment and experience of the plaintiff, the location and construction of the shaft, whether it was dangerous to female employees required to come in close proximity to it, whether the defendant knew, or might have known, by the exercise of ordinary care, of such danger as probable, whether such danger was obvious and apparent to a person ignorant of and inexperienced in the operation of such shafts, whether the plaintiff was warned of its danger, and whether the defendant was guilty of the want of ordinary care in constructing and putting the shaft in motion when the plaintiff was sweeping the room, as well as the question of care on the part of the plaintiff.

It is contended by the appellant that there was nothing which required the defendant to anticipate an accident of this sort as likely to occur from a failure to guard this piece of smooth shaft, and that the defendant neither knew, nor could have known by the exercise of ordinary care, of the hidden danger to the plaintiff or others. But the record, we think, fully justified the court in submitting those questions to the jury. A number of expert witnesses testified, and those on the part of the plaintiff not only said there was danger from leaving a shaft of this kind unprotected, but they gave instances of accidents from coming in contact

with shafting, which had happened in their own experience or observation.

G. B. Ahler, who had been a machinist for over twenty years, said a person approaching shafting like this, especially a girl or a woman, is liable to be caught and be wound up by it, and that he always instructed owners of buildings where he erected machinery to box up the shafting. James O. Towson, who had been a machinist since 1875, said: "I consider a vertical shaft to be dangerous if it is not enclosed; and it has always been my custom, when it has been found absolutely necessary to place a vertical shaft, to advise the additional expense of enclosing it." Charles R. Spencer testified to the same effect, and said a vertical shaft was more dangerous than a horizontal one. W. T. Howard, a mechanical engineer, and Benjamin Chambers, a machinist for over thirty years, also spoke of the dangers of such shafting. Mr. Chambers explained very fully and clearly such dangers. He said there was a tendency to create a vacuum about the surface, and that induces the surrounding atmosphere to rush toward the shaft to fill the vacuum created, and thus draw articles of light material around the shaft. In answer to the question about the danger to a female sweeping near it, he said: "The very act of sweeping itself would necessitate a movement, moderately rapid, of her body and of her garments, in passing and sweeping there. It would be moderately rapid, because that would be necessary to an industrious worker, and, on nearing that shaft there would be imminent danger that she would be wrapped about it." Again he said: "All shafts are dangerous; but I regard a vertical shaft, passing up through the floor unprotected, as the most dangerous character of shaft." That witness also said that, "where shafting stands vertically the method is to take some lumber and make about 7 feet high two half barrels, as it were, or two pieces, which, when put together, form a circle, and that is put around the shaft and hooked together, and that can be readily removed for the purpose of oiling, etc."

Thus the witnesses of the plaintiff not only testified as to the danger of such shafting, but their evidence, if accepted by the jury as correct, was sufficient to justify them in believing that the defendant knew, or ought by the exercise of reasonable care to have known, that it was not safe to thus leave it unprotected when the duties of the plaintiff (and possibly other inexperienced persons) required her to come in close proximity to it in the discharge of her duties. The superintendent of the factory, in answer to the question: "Had you ever known of anybody being injured by a smooth piece

of shafting of that kind prior to this accident?" replied: "Only from knowledge gleaned from the daily press"—thus admitting that he had knowledge from that public source that accidents did happen as the result of coming in contact with smooth shafting.

Of course it would not be necessary, under all circumstances, to cover shafting. It may be so situated as to be safe, and at least beyond the reach of inexperienced persons; but, when shafting is so easily protected as described by some of the witnesses, and when it is so situated that those inexperienced with its danger may be brought in contact with it in the discharge of their duties, there can be no reason why in a case of this kind the question whether the owner of the factory was guilty of the want of ordinary care, and whether it was an accident likely to occur, should not be submitted to the jury.

In *Pullman's Palace-Car Co. v. Harkins*, 5 C. C. A. 326, 17 U. S. App. 22, 55 Fed. 932, this very question was considered. The court said: "Revolving shafting, it appears, is attended with peculiar and latent danger. It seizes with fatal result the clothing of any person who unconsciously or incautiously comes in contact with it;" and again it said that the evidence justified the statement of the judge below that "all the witnesses agree in the opinion that shafting when in motion is very dangerous, and that it should be boxed, or covered, or protected in some manner when in a place where persons are liable to come into contact with it." See also *Fairbank v. Haentzsch*, 73 Ill. 236; *Kinchlow v. Midland Elevator Co.* 57 Kan. 375, 46 Pac. 703.

Thus, we have in this case not only the fact that an accident did happen by the plaintiff coming in contact with smooth revolving shaft and the evidence of a number of witnesses that such accidents are likely to happen if the shafting is not guarded, and the admission of the superintendent of the factory that he had seen notices of them in the public press; but we find the question has already been before the courts. The prayers, as granted, correctly announce the law, and we will not discuss them further, but would affirm the judgment if it was properly before us, as there was no other exception taken.

The verdict was rendered on the 4th day of April, 1898, and nothing was done in reference to the bill of exceptions until May 5th, 1898, when an order was passed extending the time for signing and filing it. Section 170 of article 4 of the Code of Public Local Laws provides that "bills of exception may be signed in any cause pending in any of said courts at any time within

thirty days from the rendition of the verdict of the jury or the findings of the court upon the issues of fact in said cause, but not thereafter unless the time for signing said bill of exception shall have been previously extended by order of court, or by consent of parties," etc. There was no consent of the parties, and the order extending the time of signing was passed after the expiration of thirty days from the rendition of the verdict, if Sundays be included. It is contended, however, that Sundays should be excluded, and that the statute means thirty working or judicial days. But with that contention we cannot agree. If there had been error in the rulings of the court below, it might have seemed a hardship that the appellant should have lost its right of appeal by being one day too late; but neither this court nor the court below can disregard the plain language of the statute, and we have had occasion to speak more than once of the importance and necessity of having bills of exception signed promptly. *Westminster v. Shipley*, 68 Md. 610, 13 Atl. 365; *Palmer v. Hughes*, 84 Md. 652, 36 Atl. 431.

"As a general rule, where an act is required to be done in any certain number of days after or before a fixed time, Sunday is to be included in computing the number of days, when it exceeds seven. If it is less than seven, Sunday must be excluded." 26 Am. & Eng. Enc. Law, p. 10, and cases cited. Of course that rule will not apply when Sundays are expressly excluded by the statute, or the intention of the legislature to exclude them is manifest. The rule may be said to be somewhat arbitrary, yet it is not without a reason. When the legislature fixes a limitation of time of more than seven days, it knows that the period must necessarily include one or more Sundays, and hence, if it intends to exclude them, it can and should say so; but, when the period of time is less than seven days, it may or may not include a Sunday, depending upon the day of the week it is computed from. It is said in *Hanover F. Ins. Co. v. Shrader*, 89 Tex. 35, 30 L. R. A. 498, 5 Am. St. Rep. 25, 32 S. W. 872, 33 S. W. 112, "the principle would seem to be that when but a few days are allowed in which to do the act, it is not to be presumed the legislature intended further to abbreviate it, in effect by including a day ordinarily observed as a day of cessation from all ordinary business. For example, where two days are designated it is not reasonable to hold that it was the purpose to include a Sunday when the practical effect of the ruling would be to reduce the time to one day only. But, when weeks are included in the time allowed, the reason does not apply." In *State v. Harris*, 121 Mo. 445, 26 S. W. 558, cited by the appellant,

this distinction is recognized. There it was held that Sunday would be excluded in the computation of the four days within which motions for new trials can be made; but in the same case, where sixty days from August 9th had been allowed within which to sign a bill of exceptions, it was said that October 9th was too late, thus, in effect, holding that Sundays must be included. See also *State v. Seaton*, 106 Mo. 198, 17 S. W. 169; *Cunningham v. Mahan*, 112 Mass. 58; *Caulfield v. Cook*, 92 Mich. 626, 52 N. W. 1031; *Hanover F. Ins. Co. v. Schrader*, 89 Tex. 35, 30 L. R. A. 498, 59 Am. St. Rep. 25, 32 S. W. 872, 33 S. W. 112.

There are but few exceptions to the general rule laid down above. There are cases which may seem to be, but a careful examination of the most of them will show that, when Sundays are excluded from the computation of time of more than a week, it is because of the language of the statute, or because the days referred to are such as the courts find exclude Sundays. We were cited to the case of *Matthews v. State*, 92 Ala. 89, 9 So. 740, to show that the constitutional limit of the sessions of the legislature in that state to fifty days excluded Sundays. But we do not understand that to have been the construction that has always been put on our constitutional provision that the general assembly may continue its sessions for a period not longer than ninety days. There are many instances in our statutes where the practice has always been to include Sundays. Take, for example, § 8 of article 66 of the Code, which provides for twenty days' notice of the time, place, and terms of sale under powers of sale contained in mortgages. If Sundays are to be excluded, many sales have been made without legal notice, as it has not been the practice to exclude them. Section 6 of article 5 provides for appeals from orders or decrees of the orphans' courts within thirty days, and so § 7 of that article allows thirty days for appeals under the insolvent laws. In none of those cases has it been the practice, so far as we are aware, to exclude Sundays in the computation of the time fixed by the respective statutes, and other instances might be given.

Nor do we think the language of the statute, "at any time within thirty days," etc., can make any difference. That simply means at any time within the thirty days that the court can act; and whether or not a bill of exceptions can be signed on Sunday is not relevant to the question in this case.

It will not be out of place, and may prevent further trouble, to add that if the thirty days expire on Sunday, it should still be counted, and the next day should not be 69 L. R. A.

allowed, as we can see no valid reason for excluding the last Sunday and including the others. The general rule, subject to but few exceptions, is that statutory time of over seven days cannot be extended because the last day falls on Sunday. 2 Enc. Pl. & Pr. p. 256; *Brown v. Vailes*, 16 Colo. 462, 14 L. R. A. 120, 27 Pac. 945; *Cooley v. Cook*, 125 Mass. 406; *Ex parte Dodge*, 7 Cow. 147; *Johnson v. Meyers*, 4 C. C. A. 399, 12 U. S. App. 220, 54 Fed. 417.

As neither the bill of exceptions, nor the order extending the time, was signed within thirty days from the rendition of the verdict, *the motion to dismiss the appeal must prevail.*

Frank A. BONSAI, Appt.,

v.

George W. YELLOTT *et al.*, Commissioners of Baltimore County, etc.

(.....Md.....)

Appropriations to aid counties in the construction of public roads are not forbidden by a constitutional provision that the general assembly shall not have power to involve the state in the construction of works of internal improvement, nor to grant any aid thereto, which shall involve the faith or credit of the state, nor make any appropriation therefor.

(March 22, 1905.)

A PPEAL by plaintiff from a decree of the Circuit Court for Baltimore County in favor of defendants in a suit to enjoin the expenditure of public funds for the improvement of highways. *Affirmed.*

The facts are stated in the opinion.

Messrs. William S. Bryan, Jr., and Redmond C. Stewart, for appellant:

The language of the prohibition is clear and unequivocal, and includes all internal improvements.

There is nothing in the constitutional debates of 1851 to show that the words "internal improvements" were used in any limited sense.

Bandel v. Isaac, 13 Md. 202.

In construing the Constitution, as in construing every other written paper, we should give the instrument the meaning which the framers of it intended, and not the meaning which we may now think it would have been wiser or better for them to have intended.

Queensberry Case, 1 Blight, 479; *Jones v. Smart*, 1 T. R. 51.

NOTE.—For other cases in this series as to constitutional provisions against state engaging in works of internal improvement, see *Rippe v. Becker*, 22 L. R. A. 857; *Oren v. Pingree*, 46 L. R. A. 407; and *State ex rel. Jones v. Froehlich*, 58 L. R. A. 757.

Messrs. John J. Donaldson and Osborne I. Yellott, for appellees:

All powers of legislation are taken to exist, except where prohibited, in express terms or by necessary implication, in the Constitution of the state.

Cooley, Const. Lim. 6th ed. 102-109, 200, 201; *People ex rel. Wood v. Draper*, 15 N. Y. 532; *Thorpe v. Rutland & B. R. Co.* 27 Vt. 140, 62 Am. Dec. 625; *Whittington v. Polk*, 1 Harr. & J. 236; *Davis v. Helbig*, 27 Md. 452, 92 Am. Dec. 646; *Dorchester County v. Meekins*, 50 Md. 28.

To justify the courts in setting aside enactments of the co-ordinate legislative department of the state government there must be a plain, and not a doubtful, violation of the organic law.

Drennen v. Banks, 80 Md. 310, 30 Atl. 655; *Davis v. Helbig*, 27 Md. 452, 92 Am. Dec. 646; *Dorchester County v. Meekins*, 50 Md. 28.

In construing the Constitution the courts must consider the circumstances attending its adoption, and what appear to have been the understanding and purpose of those who adopted it.

Bandel v. Isaac, 13 Md. 202; *State v. Mace*, 5 Md. 337; *Manly v. State*, 7 Md. 135; *Buckingham v. Davis*, 9 Md. 324; *Jackson v. State*, 87 Md. 191, 39 Atl. 504.

It must be construed, also, with reference to the previous legislation of the state.

Baltimore v. State, 15 Md. 376, 74 Am. Dec. 572; *Manly v. State*, 7 Md. 135.

In like manner, a contemporaneous and continued construction is of the greatest weight, and should not be shaken except upon the ground of manifest error and urgent necessity.

State v. Mayhew, 2 Gill, 487; *Catholic Cathedral Church v. Manning*, 72 Md. 116, 19 Atl. 599; *Harrison v. State*, 22 Md. 468, 85 Am. Dec. 658.

Such powers and duties as local authorities have had in Maryland, from the first settlement till to-day, in dealing with the public roads, including their construction and maintenance, the levy and appropriation of taxes for the purpose, they had solely by delegation from the general assembly.

Hagerstown v. Schner, 37 Md. 180; *Baltimore v. State*, 15 Md. 376, 74 Am. Dec. 572; *Horn v. Baltimore*, 30 Md. 218; *Groff v. Frederick City*, 44 Md. 67; *Frederick v. Groshon*, 30 Md. 436, 96 Am. Dec. 591; *Talbot County v. Queen Anne's County*, 50 Md. 245; *Pumphrey v. Baltimore*, 47 Md. 145, 28 Am. Rep. 446; *Daly v. Morgan*, 69 Md. 460, 1 L. R. A. 757, 16 Atl. 287; *Baltimore v. Reitz*, 50 Md. 574.

The taxing power belongs to the legislature, and it will not be held to have been conferred on a municipal corporation except 69 L. R. A.

by express language or necessary implication.

State v. Rowe, 72 Md. 548, 20 Atl. 179.

The general words must be restricted to subjects of the same genus as those specifically named.

Maxwell, Interpretation of Statutes, 55, 297; *Roberts v. Gibson*, 6 Harr. & J. 116.

Boyd, J., delivered the opinion of the court:

The appellant filed a bill in equity against the appellees, in which he sought to enjoin them from expending any of the public funds under their control for plans and specifications for the construction of any road under the provisions of Acts 1904, p. 388, chap. 225, and from making any other expenditure of such public funds under color of the provisions of that act. The appellant is a resident and taxpayer of Baltimore county, and the appellees are the county commissioners, sitting as the highways commission of said county. The act of 1904 is entitled "An Act for the Improvement of the Public Highways of the State and to Provide the Means Therefor, and to Require the Commission Created by an Act of the General Assembly of 1896, chap. 51, to Perform Certain Additional Duties." By it, it is proposed to furnish state aid for the construction of roads which may be macadamized, or of a telford or other stone, or constructed of gravel or other good material, "in such a manner that the same will be, with reasonable repairs thereto, at all seasons of the year firm, smooth, and convenient for travel." It appropriates the sum of \$200,000 annually, or, so much thereof as may be necessary, out of the state treasury, and provides that the state shall pay not exceeding one half of the total cost and expenses of the roads built according to its provisions. The counties are to pay the other half, and no county is to receive a larger share of the amount appropriated than the proportion the public-road mileage of the county bears to the total public-road mileage of all the counties in the state applying, as determined by the commission. Any road constructed under the act is to be thereafter a county road, and the duty of keeping it in regular order devolves upon the county. The commission provided for by the act of 1896, and referred to in this act, is composed of the governor, the comptroller, the president of Johns Hopkins University, and the president of the Maryland Agricultural College, and it has various duties to perform under the provisions of the statute.

The question is whether this act is in conflict with that part of § 34 of article 3 of the Constitution of the state which is as

follows: "The credit of the state shall not in any manner be given or loaned to, or in aid of, any individual association or corporation; nor shall the general assembly have the power in any mode to involve the state in the construction of works of internal improvement, nor in granting any aid thereto, which shall involve the faith or credit of the state; nor make any appropriation therefor, except in aid of the construction of works of internal improvements in the counties of St. Mary's, Charles, and Calvert, which have had no direct advantage from such works as have been heretofore aided by the state; and provided that such aid, advances, or appropriations shall not exceed in the aggregate the sum of \$500,000." The first provision of this character that was adopted in this state was in § 22 of article 3 of the Constitution of 1851. It was similar to that in the present Constitution, excepting, instead of using the expression "nor in granting any aid thereto, which shall involve the faith or credit of the state," it said, "or in any enterprise which shall involve the faith or credit of the state," and no exception was made in favor of the three counties named. The Constitution of 1864 followed the language of that of 1851.

Inasmuch, then, as the provision in controversy was first introduced in the Constitution of 1851, and was continued in that of 1864, and, with such changes as we have noted, in that of 1867, it will be proper to consider the circumstances under which it was first adopted, the object of its adoption, and the construction that has been placed on it by the legislature, the framers of the several Constitutions, and by the people. Questions of this character cannot be determined by simply ascertaining the etymology of the terms used. Public roads may be, and unquestionably generally are, "internal improvements;" but when the general assembly has been prohibited for more than half a century from in any mode involving the state in "the construction of works of internal improvement, or granting any aid thereto, which will involve the faith or credit of the state, or making any appropriation therefor," the question is not whether that term can include "public roads," but whether it was intended to and did do so, as used by the framers of the Constitution and the people who adopted it. As was said in *Jackson v. State*, 87 Md. 194, 39 Atl. 505: "The Constitution is not to be construed in a technical manner, but in ascertaining its meaning we are to consider the circumstances attending its adoption, and what appears to have been the understanding of the people when they adopted it;" and we then only announced a rule of interpretation which had been frequently adopted.

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It is only by recalling what seems almost like ancient history to us of to-day—that there was a time when the state's credit was seriously affected—that we can appreciate the occasion for such a provision as the one under consideration. Yet we find the same legislature that passed this act recognizing the great public services rendered by a former governor of Maryland in preserving its credit, not long prior to the assembling of what was called "The Maryland Reform Convention to Revise the Constitution." From the debates of that convention and other history of the state, it is well known that it had expended millions of dollars in aiding "works of internal improvement," which in some instances proved to be worthless investments, and in others giving little or no promise of early returns. But they were canals, railroads, possibly turnpikes, and similar internal improvements; and, so far as the records disclose, or we are informed, not one dollar of the state's money had been lost or was in any jeopardy by reason of aid to such "public roads" as we are now concerned in. With the exception of about \$20,000, in the aggregate, loaned to three counties by Acts 1774, chap. 21, we have not been cited to any instance where its credit had been involved for the benefit of "public roads," and, indeed, that was whilst Maryland was still a colony. It was said by the appellees, and does not seem to be denied by the appellant, that that act is "the only instance of direct aid from the treasury of the government, provincial or state, to public roads." But be that as it may, certain it is, as clearly shown by the debates of the convention, that the "works of internal improvement" which had been and were then giving people of this state such concern were the Baltimore & Ohio Railroad, the Chesapeake & Ohio Canal, the Tidewater Canal, and similar companies in which the state's money had been so largely invested. Such enterprises were being aided not only for the purpose of developing the state, but the legislature had doubtless been made to believe that they would be profitable investments. But the time came when the state could not meet the interest on its debt incurred by reason of these investments, and it was in danger of bankruptcy and repudiation. The legislature passed: "An Act to Sell the State's Interest in the Internal Improvement Companies, and to Pay the Debts of the State" (Acts 1842, 1843, chap. 301). but they could not be sold, for want of purchasers; and finally, after a great struggle, the obligations of the state were met by increased taxation, and its credit re-established. When, then, the constitutional convention of 1851 submitted to the people this

provision, it is certain that its members and the people had in mind the character of "internal improvements" which had been so disastrous to the state, and it would seem to be equally clear that they did not refer to the ordinary "public roads," which the public authorities alone construct.

We are not called upon to attempt to give the history of highway legislation in Maryland. An article of much interest is found in volume 3 of "Maryland Geological Survey," and the briefs filed in this case can be studied with profit. It must suffice to say that, with the exception of the National Road, built by the general government from Cumberland westward, and the turnpike and plank roads constructed by private corporations chartered by the state or by individuals, the public roads have been constructed almost, if not altogether, exclusively by the local authorities. We followed that rule of the common law, with others. But, while that is so, it is equally true that no power of taxation or other means of raising revenue for the construction and maintenance of roads is vested in the counties, excepting what the state gives them. "Cities and counties are but local divisions of the state, organized and chartered for the more efficient and economical administration of the government. As such they have no inherent power of taxation. The legislature itself may levy needful taxes to defray the general expenses of such cities or counties, or it may delegate this power to the local authorities. These expenses of a city or county—for example, expenses for . . . the maintenance of the public highways and other like expenses—are public or governmental expenses; and the power of taxation, exercised by the local authorities, to defray such expenses, is a delegated power derived from the legislature." *Daly v. Morgan*, 69 Md. 467, 1 L. R. A. 757, 16 Atl. 287. Under our present system the county commissioners are the boards in charge of the local affairs of the counties; and, by § 1 of article 7 of the Constitution, "their compensation, powers, and duties shall be such as now or may be hereafter prescribed by law." Under the Code of Public General Laws (art. 25) they have charge of and control over county roads and bridges, have the power to open, alter, or close public roads in their respective counties, and are required to keep them in repair. But the legislature can so change their powers and duties as to the public roads as to place them under the control of another board, as was done in Baltimore county, where they were put in the hands of road commissioners; and the statute was upheld by this court, to the ex-

tent of relieving the county commissioners from liability for damages for injuries sustained by reason of a road being out of repair. *Baltimore County v. Wilson*, 97 Md. 207, 54 Atl. 71, 56 Atl. 596.

Such being the case, it would seem strange if the people did mean by this provision in the Constitution to deprive the legislature of the power to aid in the construction of county roads. It may well be that such assistance by the state as is proposed by this act may be the means of enabling the counties to construct roads of a character that no one county could well undertake. A state commission such as that provided for may be able to introduce a system and methods that the local authorities of one county could not be expected to undertake. Yet, if the contention of the appellant is correct, there not only could not be a commission paid by the state to help the counties in this work, but even one such as this would be unlawful, for, although the act of 1896 which created the commission requires the members to serve without compensation, it provides that they shall be reimbursed for actual expenses incurred, and there are expenses connected with their duties, other than those personal to the members of the commission, which must be met. Indeed, can it be doubted that much of the work already done in connection with the Maryland Geological Survey is in conflict with this provision of the Constitution, if the construction contended for must be placed on it? On page 38 of volume 1 of the reports of that survey attention is called to "the special investigation of road materials." After referring to the fact that perhaps no subject is attracting more attention "of enlightened commonwealths" than the proper construction of roads, and "that, if the money now expended annually by the several states was properly applied, a system of permanently good roads could be gradually constructed in place of the temporary makeshifts now in vogue," the importance of showing to the road commissioners of each county the various rock formations within the state, the most available local materials, questions of transportation of them, etc., that page concludes: "There are few ways in which the Geological Survey can be of more direct service to the state than in giving advice regarding the proper materials for road construction, and it is the intention of the State Geologist to give the subject his careful attention as the work of the survey proceeds." One entire volume (3) of these reports is devoted to this subject, and in other ways the money of the state has been used in aid of these "internal improvements;" but is it to be sug-

gested that the framers of our three Constitutions containing this provision ever dreamt that they were so effectually sealing the doors of our state treasury as to prevent the expenditure of any of its money for such purposes? Every intelligent person in the state, who has given the work of this commission, and the officers and others employed by them, due consideration, must know that the public money has seldom been more advantageously spent for the development and advertisement of the state, and for the instruction of its people in matters that must be of the most practical and permanent benefit. Yet it cannot be doubted that, if the appropriation made by the act of 1904 is in conflict with the Constitution, the expenditure of all money heretofore expended by the officers of the Maryland Geological Survey for the benefit of the highways has likewise been so, for it would be an anomaly to say that the general assembly cannot aid in the actual construction of the public roads, but can aid in finding, developing, and testing the material for such roads, in instructing the county officials how to make roads, etc. Of course, we are aware that it would not justify the expenditure of the money under the act of 1904 to show that other money of the state had been used in connection with public roads, but we refer to this to show how far the contention of the appellant would require us to go, if adopted; and, as we have no doubt of the authority of the officers of the Maryland Geological Survey to give such assistance to the counties as we have referred to, it reflects upon the question now before us.

One way of ascertaining the meaning of a word, term, or expression as used in a Constitution, sanctioned by this and other courts, is to see how it is used in other connections and provisions in the same instrument. The concluding part of this prohibition of the present Constitution throws considerable light on the subject: "Except in aid of the construction of works of internal improvement in the counties of St. Mary's, Charles, and Calvert, which have had no direct advantage from such works as have been heretofore aided by the state." What "works" had been heretofore aided by the state? We have seen that the state had not aided such works as "public roads," but it had aided railroads, canals, etc., such as we have said the framers of the Constitution had in mind. If it was intended to equalize those counties with the others, manifestly it was intended to do so by aiding them in "such works" as the state had aided the others. It did not intend simply to make a donation to those three counties of half a million dollars, but that they

should "have such aid, advances, or appropriations" as had been given or made, which had directly benefited the other counties. That such was the legislative construction is shown by the significant fact that at the first session of the legislature it passed "An Act to Aid in Construction of Works of Internal Improvements in St. Mary's, Charles, and Calvert Counties" (Acts 1868, p. 880, chap. 454), in which this provision of the Constitution was referred to; and in the preamble it was stated that "said counties have heretofore received no direct benefit from works heretofore aided by the state." The amount was then apportioned between the three counties, and the state treasurer was authorized to subscribe to the capital stock "of any railroad company now chartered, or which may hereafter be chartered, in said counties respectively;" thus conclusively showing that the members of the legislature who were elected a few months after the Constitution was adopted construed the provision as contended for by the appellees.

Another provision of the Constitution which reflects on the subject is § 54 of the same article (3). That provides that "no county of this state shall contract any debt, or obligation, in the construction of any railroad, canal, or other work of internal improvement, nor give or loan its credit to, or in aid of, any association or corporation, unless authorized by an act of the general assembly," which must be published for two months, and then be approved by a majority of all the members elected to each house of the next general assembly. If the construction urged by the appellant be correct, a county could not incur a debt or obligation to construct a road or build a bridge without first complying with these provisions. It has happened in some portions of the state that a road as originally constructed has been so completely destroyed as to require building a new one for some distance over other lands; and, although bridges are included in the general term "internal improvements," it is not unusual, in some portions of the state, for them to be carried off by floods. If a county meets with such disaster by reason of high waters, such as some of them did in 1877, 1889, and other recent years, although a duty to replace rests upon it, nothing could be done for two or more years; depending upon when the disaster overtook it. Such a construction would be contrary to the practice of most, if not all, of the counties; and it would in some counties ruin many of the inhabitants if they are to be thus cut off from markets and other places they must reach for such length of time. Counties have frequently contracted large obligations

in the original construction of roads and bridges without attempting to comply with the provisions of this section. The legislature has, over and over again, passed laws requiring county commissioners to build bridges, and directing the issue of bonds. Sometimes it has authorized the issue of bonds for the purpose of building new roads, and, so far as we are aware, it has never been the practice in such cases to comply with the provisions of § 54 of article 3 of the Constitution, as it was not thought to be necessary, either by the members of the legislature, the governors and attorney generals passing on such acts, the county officials, or by the people at large. It would be unreasonable, therefore, to suppose that the framers of the Constitution, or the people who voted on it, ever intended to give such a construction to the term "works of internal improvement," and, if it was not so intended as to the counties, why was it as to the state? If "works of internal improvement" in § 34 include "public roads" of the character in question, why does not that term have a similar meaning in § 54 of the same article? Yet it has never been so understood, and it would be contrary to all precedents to so construe it.

Still other expressions are to be found in the Constitution of the state showing that the meaning of this term is not such as the appellant urges. In this same section the legislature is forbidden to "use or appropriate the proceeds of the internal improvement companies;" in § 42, art. 3, Const. 1851, it was made the duty of the legislature, as soon as the public debt was paid, "to cause to be transferred to the several counties and the city of Baltimore stock in the internal improvement companies;" in § 3, art. 12, Const. 1867, the board of public works was authorized to exchange the state's interest in the Baltimore & Ohio Railroad Company, and "to sell the state's interest in the other works of internal improvement, whether as a stockholder or a creditor;" and now by that section, as amended in 1891, "to sell the state's interest in all works of internal improvement, whether as a stockholder or creditor." In 1867 the state owned, exclusive of the counties, the national road within its boundaries, and it was undoubtedly a "public highway;" but can it be supposed for a moment that it was a "work of internal improvement," within the meaning intended to be given that term in the Constitution,—either in § 3 of article 12, or in § 34 of article 3? And do not these several provisions of the Constitution show conclusively that the "works of internal improvement" intended were such as the state had been connected with or interested

in as "stockholder" or "creditor,"—such as had driven it to the very verge of bankruptcy and repudiation,—and not such as every state government must have, either in its own name, or in the names of its "political agencies, created for the better government of the affairs of the state," which counties are said to be in *Queen Anne's County v. Talbot County*, 99 Md. 13. 57 Atl. 1.

The learned counsel for the appellees have quoted the titles of many acts of the general assembly passed prior to the adoption of the Constitution of 1851 which strongly indicate the meaning of the term as used by the legislature during the period this state was becoming interested in "internal improvements." They are such as "An Act for the Promotion of Internal Improvements," "A Supplement to the Act Entitled 'An Act for the Promotion of Internal Improvements,'" "An Act to Provide Ways and Means to Meet the Subscriptions on the Part of the State to Works of Internal Improvements," and many others. It will be seen by an examination that in most of them provision was made for subscription by the state to the stock or bonds of railroads or canals, or both, the issue of certificates of stock of the state, and other means to aid these "internal improvements." An examination of these and similar acts cannot fail to strengthen the conviction that the makers of our Constitutions, and the people who by their action made them effective, had in mind such internal improvements as those acts have reference to, and not such as public roads.

It is difficult to do full justice to this subject in an opinion of anything like reasonable length, and we do not desire to unnecessarily prolong this, important as we realize the subject to be. We fully appreciate the importance, and, under some conditions, the necessity, of curbing the tendency to make too free use of the public funds or the credit of the state. This provision in the Constitution is a wise one, and perhaps has at times saved the state from becoming interested, not to say involved, in what might well be deemed questionable enterprises for a state to embark in. Nor have we any doubt that a public highway is an "internal improvement," as, indeed, in a sense, the term may include the statehouse, the court of appeals building, the penitentiary, house of correction, reformatory institutions, hospitals, and the like, including the improvements of the grounds appurtenant thereto, and the roads and ways leading to them; but we are convinced that the term "works of internal improvement," as used in this section of the Constitution, was not intended to, and does

not, embrace the "public highways" contemplated by the act of 1904. The occasion for such provision, the discussion of the subject in the convention that first adopted it, the context, the evident meaning of the term in other parts of the Constitutions, the prior, contemporaneous, and subsequent construction of the term, all suggest this as the reasonable and proper meaning to be given to it by the courts. Then, when we add to those considerations the additional one that by the same Constitution which first adopted this provision it was provided that the county commissioners "shall exercise such powers and duties only as the legislature may from time to time prescribe," and by the present one their "powers and duties shall be such as now, or may be hereafter prescribed by law," we are strengthened in our conviction. For, as was well said in appellees' brief, "the establishment, construction, and maintenance of public roads is a primary function of government," and when we remember that a county is but a division of the state, "created and organized for public political purposes connected with the administration of the state government," and that the legislature has, under the power given it by the Constitution, imposed the duty on the county commissioners to raise money with which the public roads can be maintained, it would seem remarkable, if not unjust to the counties, if the legislature was intentionally shorn of the power to give such reasonable aid to the counties towards the construction or improvement of public roads as this act contemplates. The general assembly exercises great power over the counties, and in no respect more than concerning their public roads and bridges, as illustrated in the cases between *Queen Anne's County and Talbot County* in 50 Md. 245, and 99 Md. 13, 57 Atl. 1, the *Baltimore County v. Wilson Case*, 97 Md. 207, 54 Atl. 71, 56 Atl. 596, and by the act of 1878, chap. 158, p. 256, by which it required Allegany and Garrett counties to take charge of and keep in repair the national road. Yet, if the appellant's contention is right, it cannot aid these "political divisions of the state, organized with a view to the general policy of the state," as was said of counties in *Daly v. Morgan*, "although they are constantly subject to legislative control," however desirable for the state at large it may be to do so. It cannot be doubted that, in the absence of some constitutional prohibition, the general assembly has full power to furnish such aid; and when we are called upon to determine whether a recognized and unquestioned power has been taken from a body such as the general assembly, in which it was formerly vested, any doubt on the 60 L. R. A.

subject should be resolved in favor of its continuance, rather than against it,—especially when it concerns a subject in which the state has so much interest as public roads. Rules of interpretation adopted by the courts require them to sustain legislation when it can properly be done, and courts should be inclined to continue the powers formerly vested in the general assembly, unless there be manifested a clear, unquestionable intent to take them from it.

Being of the opinion that Acts 1904, chap. 225, p. 388, is not in conflict with § 34 of article 3 of the Constitution, as the term "works of internal improvements," as therein used, was not intended to apply to such public highways of the state as are constructed by the counties and contemplated by that act, the decree of the lower court so holding will be affirmed.

Decree affirmed; costs to be paid by the appellant.

Mary E. POLK *et al.*, *Appts.*,
v.

Helen A. LINTHICUM

(.....Md.....)

1. Mere unfriendliness of a cestui que trust toward a trustee is not sufficient ground for the removal of the latter.
2. The removal of the widow as trustee of a fund provided for the benefit of testator's daughter is required, where she elected to take her dower rights in opposition to the will, thereby depleting the trust estate, and destroying a very important part of the scheme of the testator, remarried within a short time, became estranged from the cestui que trust and her cotrustees so that no intercourse could subsist between them, and kept the estate in needless litigation.

(March 23, 1906.)

A PPEAL by plaintiffs from a judgment of the Circuit Court for Baltimore City refusing to remove a trustee. *Reversed.*

The facts are stated in the opinion.

Messrs. James P. Gorter and H. Arthur Stump, for appellants:

The behavior of Mrs. Linthicum is very much below the standard that the courts of this state exact in the performance of the responsible and delicate duties pertaining to the office of trustee.

Dickerson v. Smith, 17 S. C. 289.

There ought to be peaceful intercourse between the beneficiary and those intrusted with the management of the estate. Where

NOTE.—On the question of dissensions between beneficiary and trustee as ground for the latter's removal, see also, in this series, *May v. May*, 41 L. R. A. 767.

strained relations exist between trustee and *cestui que trust*, the court has exercised its power, and removed the trustee.

Wilson v. Wilson, 145 Mass. 492, 1 Am. St. Rep. 477, 14 N. E. 521; *McPherson v. Cox*, 96 U. S. 419, 24 L. ed. 751; *Scott v. Rand*, 118 Mass. 215; *May v. May*, 167 U. S. 310, 42 L. ed. 179, 17 Sup. Ct. Rep. 824.

Strained relationship between the trustees is an additional ground for removal.

May v. May, 167 U. S. 310, 42 L. ed. 179, 17 Sup. Ct. Rep. 824; *Urcdale v. Ettrick*, 2 Ch. Cas. 130; *Jones v. Stockett*, 2 Bland, Ch. 434; *Quackenboss v. Southwick*, 41 N. Y. 117; *Re Bernstein*, 3 Redf. 26; *Druid Park Heights Co. v. Octtinger*, 53 Md. 62.

When Mrs. Linthicum renounced the will, she ceased to be trustee.

Meyer's Estate, 8 Pa. Co. Ct. 374.

Messrs. T. R. Clendinen, Enoch Harlan, and J. Charles Linthicum & Brother, for appellee:

Equity will not exercise its power to take charge of and administer a trust when it is being properly administered by the trustee.

Perry, Tr. § 275; Schouler, Exrs. & Adms. 2d ed. § 33, pp. 45, 46; *Massey v. Stout*, 4 Del. Ch. 274; *Thompson v. Thompson*, 2 B. Mon. 175.

A trustee appointed by the grantor of the benefits should not be displaced unless he has violated his trust,—especially when asked for by part only of the beneficiaries.

Berry v. Williamson, 11 B. Mon. 271; *Re Newman*, 124 Cal. 688, 45 L. R. A. 782, 57 Pac. 686; *Kidd v. Bates*, 120 Ala. 79, 41 L. R. A. 155, 74 Am. St. Rep. 17, 23 So. 735.

An executor appointed by will cannot be rejected by the court, except where the law has specially so provided.

Smith's Appeal, 61 Conn. 420, 16 L. R. A. 538, 24 Atl. 273; *William's Appeal*, 73 Pa. 277; *Bonner v. Lessley*, 61 Miss. 397; *Moorman v. Crockett*, 90 Va. 198, 17 S. E. 875.

The mere fact of there being a dissention between the *cestui que trust* and the trustee is not a sufficient ground for removing that trustee from the trust.

Forster v. Davies, 4 DeG. F. & J. 139; *Gibbes v. Smith*, 2 Rich. Eq. 134; *Clark v. Anderson*, 10 Bush, 113; *Nickels v. Philips*, 18 Fla. 735; *Keen's Estate*, 6 Pa. Co. Ct. 645; *Stevenson's Appeal*, 68 Pa. 105.

Testator's judgment in appointment will not be interfered with.

Berry v. Williamson, 11 B. Mon. 245; *McPherson v. Cox*, 96 U. S. 404, 24 L. ed. 746; *Smith's Appeal*, 61 Conn. 420, 16 L. R. A. 538, 24 Atl. 273; *May v. May*, 167 U. S. 317, 42 L. ed. 183, 17 Sup. Ct. Rep. 824.
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Page, J., delivered the opinion of the court:

This is an appeal from the order of the lower court dismissing the petition of the appellants for the removal of the appellee from the trust created by the last will and testament of the late Gabriel D. Clark. The decedent left, surviving him, a widow (the appellee in this case) and two children by a former wife (a son, Gabriel D. Clark, Jr., and a daughter, Mary, who, with her husband, Lucius C. Polk, are the appellants). By his last will, made in the year 1892, he distributed a large estate, except as to a small portion donated to certain charitable purposes, among the several members of his family. For his wife he made an ample provision. He gave her his residence and contents, and one half of his personal estate, amounting to more than a million and a half of dollars, for her life or widowhood, and one third of the residue of his realty for life. All the residue of his estate, including that portion that might remain after the termination of the estate given to the wife for life or for widowhood, he divided among his son and daughter. The son took his share absolutely, but that of his daughter was given to his widow, his son, and the Mercantile Trust Company of Baltimore, in trust to hold and manage the same, and pay over the income thereof to Mrs. Polk, "into her hands and not into another," for her life, and from her death to his grandson, if he be then living, during his natural life, and then for the benefit of his child or children, until the youngest child shall have reached twenty-one years of age, when the trust is to close, and the property shall vest absolutely in the said children. In the event of his grandson dying without leaving child or descendant, the property is to go to the children of the testator's brother. He died on the 8th December, 1896, and in June, 1898, the court assumed jurisdiction of the trust.

The appellee and the decedent were married in 1883. From the time of the marriage up to his death, it seems not to be questioned that their intercourse was harmonious and agreeable. From the period of Mr. Clark's death, there arose causes of estrangement between the widow and the children, which have brought about much bad feeling, and broken up all the pleasant relations that may have heretofore subsisted between them. We do not deem it necessary, in the view we take of the case, to enter into a discussion of the nature of these causes, nor to make any attempt to determine how far the suspicion and distrust the children seem to entertain for the appellee may be justified by the circumstances as they are disclosed by the record. It will be suf-

sufficient to observe that in fact ever since Mr. Clark's death these causes have operated to bring about a most unfortunate state of bad feeling in the family, and to develop differences respecting the conduct of the trust which have kept the estate in constant litigation. The appellee, it is true, has testified that she has never entertained "one moment of ill will against one of them" (meaning Mr. Clark and his sister); and it may be conceded that the appellee has testified with entire candor and honesty. But notwithstanding this, it seems improbable, if not impossible, that, under all the circumstances of the case, she can ever resume with them the kindly and sympathetic relations that existed during the lifetime of the testator, and are so necessary for the successful conduct of a trust like the one under this will. It may not unreasonably be assumed that the testator made selection of his widow not only because of his entire confidence in her judgment and integrity, but also because he knew of her satisfactory relations with Mrs. Polk. He must have sought not only that his daughter's share of his estate should be wisely and honestly controlled, but that her dealings with those managing the trust might be through the medium of the appellee, whose affectionate solicitude for her comfort and welfare would soften to some extent, at least, the burden of having to submit to the will of others. These remarks are not intended as the statement of a sufficient ground for a removal, for the reason that it seems to be well settled that mere unfriendliness of the *cestui que trust* towards the trustee is not a sufficient ground *per se* for the removal of the latter. *Forster v. Davies*, 4 DeG. F. & J. 139; *Wilson v. Wilson*, 145 Mass. 492, 1 Am. St. Rep. 477, 14 N. E. 521. But these reflections, we think, enable us to approach the consideration of other features of the case in our judgment of more importance. The last will of the testator was made and executed in the year 1892, four years prior to his death. It evinces a solicitude for the welfare of each member of his family, as well as an earnest desire to maintain an absolute equality among his children. He intended, it is true, to guard the share of Mrs. Polk by means of the trust, for reasons of which we are not informed, but which we must assume were inspired by the expectation that it would operate for her benefit. But he bestowed upon each of his children an equal share of the estate. To the widow he was extremely liberal. He gave her a life interest in more than one half of his estate. It included the dwelling and contents, and an income estimated by one of the counsel to amount to more than \$50,000 per annum. He seems, therefore, to

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have regarded the interest and probably the wishes of all the members of his family. At the time he selected his widow as one of the trustees for his daughter, he must have believed that the agreeable relation between her and his children would continue to exist after he was gone. He probably did not anticipate that she would remarry within less than a year and a half after his death, and thereupon would be broken up the home where they had so happily resided, nor that there would spring up so soon estrangements of serious character and far-reaching effect. His object in joining her in the management of the trust could not have been to supply the business skill needed for the successful control of so large an estate, for that was already supplied by the other trustees. What else could have been his motive, but that there might be at his daughter's side a safe, agreeable, and sympathetic medium through which she could convey her wishes respecting the trust estate to those that had it in charge? Her position on the board of trustees seems to be an additional proof of the fact that he intended the trust estate primarily for the benefit only of his daughter, to be enjoyed by her in the most agreeable as well as the most advantageous manner. It is apparent, also, from the face of the will that the scheme of the testator was, after providing liberally for his widow, to so dispose of all his property in such a manner that it should eventually go down in the line of his own blood. The testimony also shows that he was exceedingly solicitous that his dispositions should be acceptable to his wife. He trusted her, talked with her about his will, read it to her, and she promised him to do what he wished her to do. Mr. Snowden, who prepared the will, testified that after the will was executed the appellee "was called into the parlor, and Mr. Clark requested me to read it to her, which I did, very carefully and deliberately, and he asked her if she understood it, and whether she approved of it, to which she replied that she did." Notwithstanding this solemn declaration on her part, she renounced the will, and elected to take in lieu thereof her dower or legal estate. By this act she took out from the operation of the trust a very large amount—probably several hundred thousand of dollars—and diverted it to her own use. We are not now questioning in any manner her right thus to renounce, or what the moral aspect of the act may be, when considered in connection with the statements and promises made by her to her late husband, but we regard it now only as a fact to be considered in connection with other matters in relation to the trust. Moreover, it appears from the record that less than one year and a half after her husband's

death she remarried, and ceased not only to be on good terms with her stepchildren, but all intercourse of every kind with his family ceased. It is clear that by these acts she destroyed a very important part of the scheme of the testator. His property has been diverted from the channel in which he desired it to go, and the trust has been depleted to the extent of many thousands of dollars. Moreover, the proof shows that her cotrustee, Mr. Clark, entertains feeling of such a positive character towards her that proper co-operation between them in the business of the trust has become impossible, and also that the beneficiary has become charged with distrust of her, founded upon her dealings with the property of the testator, so that for the future there can no longer be personal relations between them. Finally, whatever amount of blame may or may not attach to the appellee, if any, there can be no doubt her participation in the trust has for many years operated to keep the estate in litigation, at much expense; and it is not unreasonable to expect that, if she remain, there may be other recurring matters that will develop still further litigation for many years longer. In addition to this, we think it is clear that the testator created this trust for the benefit of his daughter, and selected his wife to be one of the trustees, not for her personal advantage, but for that of the *cestui que trust*. His will ought to and must be respected; but it is not for a moment to be even suspected that he would have appointed anyone for the performance of the duty of trustee for the benefit of his daughter whose first act would be the depletion of the trust by renouncing his will, and thereby diminishing the value of the trust estate, and to that extent destroying his cherished hopes and wishes, and afterwards, having remarried, become so obnoxious to his children that they are unwilling to have dealings with her. These things show a want of fidelity to the wishes of the testator, and render the person so affected unfit to keep the financial prosperity of his daughter in her hands. In addition to this, we think it undoubtedly was Mr. Clark's desire that his daughter should not only receive her income promptly, but that she should be made comfortable in the reception of it as well as in its enjoyment. The mere fact of dissension be-

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tween the *cestui que trust* and the trustee is not, it is true, a sufficient ground for the removal of a trustee, because, as was said in *Forster v. Davies*, 4 DeG. F. & J. 139, a *cestui que trust* "might at any time raise a quarrel with the trustee, and thereupon come to this court to discharge the trustee and remove him from the trust upon the ground of the impossibility of their acting together." But it is also well settled that an application by a *cestui que trust* to remove a trustee is addressed to the reasonable discretion of the court, and "requires a careful consideration of all the circumstances, the existing relations, and to some extent the state of feeling between the parties." *Scott v. Rand*, 118 Mass. 215. And so in *May v. May*, 167 U. S. 320, 42 L. ed. 184, 17 Sup. Ct. Rep. 828, the Supreme Court said: "The power to remove a trustee and to substitute another in his place is incidental to its paramount duty to see that trusts are properly executed, and may properly be exercised whenever such a state of mutual ill feeling, growing out of his behavior, exists between the trustees, or between the trustee in question and the beneficiaries, that his continuance in office would be detrimental to the execution of the trust, even if no other reason than that human infirmity would prevent the cotrustee or the beneficiaries from working in harmony with him, and although charges of misconduct against him are either not made out, or are greatly exaggerated." *Disbrow v. Disbrow*, 46 App. Div. 115, 61 N. Y. Supp. 614, Affirmed in 167 N. Y. 606, 60 N. E. 1110; *Wilson v. Wilson*, 145 Mass. 490, 1 Am. St. Rep. 477, 14 N. E. 521.

We do not rest our decision in this case upon the mere fact of inharmonious relations between the appellee and Mrs. Polk, or between the appellee and her cotrustee; but we are of opinion that these and other facts stated in the record, and particularly that she has placed herself in a position of hostility to the plans of the decedent, whereby the trust fund has been materially depleted, convince us that she is not a proper person to longer act as a cotrustee of the fund, and should therefore be removed.

Order reversed and cause remanded, that an order may be passed removing the appellee from the trusteeship; the appellee to pay costs in this court and below.

CONNECTICUT SUPREME COURT OF ERRORS.

COLLINSVILLE SAVINGS SOCIETY
v.
BOSTON INSURANCE COMPANY, *Appt.*

(77 Conn. 676.)

An open mortgage clause attached to a policy of fire insurance, which merely provides that loss, if any, shall be paid to a mortgagee as his interest may appear, does not create any contract relations between the mortgagee and insurer, or give the mortgagee a right to participate in arbitration proceedings to fix the amount of loss; and, therefore, he will be bound by the award, although he was given no opportunity to be heard.

(April 20, 1905.)

APPEAL by defendant from a judgment of the Superior Court for Hartford County in plaintiff's favor in an action brought to recover the amount alleged to be due on a fire insurance policy. *Reversed in part.*

Statement by **Prentice, J.:**

One Woodruff was the owner of a lot of land in New Hartford, with a building standing thereon. These premises were subject to a mortgage to the plaintiff for \$10,000. Woodruff caused the building to be concurrently insured in five companies for the total sum of \$9,000. The defendant wrote \$2,000 of this amount. The policies were in the form of the Connecticut standard policy, had stamped thereon the so-called reduced rate, or 80 per cent, clause, and bore the indorsement, "Loss, if any, payable to the Collinsville Savings Society as their mortgage interest may appear." The building having been damaged by fire, the defendant and Woodruff made a submission in writing to two appraisers and an umpire in the manner prescribed in the policy. This submission, whose result the policy provided should be final, left to the determination of the appraisers and umpire the two factors from which the defendant's liability could be ascertained by a mathematical calculation, to wit, the "sound value" of the property damaged and the fire damage. It also provided that, in determining the sound value and the loss upon the property insured, the appraisers should

"make an estimate of the actual cash cost of replacing or repairing the same, or the actual cash value thereof, at and immediately preceding the time of the fire; and, in case of depreciation of the property from use, age, condition, location, or otherwise, a proper deduction shall be made therefor." The appraisers thereupon made their award, determining therein that the sound value of the property was \$17,500, and the fire loss \$3,571.94. The sound value was arrived at by estimating the cost of construction of a new building, and deducting therefrom the depreciation arising from the length of time the burned building had been built, and the use to which it had been put. Upon this basis an apportionment was correctly made, and the defendant's liability ascertained to be \$510.28. Subsequently, proof of loss having been made by Woodruff, the defendant made out its sight draft for said sum of \$510.28, payable to the joint order of Woodruff and the plaintiff, and attached thereto a receipt to be signed by said payees, and to accompany the draft when presented for payment. Woodruff thereupon, with knowledge of the result of the appraisal, indorsed said draft and signed said receipt, which recited that the amount of the draft was received of the defendant in full of all claims and demands for loss and damage by reason of its said policy and the fire in question. The plaintiff, having been presented with certain, at least, of the drafts and receipts made out in settlement of said loss, thereupon notified the defendant that it would not accept the award, and subsequently brought this action. The plaintiff was not a party to said submission, nor did it participate or acquiesce in the same or in the proceedings thereunder. Woodruff has never objected to or complained of the award. On the day upon which the plaintiff notified the defendant, as stated, that it refused to recognize the award, it obtained from Woodruff an assignment in writing of all his right, interest, and claim against the defendant by reason of said loss, and forthwith gave notice thereof to the defendant. The evidence disclosed no suggestion of bad faith on the part of either the defendant or Woodruff. The trial court ruled in favor of the plaintiff's contention that it was not

NOTE.—As to right of mortgagee to be a party to arbitration on a loss under an insurance policy taken out by the mortgagor, but containing an indorsement that the losses, if any, shall be payable to the mortgagee, see, in this series, *Bergman v. Commercial Union Assur. Co.* 15 L. R. A. 270.

As to effect on rights of mortgagee in policy 69 L. R. A.

payable to him as his interest may appear, of an accord and satisfaction between the insurer and the owner of the premises, see *Hathaway v. Orient Ins. Co.* 17 L. R. A. 514.

As to rights given generally by attachment of mortgage clause to insurance policy, see note to *Phenix Ins. Co. v. Omaha Loan & T. Co.* 25 L. R. A. 679.

concluded by said award, and also that the rule adopted by the appraisers for the determination of sound value was not the correct one. It further found that, by reason of a recent depreciation in values in the vicinity, the result reached by the appraisers was too large. It thereupon proceeded, upon independent evidence, to ascertain the market value and fix such ascertained value, to wit, \$10,000, as the sound value. The plaintiff made no complaint of the award as to the fire damage, and the court made the same finding in that regard that the appraisers had made. Upon the basis of these conclusions, the court computed the defendant's liability under its policy to be \$793.76, for which sum, with interest thereon from August 10, 1903,—making, in the whole, \$849.32,—judgment was rendered. The defendant does not contest its liability to pay the amount which results from an apportionment of the loss upon the basis of the award, but stands ready to pay that sum. Other facts not pertinent to the conclusions of this court are not stated.

Mr. Charles E. Gross for appellant.

Mr. Theodore M. Maltbie, for appellee:

The title of the plaintiff to the amount of the loss was given by the policy contract, and vested in the plaintiff when the loss occurred.

Hall v. Fire Asso. 64 N. H. 405, 13 Atl. 648; *Beach v. Fairbanks*, 52 Conn. 167.

As the title of the plaintiff is coincident with the origin of the claim, the conduct of the insured in reference to the loss and its adjustment, without the knowledge and consent of the plaintiff, could not prejudice the plaintiff's right to recover the full amount of the loss.

Harrington v. Fitchburg Mut. F. Ins. Co. 124 Mass. 126; *Hathaway v. Orient Ins. Co.* 134 N. Y. 409, 17 L. R. A. 514, 32 N. E. 40; *Hall v. Fire Asso.* 64 N. H. 405, 13 Atl. 648; *Brown v. Hartford F. Ins. Co.* 5 R. I. 398; *Bergman v. Commercial Assur. Co.* 92 Ky. 494, 15 L. R. A. 270, 18 S. W. 122; *Wilson v. Hakes*, 36 Ill. App. 547; *Jones, Mortg.* § 407.

Prentice, J., delivered the opinion of the court:

The plaintiff concedes that, by the assignment from the property owner of his claim under the policy sued upon, it has not, under the facts of this case, acquired any right which it did not previously have, save the right to maintain in its own name an action against the defendant. That assignment may therefore be disregarded.

If, as the defendant contends, the plaintiff is bound by the award made under the

submission entered into by the defendant and the property owner, there is error in this case. The court ruled against this contention, and rendered judgment in favor of the contrary claim of the plaintiff,—that it was not bound by said award. Two reasons are urged in support of the plaintiff's position, to wit: (1) That it was not a party to the submission, and has never acquiesced in or ratified it; and (2) that the appraisers applied an erroneous rule of law in their determination of the sound value of the property insured.

The policy, whose provisions prescribe and define the defendant's liability, is the Connecticut standard policy, having indorsed thereon the so-called reduced rate or 80 per cent clause, and also the following: "Loss, if any, payable to the Collinsville Savings Society as their mortgage interest may appear." Said society is in no other way or place, either specifically or descriptively, mentioned in the policy or its indorsements, save as it is provided in the body of the policy that "if, with the consent of the company, an interest under this policy shall exist in favor of a mortgagee, or of any person or corporation having an interest in the subject of insurance other than the interest of the insured as described herein, the conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest as shall be written upon, attached or appended hereto."

The indorsement above recited, designating the payee of any loss, which, for the purposes of distinction, has been called the "open mortgage clause," did not bring the plaintiff and defendant into contractual relations with each other, either directly or through an assignment of the policy; neither did the plaintiff thereby become a person or corporation whose property or property interests were insured under the policy. The contract for indemnity remained one exclusively between the defendant and the property owner. The plaintiff was only a conditional appointee of the latter. As such appointee, it was entitled to receive so much of any sum that might become due under the policy as did not exceed its interest as mortgagee, and nothing more. Such is the accepted rule in this state, and, with few possible exceptions, elsewhere. *Woodbury Sav. Bank & Bldg. Asso. v. Charter Oak F. & M. Ins. Co.* 29 Conn. 374; *Meriden Sav. Bank v. Home Mut. F. Ins. Co.* 50 Conn. 396; *Franklin Sav. Inst. v. Central Mut. F. Ins. Co.* 119 Mass. 240; *Baldwin v. Phoenix Ins. Co.* 60 N. H. 164; *Biddeford Sav. Bank v. Drelling-House Ins. Co.* 81 Me. 566, 18 Atl. 298; *Magoun v. Fireman's Fund Ins. Co.* 86

Minn. 486, 91 Am. St. Rep. 370, 91 N. W. 5; *Hartford F. Ins. Co. v. Olcott*, 97 Ill. 439; *Williamson v. Michigan F. & M. Ins. Co.* 86 Wis. 393, 39 Am. St. Rep. 906, 57 N. W. 46; *Van Buren v. St. Joseph County Village F. Ins. Co.* 28 Mich. 398; *Martin v. Franklin F. Ins. Co.* 38 N. J. L. 140, 20 Am. Rep. 372; *Grosvenor v. Atlantic F. Ins. Co.* 17 N. Y. 391; *Syndicate Ins. Co. v. Bohn*, 27 L. R. A. 614, 12 C. C. A. 531, 27 U. S. App. 564, 65 Fed. 165. It is universally held that a policy so indorsed may become forfeited, and the mortgagee deprived of all protection thereunder, by any act or default of the property owner before loss. *Moore v. Hanover F. Ins. Co.* 141 N. Y. 219, 36 N. E. 191; *Baldwin v. Phenix Ins. Co.* 60 N. H. 164.

There is another stipulation appearing in or appended to policies issued to property owners, and designed to protect the interest of mortgagees, which it is important to notice. This has been variously denominated the "mortgagee clause" and the "union mortgage clause." It is embodied in the standard policies in some states, and is frequently used as a rider upon policies in other states. It embraces the provision, in substance, that no act or default of any person other than such mortgagee or his agent, or those claiming under him, shall affect the mortgagee's right of recovery. It has frequently been held that the effect of this clause, whenever it is made a part of or indorsed upon a policy, is to bring the insurer and mortgagee into relations of privity, to convert the mortgagee into a party to the contract of insurance, to give to the mortgagee separate and distinct protection to his interest, to create in him an interest under the policy distinct from that of the property owner, and to, in fact, make him an assured. *Hastings v. Westchester F. Ins. Co.* 73 N. Y. 141; *Magoun v. Fireman's Fund Ins. Co.* 86 Minn. 486, 91 Am. St. Rep. 370, 91 N. W. 5; *Hartford F. Ins. Co. v. Olcott*, 97 Ill. 439; *Phenix Ins. Co. v. Omaha Loan & T. Co.* 41 Neb. 834, 25 L. R. A. 679, 60 N. W. 133; *Ormsby v. Phenix Ins. Co.* 5 S. D. 72, 58 N. W. 301; *Syndicate Ins. Co. v. Bohn*, 27 L. R. A. 614, 12 C. C. A. 531, 27 U. S. App. 564, 65 Fed. 165; *Clement, Ins. 33; Elliott, Ins. § 341*. This court has never gone to the full length of these decisions, nor need we do so now. In *Meriden Sav. Bank v. Home Mut. F. Ins. Co.* 50 Conn. 396, was presented a case in which the policy had attached to it the "open mortgage clause;" but the insurer and mortgagee had entered into a collateral agreement by which, in effect, the provisions of the "union mortgage clause" were made applicable to all policies issued or to be issued by the defendant (the insurer), where in the loss had been or might be made pay-
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able to the plaintiff as mortgagee, or had been or might be assigned to it. The mortgagee brought suit against the insurance company to recover for a loss, the policy being one bearing the appointee indorsement. The first count was on the policy and indorsement alone; the second, upon the policy, indorsement, and collateral agreement. The defendant demurred to each count. The court, after holding that recovery could not be had upon the first count for want of privity between the parties, decided not only that the agreement created such privity, but also that the mortgagee was thereby "made a party to the contract of insurance." The exigencies of the case required the court to go no further for the overruling of the demurrer to the second count, and so the court said that it would go no further at that time and in that case. It is unnecessary to inquire into the logical consequences of what was then held, since it is quite clear that the plain and explicit provision of the "union mortgage clause," to the effect that the mortgagee's right of recovery under the policy, as the payee thereof, shall not be affected by the act or neglect of any person other than the mortgagee, his agent, or those claiming under him, must suffice to establish for a mortgagee under such conditions a status with respect to the insurance which is not only independent of, but also superior to, that of the property owner. The former's rights are thus expressly set free from the operation of those acts and neglects of the latter which would destroy the latter's insurance or limit the extent of his recovery. The rights of the mortgagee become not merely those of a substitute for the owner. He acquires rights of his own which are subject to no man's control, and which give him independent and distinct protection.

It requires no argument to demonstrate that, under such circumstances, the mortgagee's protection extends, as we have above assumed it to do, to the consequences of all the acts and neglects of the property owner both before and after loss, and that it therefore precludes a submission to appraisers which should be binding upon the mortgagee without his concurrence or ratification. The plaintiff's claim is dependent upon the proposition that, however unlike the essence and character of the two clauses discussed may be, and however much the consequences flowing from the acts and neglects of the insured prior to the occurrence of the loss may differ, according as the one or the other enters into or is indorsed upon the policy, the consequences flowing from acts and neglects subsequent to the loss are the same, regardless of which of the forms is used, so that in either event the mortgagee will not be bound by any adjustment of the loss in

which he does not participate or concur. In support of this proposition, six cases are cited. These cases are frequently referred to by legal writers and annotators as supporting the principle propounded by the plaintiff and accepted by the trial court. An examination of them, however, discloses that many, if not most, of them have no pertinence whatever to the proposition in support of which they are so often cited, and that the balance are not of such a character as to strongly commend them as authorities in this jurisdiction, at least.

In *Hathaway v. Orient Ins. Co.* 134 N. Y. 409, 17 L. R. A. 514, 32 N. E. 40, the right of the mortgagee to participate in the adjustment of the loss was not in question. Both the policy and loss covered a building mortgaged, and machinery therein not mortgaged, save such as had become attached to the realty. What had become so attached was a matter of dispute between the owner and mortgagee. The latter's interest, therefore, in the sum to be paid by the insurance company, was not only a partial, but also an uncertain, one. The company and owner not only adjusted the loss, but also made a division of the amount of the adjustment, which was a single gross sum, between the owner and mortgagee, without consulting the latter. This latter attempt at a distribution of what had been determined upon as the amount due from the insurer, without the participation therein of one who had a vested right in some part of that amount, while suggestive of fraud and collusion, was also in plain violation of the mortgagee's right, and the court so held. What it determined was that the insurer "had no authority to agree with the owner as to the amount of the damages, and determine as between him and the mortgagee what sum was payable to each."

In *Wilson v. Hakes*, 36 Ill. App. 547, the only question raised related, not to the adjustment, but to the payment of what was in fact paid. The contention successfully made was that a mortgagee, with whom the owner and mortgagor has in the mortgage covenanted to maintain insurance sufficient to secure the indebtedness, has such an equitable right to insurance money due by reason of a loss that the insurer, after notice, cannot pay the owner, except at its own risk. Massachusetts in 1873 adopted a standard form of policy, which embodied as one, of its provisions the "union mortgage clause." Such must have been the policy in the oft-quoted case of *Harrington v. Fitchburg Mut. F. Ins. Co.* 124 Mass. 126. That case is not, therefore, authority for the doctrine which is credited to it. The report of the case of *Hall v. Fire Assn.* 64 N. H. 405, 13 Atl. 648, is so meager that it is

impossible to gather from it with certainty what the terms of the policy in suit were. A standard policy containing the "union mortgage clause" was adopted by that state prior to June, 1886, and probably in 1885. The case was decided in December, 1887. It is altogether probable, therefore, that the situation there was identical with that in the Massachusetts case. *Brown v. Hartford Ins. Co.* 5 R. I. 398, was decided upon the proposition that the "open mortgage clause" indorsed upon a policy operated as an assignment of it, by reason of which the mortgagee acquired not only a right of action upon the policy as long as his debt was unpaid, but afterwards. This principle, entirely at variance in its every part with the law of this state, was propounded upon the authority of the superior court decision in *Grosvenor v. Atlantic F. Ins. Co.* 5 Duer, 517, overruled upon appeal, 17 N. Y. 391, and a dictum in *King v. State Mut. F. Ins. Co.* 7 Cush. 6, 54 Am. Dec. 683, which was plainly misinterpreted, and thus made to express the reverse of the settled rule in that jurisdiction. *Fogg v. Middlesex Mut. F. Ins. Co.* 10 Cush. 337; *Hale v. Mechanics' Mut. F. Ins. Co.* 6 Gray, 169, 66 Am. Dec. 410; *Loring v. Manufacturers' Ins. Co.* 8 Gray, 28; *Franklin Sav. Inst. v. Central Mut. F. Ins. Co.* 119 Mass. 240. There remains the Kentucky case of *Bergman v. Commercial Assur. Co.* 92 Ky. 494, 15 L. R. A. 270, 18 S. W. 122, which rests its decision upon the authority of *Brown v. Hartford Ins. Co.* 5 R. I. 398; *Harrington v. Fitchburg Mut. F. Ins. Co.* 124 Mass. 126, and a text-book reference not in point. But whatever may be said of the pertinence of these decisions, we are unable to accept the conclusion said to be supported by them. We find it difficult to harmonize the accepted proposition that a mortgagee, by force of the appointment clause in question, does not become a party to the insurance contract, and is not in privity with the insurer, with the other proposition, that nevertheless he acquires the right to intervene between the only parties having contractual relations, and to exercise the functions which are created by the contract to which he is a stranger, and which are exercised in pursuance of its provisions. It has been suggested that the explanation is that upon the happening of a loss the mortgagee acquires a vested right. True, he does, but what is the right which thus vests? Is it anything more than the right to have the payment made, of his rightful share of it? If more, how and what more, and how does the claimed right to participate in the adjustment under the contract so suddenly arise? It is said that he ought, for his own protection, to have the right. But con-

tract rights are not thus created. The law does not raise up contract rights and relations for the protection of every man who has failed to protect himself.

But it is unprofitable to pursue this line of inquiry further, without first discovering what provisions there may be in the insurance contract into which the defendant entered which determine the rights of the parties in the matter under consideration, since it is clear that, in so far as the contract speaks, whether it be in the way of defining the extent of the defendant's liability for the loss in the abstract, or of prescribing the manner in which that liability in any given case should be measured, ascertained, and reduced to figures, it will be controlling. And it will be no less controlling of the rights of the mortgagee than those of the insurer and owner, since he takes his rights under and subject to the insurance contract. His right to take is limited to the insurer's obligation to pay, as determined by the provisions of the policy. Let us therefore see how far, if at all, the parties to the contract have themselves determined the questions pertinent to the present issue.

No question arises as to the extent of the defendant's liability, abstractly considered. The policy promises indemnity to an amount not exceeding \$2,000 for all direct loss or damage by fire, subject, however, to the exceptions named. These exceptions, which include the limitations upon the defendant's liability arising from concurrent insurance and the 80 per cent clause, concerning the effect of which no question arises, need not be considered. The controversy here relates solely to the means of obtaining an expression, in concrete dollars and cents, of the obligation whose statement in the abstract all concur in. Upon this subject the policy, first of all, provides that "the loss or damage shall be ascertained and established" upon a specified basis, and that such ascertainment or estimate shall be made by the insured and the company, or, "if they differ, by appraisers as hereinafter appointed." The subsequent provision for the event of a difference requires the appointment of two appraisers,—one by the insurer and the other by the insured,—and the selection by the appraisers of an umpire. The award thus obtained is made final as to the amount of the loss. The policy, it will thus be seen, could scarcely be more clear and precise in committing and limiting to the insurer and owner not only the power and right of adjustment by agreement, but also the power and right to submit the adjustment to the final decision of third parties, unless it can be said either that the term "insured," as used in this connection, is of itself sufficiently comprehensive to include this mortgagee.

(C) L. R. A.

or that the right of participation is by some other provision so given or to be implied that the term must be construed as including him.

It is easy to understand how a mortgagee, having acquired the status which the "union mortgage clause" gives one, whatever that status, technically regarded, may be, might be fairly entitled to be comprehended within the descriptive term "the insured," and, if not, that the express language of that clause so defines his rights and limits the rights and powers of the property owner that the right to participate in any adjustment of the loss is impliedly accorded him. On the other hand, it is not easy to discover upon what theory it can be reasonably claimed that a person who has not come into contractual relations with the insurer, who has obtained no insurance protection, and who is only an appointee of the owner as respects whatever may become due under the contract of insurance, to which he is a stranger, acquires the right, even by indirection, to assume the title of "the insured." If we look for other provisions which may serve, by way of implication or otherwise, to give him a standing in the adjustment of a loss, we find only that the word "insured," whenever used in the policy, should be construed to include the legal representatives of the insured, and nothing more. It appears, therefore, that the right to participate in an adjustment of a loss under this policy and indorsement has by the parties to the contract been limited to the insurer, the property owner, and his legal representatives.

The plaintiff's second objection to the binding force of the award falls with the first. It having been determined that the owner had full power in the matter of adjustment, whether by agreement or arbitration, and that the mortgagee was not entitled to be a party thereto, it follows that the former had full power to accept the result of a submission, however erroneously arrived at it might have been, and that the latter has no standing to attack it for the cause alleged.

The defendant strenuously complains that it is aggrieved because the court, after setting aside the award as not binding upon these parties, and finding that the determination of sound value therein was made upon an erroneous basis, which, under the peculiar circumstances of the case, gave too large a result, proceeded to accept the appraisal of the fire damage as correctly representing that item, without, as it is said, other evidence upon the subject than the discredited award, and the statement of one of the appraisers that he found the damage as stated therein. The contention is that the

court thus found an important fact without competent evidence, and unwillingly gave effect to a part of the award which was not only presumptively influenced by the element of sound value, but also based upon the same considerations of cost of construction which entered into the determination of that item; thus unjustly converting a 20 per cent damage into one of 35 per cent. This claim and others of an incidental character discussed at bar do not, in view of our conclusions above, call for consideration.

The plaintiff was entitled to judgment for the sum of \$510.28, the amount of the defendant's liability upon the basis of the award, together with interest on said sum from the time it was payable to the date of judgment, making, in the whole, \$549.23, and was entitled to no more.

There is error in so much of the judgment as is in excess of \$549.23, and it is set aside as to such excess. There is no error in the balance of the judgment, and the judgment is affirmed for said sum of \$549.23.

All concur.

Hester RICHARDS

v.

NEW YORK, NEW HAVEN, & HARTFORD RAILROAD COMPANY, App't.

(77 Conn. 501.)

1. Error in overruling a demurrer is not available to defendant after a voluntary default and hearing in damages thereon, unless the complaint is bad in substance.
2. The wharfage and reclamation rights of the owner of land on a cove leading off from a river are not destroyed or impaired by the construction of an embankment across the mouth of the cove.
3. No recovery can be had by the owner of land on a cove leading off from a river for interference with his right of access from his land to the river by the construction of a railroad track across the mouth of the cove, where the access is not entirely cut off, and because of the limited extent of the cove, and the shallowness of its waters, the right is not essentially impaired.

(January 4, 1905.)

A PPEAL by defendant from a judgment of the Superior Court for New London County in plaintiff's favor in an action to recover damages for injury to plaintiff's

NOTE.—As to right of owner of upland to access to navigable water, see also, in this series, *State ex rel. Denny v. Bridges*, 40 L. R. A. 593, and *note*.

As to right of riparian owner to wharf out, see *Madison v. Mayers*, 40 L. R. A. 635, and *note*.

69 L. R. A.

rights as owner of land abutting on navigable water. *Reversed.*

The facts are stated in the opinion.

Messrs. Brandegee, Noyes, & Brandegee, for appellant:

The defendant has not interfered with the wharfage right, or any other private right or privilege of the plaintiff.

Ockerhausen v. Tyson, 71 Conn. 38, 40 Atl. 1041.

The principle that riparian proprietors have the right to wharf out to the deep water or channel is applicable only where the body of water upon which they own property has a channel.

The private rights of the plaintiff not being infringed upon, her other damages are *damnum absque injuria*.

The title to the beds of navigable streams is in the state, and the state, in the absence of action by Congress under its power to regulate commerce, has authority to authorize the construction of bridges and other structures across such streams.

Frost v. Washington County R. Co. 96 Me. 86, 59 L. R. A. 68, 51 Atl. 806; *Davidson v. Boston & M. R. Co.* 3 Cush. 106; *Clark v. Saybrook*, 21 Conn. 325; *O'Brien v. Norwich & W. R. Co.* 17 Conn. 372.

The legislature has the power to authorize a railroad company to build a permanent bridge over navigable waters, and the riparian owners above are not only without remedy, but without a right to a remedy.

Bailey v. Philadelphia, W. & B. R. Co. 4 Harr. (Del.) 389, 44 Am. Dec. 593; *Homochitto River v. Withers*, 29 Miss. 21, 64 Am. Dec. 126; *Boston & W. R. Corp. v. Old Colony R. Corp.* 12 Cush. 605; *Brayton v. Fall River*, 113 Mass. 229, 18 Am. Rep. 470; *Blakwell v. Old Colony R. Co.* 122 Mass. 1; *Thayer v. New Bedford R. Co.* 125 Mass. 253; *Breed v. Lynn*, 126 Mass. 367; *Pound v. Turck*, 95 U. S. 459, 24 L. ed. 525; *Gilman v. Philadelphia*, 3 Wall. 713, 18 L. ed. 90; *Passaic Bridges (Milnor v. New Jersey R. & Transp. Co.)* 3 Wall. 782, Appx., and 16 L. ed. 799; *Baldwin Am. Railroad Law*, pp. 68, 105; *Whitehead v. Jessup*, 53 Fed. 709.

The complaint in the present case contains no such allegations of special damage.

Harvard College v. Stearns, 15 Gray, 1; *Lansing v. Smith*, 8 Cow. 146; *Brightman v. Fairhaven*, 7 Gray, 272.

As the navigation of Clark's cove has only been impaired, the plaintiff has no right of action.

Randolph, Em. Dom. 25; *Blood v. Nashua & L. R. Corp.* 2 Gray, 137, 61 Am. Dec. 444; *Jolly v. Terra Haute Drawbridge Co.* 6 McLean, 237, Fed. Cas. No. 7,441.

Even if the weight of the railroad struc-

ture has caused the filling up of a small portion of the cove outside the railroad location, the plaintiff cannot recover damages therefor.

Wesson v. Washburn Iron Co. 13 Allen, 101, 90 Am. Dec. 181; *Stetson v. Faxon*, 19 Pick. 147, 31 Am. Dec. 123; *Hatch v. Vermont O. R. Co.* 28 Vt. 142.

Messrs. Franklin H. Brown and Donald G. Perkins, for appellee:

The owner of land abutting on a navigable stream has the right of access to and from his land on the water, and a right to fill in flats and wharf out to deep water; and these rights are privileges or franchises attached to the land, and constitute a valuable property right.

East Haven v. Hemingway, 7 Conn. 202; *New Haven S. B. Co. v. Sargent*, 50 Conn. 206, 47 Am. Rep. 632; *Ladies' Seaman's Friend Soc. v. Halstead*, 58 Conn. 150, 19 Atl. 658; *Prior v. Swartz*, 62 Conn. 132, 18 L. R. A. 608, 36 Am. St. Rep. 333, 25 Atl. 398; *Lane v. New Haven Harbor*, 70 Conn. 695, 40 Atl. 1058; *Ockerhausen v. Tyson*, 71 Conn. 31, 40 Atl. 1041; *New York, N. H. & H. R. Co. v. Long*, 72 Conn. 21, 43 Atl. 559; *French v. Connecticut River Lumber Co.* 145 Mass. 261, 14 N. E. 113; *Yates v. Milwaukee*, 10 Wall. 497, 19 L. ed. 984; *Sullivan Timber Co. v. Mobile*, 110 Fed. 193; *Carli v. Stillwater Street R. & Transfer Co.* 28 Minn. 373, 41 Am. Rep. 290, 10 N. W. 205; *Chicago & P. R. Co. v. Stein*, 75 Ill. 45; *Rook Island & E. I. R. Co. v. Gordon*, 184 Ill. 456, 56 N. E. 810; *Baltimore & O. R. Co. v. Chase*, 43 Md. 23; *Clark v. Peckham*, 10 R. I. 35, 14 Am. Rep. 654; *Providence Steam Engine Co. v. Providence & S. S. S. Co.* 12 R. I. 356, 34 Am. Rep. 652; *Rumsey v. New York & N. E. R. Co.* 133 N. Y. 79, 15 L. R. A. 618, 28 Am. St. Rep. 600, 30 N. E. 654; *Williams v. New York*, 105 N. Y. 419, 11 N. E. 829; *Re New York*, 168 N. Y. 135, 56 L. R. A. 500, 61 N. E. 158; *Bucclough v. Metropolitan Board of Works*, L. R. 5 H. L. 418; *Lyon v. Fishmongers' Co.* L. R. 1 App. Cas. 682.

The right to wharf out is usually on a line at right angles with the channel, and the right exists and may be exercised no matter whether deep water is near or far.

New Haven S. B. Co. v. Sargent, 50 Conn. 206, 47 Am. Rep. 632; *Morris v. Beardsley*, 54 Conn. 341, 8 Atl. 139; *Lowndes v. Wicks*, 69 Conn. 30, 36 Atl. 1072.

The indentation of the shore of the river at plaintiff's land is just as much a part of the river as a point where the shore is straight.

Gallup v. Tracy, 25 Conn. 16.

An obstruction in a navigable stream is a public nuisance, and any person who suf-

fers a particular injury from a public nuisance can maintain an action therefor.

Burrows v. Pizley, 1 Root. 363, 1 Am. Dec. 56; *Frink v. Lawrence*, 20 Conn. 120, 50 Am. Dec. 274; *Hubbard v. Deming*, 21 Conn. 360; *Wheeler v. Bedford*, 54 Conn. 248, 7 Atl. 22; *Cooley, Torts*, pp. 732-737.

The mere layout of the railroad, and the approval of the layout over the water in front of plaintiff's land, did not authorize or imply that the railroad company could take and destroy the plaintiff's rights before or without first making compensation, any more than such a layout over upland accomplishes such a result.

Bradley v. New York & N. H. R. Co. 21 Conn. 306; *Hooker v. New Haven & N. Co.* 15 Conn. 326; *Gilpin v. Ansonia*, 68 Conn. 79, 35 Atl. 777; 10 Am. & Eng. Enc. Law. 2d ed. p. 1137.

But even though the state itself authorized a railroad company to cross navigable waters, it could not do so and thereby take and destroy the property rights of a landowner abutting on the water, until it had first made compensation for the damage; for the state itself cannot take private property for public use without making compensation.

Farist Steel Co. v. Bridgeport, 60 Conn. 283, 13 L. R. A. 590, 22 Atl. 561; *Hooker v. New Haven & N. Co.* 14 Conn. 152, 36 Am. Dec. 477; *Bradley v. New York & N. H. R. Co.* 21 Conn. 294.

The rights are analogous to those of a property holder abutting on a highway.

Shively v. Bowlby, 152 U. S. 14, 38 L. ed. 337, 14 Sup. Ct. Rep. 548; *Kane v. New York Elev. R. Co.* 125 N. Y. 164, 11 L. R. A. 640, 26 N. E. 278.

Even though a statute authorizing the taking of property makes no provision for compensation, this will not relieve from liability, for the Constitution requires compensation for taking property for a public use.

McKeon v. New Haven, N. H. & H. R. Co. 75 Conn. 343, 61 L. R. A. 730, 53 Atl. 656; *Knapp & C. Mfg. Co. v. New York, N. H. & H. R. Co.* 76 Conn. 314, 100 Am. St. Rep. 994, 56 Atl. 512.

Torrance, Ch. J., delivered the opinion of the court:

The complaint alleges, in substance, that the plaintiff is the owner of land having a frontage of several hundred feet on the Thames river, a navigable stream in this state; that the defendant, "wrongfully and against the will and consent of the plaintiff," has built and maintains a permanent embankment in front of said land and between it and said river; and that "the defendant has thereby separated and cut off the plaintiff's said land from said river, and

diverted said river so that it no longer flows by plaintiff's said land in its natural course, and has obstructed and destroyed the plaintiff's use of said river as a way of access to her said land, and has obstructed and destroyed the right, which the plaintiff owned as attached to her said land, to wharf out from her said land into deep water in said river for use of the same as a navigable stream, and has obstructed and destroyed the view and prospect of and over said river from the plaintiff's said land." The complaint also alleged damages caused by the upheaval of mud of the river bottom outside of the location of said embankment in consequence of the building of said embankment. The defendant demurred to the complaint, and, after this was overruled, suffered a default, and was heard in damages upon notice, which gave the defendant the right to contest all the allegations of the complaint. The action of the trial court in overruling the demurrer is assigned for error in one of the reasons of appeal.

After a voluntary default and hearing in damages thereon, this reason of appeal is no longer open to the defendant, unless the complaint is bad in substance; and, as this is not the case, the assignment above referred to cannot avail the defendant upon this appeal. *Houigan v. Norwich*, 77 Conn. 358, 59 Atl. 487.

The other errors assigned relate to the action of the court in overruling certain claims of law, and in rendering judgment for more than nominal damages. The controlling facts in the case are, in substance, the following: The Thames river, a navigable stream, flows in a southerly direction to Long Island sound. Upon its eastern margin, at a point just above Gale's ferry, there is a small pouch shaped indentation known as "Clark's cove." This cove is about 1,600 feet in length north and south, and, near its northerly end, it has an opening or mouth into the river about 450 feet in width. There is no channel in the cove, and it has a mud bottom, with from $1\frac{1}{2}$ to $2\frac{1}{2}$ feet of water thereon at mean low tide. The mean rise and fall of the tide there is 2 feet and 10 inches. The channel of the river is about 800 feet westerly from the mouth of the cove. The land surrounding the cove is owned by divers owners in severalty. The land described in the complaint lies within the cove, and has a frontage of between 450 to 500 feet upon the waters of the cove. Its front line lies opposite the mouth of the cove, and about 200 feet distant easterly therefrom. Two lines drawn at right angles to the channel of the river, one at the north and one at the south side of the cove mouth, 69 L. R. A.

would embrace the frontage above mentioned. There are three dwelling houses on said land. Prior to the doing of the acts complained of there was no obstruction on the waters of the cove or the river between the plaintiff's said land and the channel of the river. The defendant is the lessee of the Norwich & Worcester Railroad Company, and in doing the acts complained of it acted as such lessee and as the agent of said lessor; but it was agreed by the parties upon the trial below that judgment, if in favor of the plaintiff, should properly run against the defendant, and that the defendant should be treated as if it were the owner of said railroad, invested, with reference thereto, with all the power and authority conferred by the legislature upon said lessor. In this view of the case the defendant owns the land fronting on the river immediately north and south of the cove mouth. It has made, and laid its railroad thereon, a solid embankment, 20 feet wide and 10 feet high, across the mouth of said cove, save at the northerly end thereof, where it has left an opening 16 feet wide, but permanently closed at the top with its railroad, between the cove and the river. All this was done by legislative authority and sanction under laws which made no provision for compensation to parties who might be injured by acts done by virtue of such authority. Through the opening aforesaid left at the north end of said roadbed "boats with masts set cannot enter, and it is difficult for small boats to enter, except at low water, on account of the flow of water caused by the tide." The building of said roadbed has forced parts of the bottom of the cove upwards, in places outside of the defendant's location, and these parts are not flowed at low water. It was agreed that the damages to be awarded, if any, should be for the permanent depreciation of the plaintiff's property by reason of the building of the railroad across the mouth of the cove, to be assessed once for all. "It did not appear in evidence that the plaintiff personally ever used said cove, or intended to use it in any way for any purpose." Upon these facts the defendant based certain claims of law made in the court below, which were there overruled. In the view we take of this case, it will be unnecessary to state or consider separately these claims of law with the rulings thereon. With reference to said claims it is enough to say that, except as hereinafter indicated, the court committed no error in overruling them.

The plaintiff's case, as stated in her complaint, proceeds upon the theory that her land fronts upon the Thames river, and not

upon Clark's cove, and the case was tried and decided upon that theory. In this there was error. It is undoubtedly true that, so far as the public rights of fishing and navigation and others of like nature are concerned, Clark's cove is a part of the Thames river (*Gallup v. Tracy*, 25 Conn. 10); but it does not follow from this that for all purposes the cove is to be regarded as a part of the river. It does not follow, for instance, that the riparian owner at the south end of the cove has rights of wharfage, or reclamation, or alluvian in the main river. The situation of his land precludes the existence of any such rights, and this is equally true of other owners of land fronting upon the waters of the cove. They have undoubtedly certain exclusive, yet qualified, rights and privileges in the waters and submerged land adjoining their upland; but they must take their riparian rights as they find them, and they are entitled only to such as the condition of the cove and the situation of their land with respect to the cove will afford. *New Haven S. B. Co. v. Sargent*, 50 Conn. 199-208, 47 Am. Rep. 632. Among the most important of these rights and privileges in the cove and its waters are (1) the right of access by water to and from their upland, (2) the right to wharf out in front, and (3) the right of reclamation or accretion. *Mather v. Chapman*, 40 Conn. 382-395, 16 Am. Rep. 46; *Ockerhausen v. Tyson*, 71 Conn. 31-36, 40 Atl. 1041. Riparian proprietors in the cove have the right to wharf out and to reclaim, but they are rights confined to the cove, and to be exercised therein, and not in the main river, and to be exercised by each subject to the riparian rights of his neighbors and to the rights of the public in the cove and its waters. They also have each the important right of access; that is, the right to go from their land to the river and from the river to their land, through the waters of the cove. This right is distinct from the right of each as a member of the public to navigate the waters of the cove. It is a private right, belonging to each as the owner of land bordering upon waters forming part of a great water highway. However much courts may differ upon the question whether such a right can be destroyed or impaired by the state without compensation to the owner, they all agree that the right of access exists. The following are a few of the many cases recognizing its existence: *Lyon v. Fishmongers' Co.* L. R. 1 App. Cas. 662; *Delaplaine v. Chicago & N. W. R. Co.* 42 Wis. 214, 24 Am. Rep. 386; *Brisbane v. St. Paul & S. City R. Co.* 23 Minn. 114; *Backus v. Detroit*, 49 Mich. 69 L. R. A.

110, 43 Am. Rep. 447, 13 N. W. 380; *Yates v. Milwaukee*, 10 Wall. 497, 19 L. ed. 984; *Illinois C. R. Co. v. Illinois*, 146 U. S. 445, 36 L. ed. 1039, 13 Sup. Ct. Rep. 110; *Scranton v. Wheeler*, 179 U. S. 141, 45 L. ed. 126, 21 Sup. Ct. Rep. 48. See also the case in the note, 40 L. R. A. 593. Each riparian proprietor in the cove had then at least three important rights, but they all related to the waters of the cove and to the land submerged by said waters, and not to the river proper. It may be said that the situation of the plaintiff's land was such, with reference to the mouth of the cove and the channel of the river, as to give her the right to wharf out to the channel, and also to reclaim submerged land in that part of the river lying westerly of and opposite to her land; but we do not think so. Her rights of wharfing out and of reclamation, like those of her neighbors, were confined to the cove. The existence in her of a right to wharf out and reclaim in the river is entirely inconsistent with, and its exercise might be destructive of, the rights of access belonging to her neighbors. It would give the plaintiff the right, as against her neighbors, to fill up wholly or partially the waters of the cove and its mouth, so as practically to impair or destroy the riparian rights of those neighbors, and especially their right of access. It follows from the fact that her rights of wharfing out and of reclamation were confined to the cove, that these rights were not invaded by the acts of the defendant, and that the court erred in holding that they had been.

As to her right of access, it is clear, upon the facts found, that it has not been destroyed. She can still get from her land to the river, and from that to her land, through the waters of the cove. Nor does the finding show that it has been essentially impaired, taking into account the situation and limited extent of the cove and the shallowness of its waters. Its uses for purposes of navigation have always been, and, in the nature of things, must continue to be, quite insignificant; and if its availability for such purposes has been lessened to some extent, that is a matter of which the plaintiff cannot be heard to complain in this action. It is a public, and not a private, detriment. We think the facts found fail to show that the riparian rights of the plaintiff have been invaded or injured.

There is error. *The judgment is set aside*, and the cause remanded, in order that nominal damages may be assessed.

All concur.

Amelia P. DE WITT *et al.*
v.
William L. BISSELL, *Appt.*

(77 Conn. 530.)

The owner of property bordering on a mill pond cannot enjoin the owner of the dam and water privilege from drawing the water down to its natural level when it becomes necessary for the utilization of the power, although a portion of the bottom of the pond is thereby uncovered and exposed to the sun, rendering it unhealthy and injurious to the abutting owner.

(March 9, 1905.)

A PPEAL by defendant from a judgment of the Superior Court for Litchfield County enjoining him from drawing the water from a mill pond. *Reversed.*

Statement by **Hamersley, J.**:

The complaint alleges the following facts: On July 15, 1897, the plaintiff was, and ever since has been, the owner of a piece of land adjoining and bordering upon the east shore of Long pond, on which piece of land is a dwelling house used by the plaintiff as a summer residence. At the outlet of said pond there is a dam, claimed to be owned by the defendant, which maintains the water of said pond at a higher level than its natural level. From July 15th to October 1st in each of the years 1897, 1898, and 1899, and from July 15th to the commencement of this suit on September 18th in the year 1900, the defendant drew off the water of said pond by raising the gate in said dam until a large area of the land which is covered by water when said pond is full was exposed, which exposed condition continued until October 1st in the years 1897, 1898, and 1899, when the defendant permitted said pond to fill up to its usual level as maintained by said dam, and continued in the year 1900 until the commencement of this suit. When the water was thus drawn off, the land thus exposed to the sun produced offensive stenches, unhealthy to the plaintiff and other inmates of said house, rendering said house uninhabitable, and constituting a nuisance. The defendant formerly operated a gristmill, machine shop, and foundry with the water flowing from said pond,

NOTE.—As to rights in artificial condition of body of water generally, see *note* to *Pewaukee v. Savoy*, 50 L. R. A. 836.

As to right of owner of mill to draw off the water and lower the water in the pond so as to destroy the ice privileges of the owner of land bordering on the pond, see, in this series, *Eldemiller Ice Co. v. Guthrie*, 28 L. R. A. 581.

As to right of owners of mill on stream flowing from great pond to lower outlet to draw down the water in the pond, see *Fernald v. Knox Woolen Co.* 7 L. R. A. 459.
60 L. R. A.

which gristmill, etc., stood on a tract of land owned by the defendant below the outlet of said pond; but said mill, machine shop, and foundry have been abandoned, and the defendant has put the water drawn from said pond at the times above mentioned to no beneficial use. The acts of the defendant in creating such nuisance have injuriously affected the health and comfort of the plaintiff and her family, and the value of the plaintiff's said land has been depreciated. The plaintiff has often requested the defendant to cease drawing off the water as aforesaid, but the defendant, notwithstanding such requests, has continued to so draw it off, and the plaintiff is without adequate remedy at law. The prayer for relief asks an injunction restraining the defendant from drawing off the water below the level maintained by said dam when the gate therein is closed from July 15th to October 1st in each year, and \$5,000 damages. The defendant's answer, after denying certain paragraphs of the complaint, sets up as a special defense to the plaintiff's cause of action as stated in the complaint the following: "(1) The defendant on the 15th day of July, 1897, was and for more than twenty years prior thereto had been, and still is, the owner of the dam and water privilege at the outlet of said Long pond, and during all of said time was, has been, and still is the owner and user of the water flowing therefrom; and during all of said time has been and still is entitled to the right to raise the water in said pond to the height of said dam, and to draw off and use all the water from said pond that would flow from the same. (2) Any and all acts of the defendant in raising and lowering the water of said Long pond were done in the exercise of his legal right as owner and user, as set forth in paragraph 1 of this defense." The plaintiff, in her reply to the special defense, admitted so much of paragraph 1 as alleged that the defendant was on July 15, 1897, and for more than twenty years prior thereto had been, and still is, the owner of the dam at the outlet of Long pond, and denied the remainder of said paragraph and paragraph 2. The judgment of the court finds for the plaintiff the issues of fact raised by the pleadings, and adjudges that the defendant be perpetually enjoined from drawing off the water of Long pond from July 15th to October 1st in each year, and that the plaintiff recover of the defendant \$100 damages.

Messrs. Charles E. Perkins and J. Henry Roraback, for appellant:

Using a mill pond for the uses for which it is made, in the manner which is absolute-

ly necessary for its practical use, is not an unreasonable and unlawful use of it.

Hurlbut v. McKone, 55 Conn. 42, 3 Am. St. Rep. 17, 10 Atl. 164.

A distinction has been made between a case where the injury is the natural and necessary consequence of the exercise of the legal right of the owner to develop the resources of his property, and a case where it is the consequence of his election to devote his land to the establishment of a particular sort of manufacture having no natural connection with the soil or the subjacent strata.

21 Am. & Eng. Enc. Law, 2d ed. p. 689; *Pennsylvania Coal Co. v. Sanderson*, 113 Pa. 126, 57 Am. Rep. 445, 6 Atl. 453; *Robb v. Carnegie Bros.* 145 Pa. 324, 14 L. R. A. 329, 27 Am. St. Rep. 694, 22 Atl. 649.

This distinction has sound reason and good sense to sustain it.

Brown & Bros. v. Illius, 27 Conn. 95, 71 Am. Dec. 49; *Isbell v. New York & N. H. R. Co.* 27 Conn. 412, 71 Am. Dec. 78.

This rule is especially applicable to the case of a person coming to live near the alleged nuisance.

Fay v. Salem & D. Aqueduct Co. 111 Mas. 27; *State v. Sunapee Dam Co.* 70 N. H. 458, 59 L. R. A. 55, 50 Atl. 108; *Bierce v. Sharon Electric Light Co.* 73 Conn. 300, 47 Atl. 324.

Where a mill has been erected upon a stream for a long period of time, it gives the owner the right to have the water flow to and from the mill in the manner in which it has been accustomed to flow all the time. The owner is not bound to use the water in the precise manner, or apply it to the same mill.

Saunders v. Newman, 1 Barn. & Ald. 261; Gould, Waters, 3d ed. § 234, p. 464.

Messrs. Hubert Williams and Warner & Landon, for appellees:

Defendant must so use his property as not to injure his neighbor.

Whitney v. Bartholomew, 21 Conn. 218; *Grady v. Wolsner*, 46 Ala. 381, 7 Am. Rep. 593; *Hurlbut v. McKone*, 55 Conn. 41, 3 Am. St. Rep. 17, 10 Atl. 164; *Kaspar v. Dawson*, 71 Conn. 410, 42 Atl. 78.

The question as to whether the acts complained of constitute a nuisance is one of fact to be determined by the trier.

Stowe v. Miles, 39 Conn. 428; *Burnham v. Hotchkiss*, 14 Conn. 318; *Bierce v. Sharon Electric Light Co.* 73 Conn. 301, 47 Atl. 324.

Plaintiffs having proved a special and peculiar injury by reason of the defendant, they were entitled to the judgment for damages, and to the injunction granted.

Bigelow v. Hartford Bridge Co. 14 Conn. 565, 36 Am. Dec. 502; *Wheeler v. Bedford*, 60 L. R. A.

54 Conn. 244, 7 Atl. 22; *Kaspar v. Dawson*, 71 Conn. 410, 42 Atl. 78; *Nolan v. New Britain*, 69 Conn. 678, 38 Atl. 703.

Hamersley, J., delivered the opinion of the court:

It is alleged by the defendant and admitted by the plaintiff that the defendant is, and for more than twenty years last past has been, the owner of the dam, which is found to have existed for nearly one hundred years, and to have been used by its owners for the purpose of storing water to the full capacity of the dam and drawing off the water thus stored as occasion required. It is also found that during the years mentioned in the complaint the defendant has, from July 15th to October 1st, substantially drawn off all the water stored for use by the dam,—i. e., to the depth of about 4 feet at its gate; that when the water is drawn off to this extent the bottom of the pond at several points is exposed to the sun and air: that one of the portions thus exposed is opposite land owned by the plaintiff, and the exposure of this portion has caused an appreciable injury to the plaintiff's said property, for which injury the defendant is liable. It is not found that drawing off the water to the depth of 2 feet would cause this injury, and it plainly appears that drawing off the water to some extent might not harm the plaintiff. The judgment perpetually enjoins the defendant against any exercise of his admitted right to draw off the water during the periods mentioned, although some exercise of that right can work no injury to the plaintiff, and for this reason the judgment is plainly erroneous.

It appears that the defendant is the owner of a dam and water privilege at the outlet of Long pond, and this property includes the power of storing the water flowing through the land on which the dam stands to the capacity of the dam, and of letting the water flow through its open gates as the owner may desire, and includes that qualified ownership in the water stored which the law recognizes. This property is subject to the rights belonging to other riparian owners as owners of the land and their rights acquired by appropriation or contract, but is in other respects similar to any property held in absolute ownership. It appears that the plaintiff in 1894 purchased a piece of land adjoining and bounded by the shore of Long pond. On this land the plaintiff, shortly after its purchase, built a house for a summer residence. The real substance of the plaintiff's cause of action, as stated in the complaint and determined by the court, is this: The uncovered condition of Long pond in the immediate neighborhood of the plaintiff's house results in the

private nuisance described in the complaint, namely, offensive stenches unhealthy to the plaintiff and other inmates of her house, and injuriously affecting the value of her land. This uncovered condition of the pond is caused by the defendant's act in drawing off the water stored by his dam, and the defendant is therefore liable, whether owner of the dam or not, to the plaintiff, for the injury caused by this nuisance. The ultimate conclusion of the court is this: The defendant drew off the water of Long pond, as alleged, and such acts constituted and created a nuisance, and entitled the plaintiff to damages on account of the appreciable injury thereby caused her property. Upon the trial the defendant claimed and asked the court to rule that the law is so that where, in the natural and necessary use of a mill pond, it is necessary in the summer months so to draw down the water as to expose some portions of the bottom of the pond, persons who purchase property and live near the pond after it has been established and used cannot object to such use on the ground that bad odors arise from such use. The court unqualifiedly overruled this claim, and in doing so plainly erred. *Bierce v. Sharon Electric Light Co.* 73 Conn. 300, 47 Atl. 324; *State v. Sunapee Dam Co.* 70 N. H. 458, 59 L. R. A. 55, 50 Atl. 108. We think this error was material, and seriously injured the defendant.

The conclusion of the court subjects the defendant's property to diminution or destruction, because its continued existence is inconsistent with the full enjoyment by the plaintiff of her property, and because, when such inconsistency exists between property such as the defendant's (i. e., a dam and water privilege) and property such as the plaintiff's (that is, land in the neighborhood of a mill and water privilege), the former property must be held and enjoyed in subordination to the latter. It is evident that in reaching such a conclusion the law determining the character and incidents of the defendant's property should be accurately understood and correctly applied. The owner of land on both sides and bed of a natural stream of water not navigable may erect a dam to create power to operate mills and machinery. He cannot do this so as to interfere with the right of proprietors of lands below to the natural flow of the water, nor so as to throw back the water upon the lands of those above without their consent; but, subject to these limitations, he may detain the water by a dam so as to create an artificial pond or enlarge a natural one, and use the water thus stored for his own purposes. He may open his gates and use the water a few miles below as well as at the outlet of the dam. He may

lease or grant the water to a lower riparian proprietor, and may use the water for any purpose, provided he does not thereby interfere with the rights of other proprietors, either above or below him. Such a dam and water privilege, with its incidental rights, constitutes property favored by the law since earliest times. *Holyoke Water-Power Co. v. Lyman*, 15 Wall. 500, 21 L. ed. 133; *Smith v. Agawam Canal Co.* 2 Allen, 356; *Whittier v. Cocheo Mfg. Co.* 9 N. H. 454, 458, 32 Am. Dec. 382; *Nuttall v. Bracewell*, L. R. 2 Exch. 1; *Miner v. Gilmour*, 33 L. T. 98. Not only has such property been always favored by the public policy of this state, but in later years the power of eminent domain has been pushed to its limits in authorizing the acquirement of such property through proceedings for condemnation. Assuming, for the moment, that such property may become, by the mere fact of its existence, the occasion of a private nuisance injurious to the property of neighboring landowners, so as to make its owner liable in damages to such landowners, especially when he is chargeable with malicious or wanton disregard of their interests, it is evident that in determining the question of such liability all the facts and circumstances must be weighed in their relation to the law which establishes a dam and water privilege as property, and defines its incidents. In the present case it is apparent from the action of the court in overruling the defendant's claim of law, as well as from the whole finding, that the law relative to this peculiar property in a dam and water privilege was not duly regarded in drawing the inferences from evidence and from the facts found as well as in reaching the ultimate conclusion. The error complained of indicates that the material conclusions of the court may have been, and probably were, influenced to the detriment of the defendant by an erroneous view of the law, and must therefore be treated as vitiating the whole judgment.

It was suggested in argument that the paragraph in the finding which states that in the year 1900, with his own hands, the defendant opened the gate of the dam, and permitted the water stored to flow out to the same extent and with similar effect upon the plaintiff's property, as in the former years mentioned, for no apparent purpose unless to assert his legal right to draw off the water as against any legal right in the plaintiff to have the water stored to the height of the dam, is sufficient to support at least that part of the judgment which gives the plaintiff damages. It may be doubtful whether, upon the pleadings, the defendant having established his ownership of the dam and water privilege, and that

during the years 1897, 1898, and 1899 he had, in pursuance of his legal right, used the water drawn from the dam for operating mills located at a point 2 miles below its outlet and owned by the Sharon Electric Light Company, which paid him for the power, the court could properly render judgment only for the damage that might have been caused by this single act; but, if it had the power, it has not rendered such a judgment. The judgment for damages covers the injury to the plaintiff's property caused by the defendant's drawing off the water from his dam from 1897 to 1900, and it is evident that the erroneous view of the law which influenced the court in drawing inferences from testimony and in reaching the conclusion that the property of the plaintiff was injured and the defendant was liable for this injury affected its conclusion in respect to damage, including any that may have been suffered in the year 1900.

There is error. *The judgment of the Superior Court is reversed*, and the cause remanded for further proceedings according to law.

All concur.

Bianca RINCICOTTI, Admrx., etc.,

v.

JOHN J. O'BRIEN CONTRACTING COMPANY, Appt.

(77 Conn. 617.)

1. **There is no distinction between the construction of the appliances furnished for the use of a servant and their maintenance**, so far as the right of the master is concerned to absolve himself from liability for injuries by furnishing suitable materials to a competent person, to be used for that purpose.
2. **The proximate cause of the injury of a servant by the fall of a derrick** because of the breaking of a spliced rope is not the failure to insert thimbles into the loops of the splice, but the failure to inspect the rope for the purpose of determining its condition, and to repair it after it has become chafed and worn by use, where there is nothing to show that the splice is not sufficiently strong, without the thimbles, to do the work required of it, but fails because of the wear due to continued use.

NOTE.—As to master's duty to inspect appliances and places of work, including right to delegate such duty, see also *note* to *Walkowski v. Penokee & G. Consol. Mines*, 41 L. R. A. 74, 109, and the later cases, in this series, of *McGuire v. Bell Teleph. Co.* 52 L. R. A. 437; *Smith v. Erie R. Co.* 59 L. R. A. 302; and *Twombly v. Consolidated Electric Light Co.* 64 L. R. A. 551.

As to duty to inspect material to be used in bridge, see *Lafayette Bridge Co. v. Olsen*, 54 L. R. A. 33.
69 L. R. A.

3. **The master is bound to make reasonable inspection of appliances used** to aid his servants in their work, and he cannot relieve himself from the consequences of his failure to do so by delegating the duty to competent employees.

4. **The admission of evidence of the age, at the time of death, of the parents of one killed by accident, for the purpose of showing his expectation of life, although erroneous because of remoteness, is not ground for new trial.**

(March 9, 1905.)

A PPEAL by defendant from a judgment of the Superior Court for Fairfield County in favor of plaintiff in an action brought to recover damages for the alleged negligent killing of her husband. *Affirmed.*

Statement by Prentice, J.:

The defendant was engaged in building a stone retaining wall along the Naugatuck river, in Ansonia. One Toole was the superintendent of the work, and had charge thereof and of the men employed upon it. The plaintiff's intestate was a mason so employed, and foreman of the masons. For the prosecution of the work the defendant used a heavy steam-hoisting derrick, having a mast 50 feet in height and a boom 54 feet long, operated by what is known as a "bull wheel." By its use the defendant was enabled to lift the heavy blocks of stone, of which the wall was constructed, from the cars, and swing them into position upon the wall. The derrick rested upon a foundation prepared for it, and was supported in its upright position by twisted wire cables which radiated in various directions from the top of the mast to secure points, where they were fastened. As the construction of the wall progressed so far that the boom would no longer serve at the point where stones were desired to be placed, the derrick was moved and relocated. Work upon the wall had been in process for some time when the intestate received his injuries, and two such relocations had been made. Toole was an expert derrick rigger, and it was a part of his duty, and his duty alone, to take care and charge of the derrick, including its locations, removals, and preparation for use. The masons had no duty in that regard. At the time of the last location of the derrick, which, like the others, was made under Toole's direction, and about one month prior to the accident, it was supported in position by six cables, varying from 186 to 413 feet in length. One of them was 360 feet in length, and extended from the masthead across the river, where it was made fast to a tree. Owing to the distance which this cable had in the former locations of the

derrick been required to span, Toole had spliced it. The new conditions necessitated the same extension, and the spliced cable was used, the point of splicing being about 15 or 20 feet from the tree and across the river. The splice was made by doubling back the end of each piece of the cable, inserting one of the loops thus formed into the other, and fastening each, and thus doubled back to the cable by iron clamps of approved design. Interlocked loops were thus made. As the result of the use of the derrick after the splicing, and the constant strain and friction at the points of contact within the loops, these parts of the cable had, before the accident, become chafed and worn, and some of the strands had parted. At the time of the accident the derrick was being used to carry a stone into position. When the stone was in mid air, said cable parted at the worn and weakened part within one of the loops. As the result, the derrick fell, striking the intestate. Toole never at any time inspected the cable to ascertain its condition. In making cable splicings such as have been described, it is customary and prudent to place a device called a "thimble" in each of the loops in such manner as to furnish the bearing in both directions. By the use of the thimbles the cables are prevented from bending as sharply as they otherwise would, the tension is distributed, and the friction and chafing obviated. Added strength and durability are thus obtained. There were suitable thimbles furnished by the defendant in a chest upon or near the premises, which fact was known to Toole.

Messrs. Seymour C. Loomis and Earnest C. Simpson for appellant.

Messrs. John J. Cullinan and Stiles Judson, Jr., for appellee:

The test as to whether one acts as a vice principal or as a fellow servant is the nature of the duties to be performed, and not the grade of employment.

Sullivan v. New York, N. H. & H. R. Co. 62 Conn. 216, 25 Atl. 711; *McElligott v. Randolph*, 61 Conn. 157, 29 Am. St. Rep. 181, 22 Atl. 1094; *Jackson v. Norfolk & W. R. Co.* 43 W. Va. 380, 46 L. R. A. 337, 27 S. E. 278, 31 S. E. 258; *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 387, 37 L. ed. 781, 13 Sup. Ct. Rep. 914.

The duty of the master is not discharged by anything short of actual performance.

McElligott v. Randolph, 61 Conn. 157, 29 Am. St. Rep. 181, 22 Atl. 1094.

Until the agent in fact acts up to the limit of the duty of his master to act, the master's duty is not done.

Wilson v. Willimantic Linen Co. 50 Conn. 433, 47 Am. Rep. 653; *Laning v. New York* 69 L. R. A.

O. R. Co. 49 N. Y. 521, 10 Am. Rep. 417; *Hough v. Texas & P. R. Co.* 100 U. S. 218, 25 L. ed. 615; *Davis v. Central Vermont R. Co.* 55 Vt. 84, 45 Am. Rep. 590; *Ford v. Fitchburg R. Co.* 110 Mass. 260, 14 Am. Rep. 598; *Brodeur v. Valley Falls Co.* 16 R. I. 450, 17 Atl. 54; *Wood, Mast. & S.* p. 871.

The servant is not bound to inspect appliances before using them, but assumes the risk only of such defects as are in fact known to him, or are patent and obvious.

Darrigan v. New York & N. E. R. Co. 52 Conn. 299, 52 Am. Rep. 590; *Gerrish v. New Haven Ice Co.* 63 Conn. 16, 27 Atl. 235; *Kelly v. New Haven S. B. Co.* 74 Conn. 347, 57 L. R. A. 494, 92 Am. St. Rep. 220, 50 Atl. 871.

The duty of maintaining sound instrumentalities while in use by the servant, which involves the duty of reasonable inspection, is obligatory on the part of the master.

Moore v. Wabash, St. L. & P. R. Co. 85 Mo. 588; *Bailey v. Rome, W. & O. R. Co.* 139 N. Y. 302, 34 N. E. 918.

The duty of inspection is affirmative, and must be continuously fulfilled and positively performed.

Brann v. Chicago, R. I. & P. R. Co. 53 Iowa, 595, 36 Am. Rep. 243, 6 N. W. 5; *Chesson v. John L. Roper Lumber Co.* 118 N. C. 59, 23 S. E. 925; *Ocean S. S. Co. v. Matthews*, 86 Ga. 418, 12 S. E. 632; *Armour v. Brazeau*, 191 Ill. 117, 60 N. E. 904; *Comben v. Belleville Stone Co.* 59 N. J. L. 226, 36 Atl. 473.

This is a nonassignable duty, and cannot be delegated so as to release the master from responsibility.

Louisville, E. & St. L. Consol. R. Co. v. Utz, 133 Ind. 265, 32 N. E. 881; *Babcock v. Old Colony R. Co.* 150 Mass. 467, 23 N. E. 325; 1 Labatt, Mast. & S. p. 241; *Jackson v. Norfolk & W. R. Co.* 43 W. Va. 380, 46 L. R. A. 337, 27 S. E. 278, 31 S. E. 258.

Where the master assumes to furnish his servant a complete instrument or apparatus for the performance of his work, the servant has nothing to do with the question of the original sufficiency of its parts, or of their subsequent preservation, unless a defect is obvious.

Shanny v. Androscoggin Mills. 66 Me. 420; *Hough v. Texas & P. R. Co.* 100 U. S. 213, 25 L. ed. 612; *Lehigh Valley R. Co. v. Kisel*, 25 C. C. A. 566, 51 U. S. App. 265, 80 Fed. 470; *Eureka Co. v. Bass*, 81 Ala. 200, 60 Am. Rep. 152, 8 So. 216; *Jager v. California Bridge Co.* 104 Cal. 542, 38 Pac. 413; *Wells v. Coe*, 9 Colo. 159, 11 Pac. 50; *Snyder v. Cleeland, C. C. & St. L. R. Co.* 60 Ohio St. 487, 54 N. E. 475; 1 Labatt, Mast. & S. p. 228; 1 Shearm. & Redf. Neg. § 194; *McNeil v. The Para.* 56 Fed. 241; *Duer v. Pittsburg Bridge Co.* 198 Pa. 183, 47 Atl.

979; *Donnelly v. Booth Bros. & H. I. Granite Co.* 90 Me. 111, 37 Atl. 874; *McGuigan v. Beatty*, 186 Pa. 329, 40 Atl. 490; *Bier v. Standard Mfg. Co.* 130 Pa. 447, 18 Atl. 637; *Baker v. Allegheny Valley R. Co.* 95 Pa. 211, 40 Am. Rep. 634; *Yaw v. Whitmore*, 46 App. Div. 422, 61 N. Y. Supp. 733, Affirmed in 167 N. Y. 605, 60 N. E. 1123; *Briddy v. The Persian Monarch*, 49 Fed. 609; *Ashley Wire Co. v. Mercier*, 61 Ill. App. 487; *Tangney v. J. B. Wilson & Co.* 87 Mich. 455, 49 N. W. 666; *Honifus v. Chambersburg Engineering Co.* 196 Pa. 47, 46 Atl. 259; *Woods v. Chicago & G. T. R. Co.* 108 Mich. 397, 66 N. W. 328; *Houston v. Brush*, 66 Vt. 332, 29 Atl. 380; *Fuller v. Jewett*, 80 N. Y. 46, 36 Am. Rep. 575; *Brennan v. Berlin Iron Bridge Co.* 74 Conn. 389, 50 Atl. 1030.

The intestate, as a stone mason, intent only upon transferring the stones from the car to the wall and there laying them, had nothing to do with the construction, inspection, and repair of the appliances that were being operated.

1 Labatt, Mast. & S. p. 595; *Benzing v. Steinway & Sons*, 101 N. Y. 547, 5 N. E. 449; 1 Shearm. & Redf. Neg. § 185b; *Crowley v. Cutting*, 165 Mass. 436, 43 N. E. 197.

The intestate had a right to assume that Toole, as a competent and skilled derrick rigger, had properly secured the derrick, and that it was safe to engage in the work of operating the same.

Buzzell v. Laconia Mfg. Co. 48 Me. 113, 77 Am. Dec. 212; *Texas & P. R. Co. v. Archibald*, 170 U. S. 665, 42 L. ed. 1188, 18 Sup. Ct. Rep. 777; *Delude v. St. Paul City R. Co.* 55 Minn. 63, 56 N. W. 461; *Bergin v. Southern New England Teleph. Co.* 70 Conn. 65, 39 L. R. A. 192, 38 Atl. 888.

The Massachusetts rule that supplying loose appliances and proper supervision by a competent representative will exempt the master from liability stands alone.

1 Labatt, Mast. & S. 1639; 1 Shearm. & Redf. Neg. § 177; *Darrigan v. New York & N. E. R. Co.* 52 Conn. 305, 52 Am. Rep. 590.

Prentice, J., delivered the opinion of the court:

The plaintiff's intestate, while acting as the defendant's servant, received injuries, from which he died, by reason of the fall of an instrumentality used in the work upon which he was employed. The injuries were not occasioned by any negligence in the use of the instrumentality. The instrumentality was not one whose construction, preparation, adaptation for use, care, or inspection entered into the performance of the intestate's work or duty, or was it an incident of it. *Fraser v. Red River Lumber* 69 L. R. A.

Co. 45 Minn. 235, 47 N. W. 785; *Burns v. Sennett*, 99 Cal. 363, 33 Pac. 916; *Robinson v. George F. Blake Mfg. Co.* 143 Mass. 528, 10 N. E. 314; *Richards v. Hayes*, 17 App. Div. 422, 45 N. Y. Supp. 234; *Labatt, Mast. & S.* § 589. It was a mechanical apparatus furnished by the master to co-operate with and facilitate the intestate and his fellow masons in the work upon which they were engaged. The duty of the defendant as master, under such circumstances and in respect to such an instrumentality, was to use reasonable care to provide one which should be reasonably safe for the work to which it was to be put. *McElligott v. Randolph*, 61 Conn. 157, 29 Am. St. Rep. 181, 22 Atl. 1094; *Gerrish v. New Haven Ice Co.* 63 Conn. 16, 27 Atl. 235. This duty was a continuing one, and included that of maintenance. *Hough v. Texas & P. R. Co.* 100 U. S. 213, 25 L. ed. 612; *Shanny v. Androscoggin Mills*, 66 Me. 420; *Ford v. Fitchburg R. Co.* 110 Mass. 240, 14 Am. Rep. 598; *Tierney v. Minneapolis & St. L. R. Co.* 33 Minn. 311, 53 Am. Rep. 35, 23 N. W. 229; *Indiana Car Co. v. Parker*, 100 Ind. 181; *Moore v. Wabash, St. L. & P. R. Co.* 85 Mo. 588; *Bailey v. Rome, W. & O. R. Co.* 139 N. Y. 302, 34 N. E. 918. The duty of maintenance necessarily involved that of reasonable inspection and repair. *Union P. R. Co. v. Daniels*, 152 U. S. 684, 38 L. ed. 597, 14 Sup. Ct. Rep. 756; *Tierney v. Minneapolis & St. L. R. Co.* 33 Minn. 311, 53 Am. Rep. 35, 23 N. W. 229; *Armour v. Brazeau*, 191 Ill. 117, 60 N. E. 904; *Comben v. Belleville Stone Co.* 59 N. J. L. 226, 36 Atl. 473; *Munch v. Great Northern R. Co.* 75 Minn. 61, 77 N. W. 541; *Louisville, E. & St. L. Consol. R. Co. v. Utz*, 133 Ind. 265, 32 N. E. 881; *Richmond & D. R. Co. v. Burnett*, 88 Va. 538, 14 S. E. 372.

The defendant says that the cause of the accident was the failure to insert thimbles in the loops made in splicing the cable, and argues therefrom that, as their absence was due to the failure of Toole, the superintendent, to insert them, and as the defendant had provided sufficient thimbles to be used when needed, it had not failed in its duty as master, and the intestate's injuries were the consequence of the negligence of Toole in respect to his service as the intestate's fellow servant. This contention is unsound in both its premise and the conclusions drawn therefrom. It is enough for our present purpose to pursue at length the first of these dual propositions. In thus limiting our discussion, however, we do not wish our silence to imply our assent to the legal principle which, in so far at least as maintenance and repair are concerned, is vigorously urged upon us, to wit, that a master upon whom rests the duty of using

reasonable care to provide and maintain for the use of his servants in their work reasonably safe mechanical instrumentalities may perform that duty by furnishing to a fit and competent agent the materials or parts out of or by means of which the instrumentality as a working entity can be either created or maintained, and that for the shortcomings of the agent in his utilization or failure to utilize this material or these parts the master assumes no responsibility. In so far as the defendant's contention assumes that there is a difference, as respects the master's duty, between construction and maintenance, it is without foundation. To whatever extent the contention is carried, it also involves principles which have had the repeated disapproval of this court. The master's duty requires performance. It may be performed in person, or by one delegated to that end. In either event, the thing required must be done. Delegation to a fit and competent agent is not sufficient. *Wilson v. Willimantic Linen Co.* 50 Conn. 433, 47 Am. Rep. 653; *McElligott v. Randolph*, 61 Conn. 157, 29 Am. St. Rep. 181, 22 Atl. 1094; *Gerrish v. New Haven Ice Co.* 63 Conn. 16, 27 Atl. 235.

Let us return now to the defendant's premise that the proximate cause of the injury complained of was the superintendent's failure to place thimbles in the loops of the splice. It is doubtless true that, had thimbles been inserted in making the splice, the cables would not by use have become so worn and defective at the points of tension that they would have parted when they did. To this extent the failure to insert the thimbles was without doubt the cause—but the remote one—of the accident. The proximate cause, however, was the worn and defective condition into which the cables had been suffered to lapse by being used for a considerable period of time without such repair or replacement as was necessary, in view of the way in which the splice was made, to maintain the requisite condition of strength. The cable as spliced was not able to stand as great a strain as one spliced with thimbles, but it does not appear that without them it was not originally sufficiently strong to do the work required of it. Its original strength became dissipated as the consequence of wear and tear and a failure in the duty of maintenance. The worn and weakened condition which resulted may not have been known to the defendant or

its superintendent, and apparently was not, as it is found that no inspection was made. But that is of no legal consequence, since it is found that it was so apparent that an inspection would have revealed it. In other words, the failure which was the true proximate cause of the parting of the cable, and thus of the intestate's injuries, was one in the master's duty of reasonable inspection. The manner of the splice was known. For Toole made it; the consequences thereon of wear were palpable, and therefore such as the defendant and Toole were bound to anticipate. The duty of inspection was one to be exercised in the light of these conditions. The facts, therefore, disclose a clear failure on the part of the defendant, as master, in the performance of its duty towards the intestate.

If it be suggested that the cable was, by the manner of the splice, inherently weak and thus defective, the master is not thereby exonerated. In that event, his failure in the duty of using reasonable care to provide reasonably safe instrumentalities only assumes a slightly different aspect; but it is the same duty. The duty of the master is the same in its essence whether it, in a given case, assumes the immediate form of original provision, maintenance, or inspection as an incident of maintenance. All are involved in the general duty of provision, which, as we have seen is a continuing one and an unchanging one.

Three rulings upon the admission of evidence are assigned as erroneous. Only one is pursued in the brief. The intestate's widow being upon the stand, the court permitted the plaintiff to ask her the age of his parents at their death, as bearing upon his health and constitution. Her reply was seventy-eight and seventy years, respectively. Rulings of this character, where the vice, if any, in the evidence offered, is remoteness, can seldom be of sufficient consequence to warrant the granting of a new trial. Much must be left to the discretion of the court. *State v. Kelly*, 77 Conn. 266, 58 Atl. 705. This ruling furnishes no exception to the general rule.

None of the corrections which the defendant claims should be made in the finding assumes any importance, in view of our conclusions.

There is no error.

All concur.

PENNSYLVANIA SUPREME COURT.

Re ESTATE OF Thomas Mifflin JONES, Jr.,
Deceased.

(211 Pa. 364.)

1. The procuring, by the legatee, of an absolute divorce subsequent to the execution of the will, does not cause the lapse of a legacy which testator creates for his "wife" by name.
2. The granting of an absolute divorce does not revoke by implication a legacy in the will of the husband in favor of the wife.

(*Mitchell, Ch. J., dissents.*)

(April 10, 1905.)

NOTE.—Effect of divorce to revoke gift by will.

- I. Introductory, 940.
- II. When status mentioned in will controls.
 - a. In general, 940.
 - b. When legatee is mentioned by name, 941.
- III. Effect of lapse of time between divorce and testator's death, 942.
- IV. Effect of property settlement, 943.

I. Introductory.

From the few decisions upon this question in England and in this country, it is plain that the courts, while taking into consideration all relevant circumstances tending to throw light upon the testator's intention, refrain as a rule from interfering with the right of a divorced legatee to take under a will executed prior to the granting of the divorce, unless from the language of the will it is, in the court's opinion, obviously testator's intention that the gift shall not go to a legatee occupying the changed relation resulting from a divorce, or unless, from some other circumstance, the court is irresistibly convinced that not to decree an implied revocation in regard to the divorced legatee on account of the divorce would be to allow something entirely contrary to the testator's desire and intention. Under such circumstances only is the doctrine of implied revocation applied.

This, it seems, is the proper course, for, if a testator had notice of divorce proceedings affecting a legatee, and thereafter made no change in his will regarding him or her when there was sufficient time and opportunity in which to do so, the presumption is strong that his will expressed his wishes and intentions, and any interference by the courts, except under the circumstances above indicated, would be an unwarranted and unjustifiable extension of the doctrine of implied revocation.

II. When status mentioned in will controls.

a. In general.

While there is strong ground for the presumption that if, after a divorce, there was opportunity and time in which a testator might have changed his will in regard to the divorced legatee, and omitted to do so, he did not care to make any change, on the other 60 L. R. A.

A PPEAL by the Fidelity Title & Trust Company, guardian of Thomas M. Jones, 3d, from a decree of the Orphans' Court of Allegheny County dismissing exceptions to the allowance of a claim to a legacy under the will of Thomas Mifflin Jones, Jr., deceased. *Affirmed.*

The amount for distribution was in the neighborhood of \$600,000. A claim to share in this under the will of the testator was presented by his former wife.

Miller, J., the auditing judge, after setting out the stipulation as to the facts, continued as follows:

"The question presented is new. Careful

hand, there is the possibility that he might have labored under the supposition that the changed status of the legatee, resulting from the divorce, would of itself revoke his gift. When, however, the legatee is specifically named, although also referred to as "husband" or "wife," the testator would hardly, in so important a matter, be justified in resting upon his belief that his gift had been revoked by virtue of the divorce proceedings alone, when he could so easily, if he had desired, have made changes which, without question, would set forth his intentions; and the application by the courts of the doctrine of implied revocation would, under such circumstances, seem to be unwarranted. *Re* JONES and the similar earlier decisions (II., b) show that the courts have proceeded upon the above principle.

But if the legatee is not mentioned by name in the will, or even, if so mentioned, is further described as "widow," or otherwise referred to in such a way that the status of marriage is, so far as can be judged from the language of the will itself, intended to exist as a condition of the gift, then there is a greater possibility that the testator might have omitted to act, under the supposition that the divorce of itself operated to revoke his gift; and under such circumstances the courts have, in a few instances, applied the doctrine of implied revocation.

Thus, a will providing that, in case the wife of testatrix's son should survive him, an annual payment should be made to her during her widowhood, was construed to mean that the wife must occupy that status or condition at the time of the son's death so as to become his widow, in order to benefit under the will; and, therefore, that a decree of divorce operated to defeat her rights therein. *Bell v. Smalley*, 45 N. J. Eq. 478, 18 Atl. 70.

The bequest of an annuity to a wife by name, "so long as she should continue my widow and unmarried," was held to be rendered inoperative by a decree subsequently obtained by her rendering the marriage null *ab initio*, on the ground that the status of widowhood was a condition of inception and a measure of the duration of the gift. *Boddington v. Clairat*, L. R. 25 Ch. Div. 683, following the lower court decision reported in L. R. 22 Ch. Div. 597, 48 L. T. N. S. 110.

But the decisions right at this point are not harmonious. Thus, where a will provided

research shows no adjudication by the supreme court of this state under the same conditions.

"Counsel for the guardian contend that, owing to the changed relations of the testator after his will was made, and the decree of divorce was entered against him, absolutely severing and making null and void the marriage relationship, that the law implies a revocation of his will as to this bequest; that the presumption is that he could not have intended the disposition of his property, made before his relations with his then wife were changed, to still continue after the relations by decree of absolute divorce were severed; that the bequest of one third of his estate was not to Mary Brown Jones as an individual only, but to

Mary Brown Jones, his wife; that the bequest so made to her was by reason of the marriage relation.

"The contention of counsel for the claimant is that, as to the identification of the beneficiary, the will speaks from its date when the claimant was testator's wife; that the word 'wife' identifies the beneficiary, but does not imply any condition; that the divorce did not render the legacy either void or lapsed; and that the lapse of time between the date of divorce and testator's death—about twenty months—without changing the will is conclusive of his fixed intention to confer upon her the benefit given by the will. Implied revocation of wills is an ingrafted heritage from the common law. When the conditions after the

for the payment of an income to a son, or, in case of his death his wife surviving him, to "the widow" of the son so long as she should so remain, it was held that the words, "his wife" and "his widow" referred to the woman who occupied that relation at the time the will was made, notwithstanding they were subsequently divorced and the son married another, who survived him. *Davis v. Kerr*, 3 App. Div. 322, 38 N. Y. Supp. 887.

Somewhat similarly, under a will devising property in trust to a daughter, and after her death "in trust for any husband with whom she might intermarry, if he should survive her," one who had married the daughter, obtained a divorce from her, and subsequently remarried, was held entitled to take under the will, since he fulfilled all the words of the bequest, there being no expression of any intention upon the part of the testator that he must be her husband at the date of death in order to take *Bullmore v. Wynter*, L. R. 22 Ch. Div. 619, 48 L. T. N. S. 309. This case, however, was disapproved in *Hitchins v. Morrisson*, L. R. 40 Ch. Div. 30, which held that, under a will bequeathing a share of testator's residuary personal estate in trust for his son and after his death in trust to pay the income thereof for life to any wife of the son, a wife from whom the son had obtained an absolute divorce cannot claim a life interest, although the son died without having remarried, since the life interest was to commence at the death of the son, and she was not at that moment in the status and position of a wife.

b. When legatee is mentioned by name.

If, however, the testator, in making the bequest, mentions by name the husband or wife who is the legatee of the gift, besides referring to him or her as "husband" or "wife," it seems justifiable, from the decisions as they stand, together with *RE JONES*, to lay down as a rule that, under such circumstances, the fact of a subsequent divorce will not affect the legatee's right to benefit under the will, since the words "wife" or "husband" will be regarded as *falsa demonstratio*, and not words implying a condition that the legatee must occupy that relation in order to receive the gift. This conclusion has been reached in a number of decisions.

Thus, a legacy willed to his wife by name, L. R. A.

by a testator, was upheld, although she subsequently obtained a decree declaring the marriage null. This decision was upon the ground that the gift of the legacy to her *qua* wife was only a *falsa demonstratio*, the description of wife being merely to point out the individual. *Boddington v. Clariat*, L. R. 25 Ch. Div. 685, following the lower court decision reported in L. R. 22 Ch. Div. 597.

So where, by a will, testator bequeathed an annuity to his son and son's wife jointly, and, in case his son should die leaving "Eliza, his wife, him surviving," to her as long as she should continue unmarried, the fact that the son obtained an absolute divorce from his wife was held not to prevent her from receiving the annuity bequeathed in the will so long as she remained unmarried, since she was the person clearly described and designated therein. *Knox v. Wells*, 48 L. T. N. S. 653, 31 Week. Rep. 559.

And where a will provided for the payment of an income to testator's nephew by name, and "Rebecca, his wife," a subsequent divorce will not operate so as to effect the wife's right to benefit under the will, since she is distinctly named therein, and the words "his wife" are to be taken as mere words of description. *Bullock v. Zillely*, 1 N. J. Eq. 489.

And so, a bequest of the income of a certain sum to be paid to the husband of the testator's daughter if he should survive her, the will mentioning him by name, remains a valid and subsistent trust although the husband and wife were divorced. The court says: "We may conjecture, but we cannot be certain, that the inducing cause of the provision for Thomas Waller was that he was the husband of the testator's daughter. The relationship, however, could not have been the sole motive, since the gift is to the individual by name, and not to him simply as husband." *Mellon's Estate*, 28 W. N. C. 120.

And similarly, where a testator bequeathed money in trust for his son, and, in case of the latter's death, that the trust be continued for the use and benefit of the son's wife, naming her; and where, during the testator's lifetime, the son and wife were divorced upon the wife's application,—such divorce does not operate to prevent her from receiving the benefit of the trust so provided for by will. *Sharpe's Estate*, 15 W. N. C. 419. The fact that the wife was mentioned in the will by name, and

making of the will produce a change in the testator's previous obligations and duties there may arise a reasonable presumption of a change of intention in his mind. 4 Kent, Com. 54. The doctrine is stated and adopted in *Young's Appeal*, 39 Pa. 115, 80 Am. Dec. 513, as follows: 'If the testator's circumstances be so altered that new moral testamentary duties have accrued to him subsequently to the date of the will, such as may be presumed to produce a change of intention, this will amount to an implied revocation. . . . This principle gives the fundamental reason of all the positive rules of law we have on this subject. . . . The positive rules are given sometimes by statute and sometimes by judicial decision.' But the fact in this case involved an antenuptial settlement and the subsequent birth of issue after date of the will. The revocation of the will under the facts does not apply here. *Lansing v. Haynes*, 95 Mich. 16, 35 Am. St. Rep. 545, 54 N. W. 699, is the leading case apparently sustaining the guardian's contention, and is worthy of extended notice. The parties were married in 1864. The wife obtained an absolute decree of divorce in 1889. The husband died in 1891. They executed mutual wills in 1881, identical in language, each devising all their property to the other. She, by agreement, became custodian of both wills

until the divorce, when she destroyed hers, and she retained his, which action was unknown to him. In 1889, pending the divorce suit, she and he made a division of his property, he conveying to her certain real estate, she releasing her interest in the remainder to him. At the same time an agreement was executed by them in which he conveyed to her certain personal property. She released him from all demand of every sort, agreeing to pay her own expenses in the divorce proceedings, it being stated in the above-recited agreement that it and the deeds recited were intended as a property settlement between them. After his death she probated his will, and under it claimed the husband's estate. Her claim was denied, the court saying, *inter alia*: "The natural presumption arising from these changed relations is the reasonable one, and the one which in law implies a revocation. . . . To hold the will unrevoked under these circumstances would be repugnant to that common sense and reason upon which law is based." The foregoing is one of the few adjudicated cases involving the effects of a divorce upon the precise point at issue; but it differs from this, that there had been a settlement of the property rights of the parties; the court, after commenting on the effect of divorce and change of relation, saying: 'It is not, in my judgment, the

was the only person answering to that description at the date of the will, was one of the reasons which appealed to the court in coming to the above conclusion. It is said: "The person intended by testator was his daughter-in-law, Ada, and to add the word 'wife' was merely to still more particularly identify her. It was to designate the person, and not to imply a condition, *viz.*, that she must be the wife of the son at the time the bequest to her took effect. She was his wife at the date of the gift to her, and that is all that is necessary."

So, in *Charlton v. Miller*, 27 Ohio St. 298, 22 Am. Rep. 307, on the same day, but prior to their marriage, the prospective husband made a will giving to his intended wife by name a certain sum. She subsequently abandoned him, whereupon he obtained a divorce. The bequest to the wife was upheld, partly upon the ground that it was absolute and unconditional in its terms, and was not conditioned upon her survivorship as his widow.

But if the legatee is referred to as "widow," although also by name, that seems to be regarded as a designation by the testator of the status which the legatee must occupy in order to receive the gift. Thus, in one case where the bequest was to the wife by name "so long as she shall continue my widow and unmarried," a decree obtained by her rendering the marriage void *ab initio* was held to prevent her from receiving the gift on the ground that the status of widowhood was a condition of the inception and measure of the duration of the gift. *Boddington v. Charlrat*, L. R. 25 Ch. Div. 685, following the lower 69 L. R. A.

court decision reported in L. R. 22 Ch. Div. 597.

III. Effect of lapse of time between divorce and testator's death.

The fact that, after the granting of the divorce with the knowledge of the testator, he had ample time before his death to change his will in regard to the legatee affected by the divorce, is a circumstance which is justly regarded as of great weight in support of the conclusion that he desired the provisions carried out which were embodied in his will at the time of his death.

A husband bequeathed to his wife a specified sum payable annually in lieu of dower. The following year he obtained a divorce from her, and died five years thereafter. In holding that the gift to the wife was not revoked by the divorce granted, the court declared that coverture could not be said to have been the sole motive or inducement to the will, since, after that was taken away, it still remained true that the legatee had been the testator's wife, and was the mother of his children; and, adding to this the further facts which existed in the case, that the testator was possessed of a large estate, the provision for the wife being comparatively a mere pittance, and that he lived nearly five years after the divorce, making no change in his will, the conclusion was declared well-nigh irresistible that he did not intend to deprive his former wife of the provision he had made for her. *Card v. Alexander*, 48 Conn. 492, 40 Am. Rep. 187.

natural presumption that, after the testator had settled with her, had conveyed to her a good share of his property, and they by agreement had terminated all their property as well as their marital relations, the will executed nearly ten years before should remain in force and operate upon his death as a conveyance of the remainder of his property to her to the exclusion of his heirs.'

"Our statutes provide for the revocation of wills—as to real estate by some other will or codicil in writing, or other writing declaring the same, by burning, canceling, obliterating, or destroying the same; as to personal estate in the same manner, except, in addition, by a nuncupative will, made under the same circumstances, committed to writing in the lifetime of the testator, so read to and allowed by him; and by the marriage, subsequent to the making of a will, of a man leaving a widow and child or widow or child or children; and by the subsequent marriage of a single woman who had made her will. The statutes are silent as to the revocation of wills in any other manner. The language that 'no will shall be revoked,' except as therein provided, indicates a strong implication that any other revocation is prohibited. In *Walker v. Hall*, 34 Pa. 483, the court, after declaring the well-recognized rules of revocation, con-

tinues: 'It is clear, therefore, that all our rules in such cases are statutory ones, established by the legislature, by which the common law has been either repealed or altered or enforced by positive legislative sanction, and therefore not open to the doctrine of implied presumption.' In *Heise v. Heise*, 31 Pa. 246, is said: 'Yet, under the 13th section, that which was once a perfect will must ever remain such unless repealed, altered, or destroyed in some one of the modes designated in the act. Those modes are exclusive of all others.' So, also, *Dixon's Appeal*, 55 Pa. 424. There is no doubt that as to the beneficiary intended this will speaks from its date. 2 Jarman, Wills, p. 320; Gardner, Wills, p. 432; *Anshutz v. Miller*, 81 Pa. 212. This person was Mary Brown Jones. The words 'my wife,' prefixed to the name, do not imply any condition. Theobald, Wills, p. 210. Testator did not stipulate that she should continue to be his wife while he lived, and his widow upon his death, as a condition precedent. The name will prevail if there is a person fully answering to it, even though there be a description and no one answers to it. 'The mere fact that a gift is made to a named legatee in a certain character, as, for instance, to my wife A, does not avoid the legacy, if the legatee does not happen to fill the character.' Theobald, Wills, p. 214. In *Bullock v.*

The fact that the will might easily have been expressly revoked, and that, on the contrary, the testator made no change in it for nearly five years after he was abandoned by his wife before he obtained a divorce from her, and more than four years after the divorce before his death, was regarded by the court as a strong reason in support of this conclusion upholding the bequest made in the will to the wife before the divorce was granted. *Charlton v. Miller*, 27 Ohio St. 298, 22 Am. Rep. 307.

So, the fact that testator survived the divorce some time, and died without making any alteration in his will, was one of the reasons which led the court to uphold the legacy in *Sharpe's Estate*, 15 W. N. C. 419.

IV. Effect of property settlement.

A settlement of property rights, made between the parties at the time of the divorce proceedings, is a circumstance which, in one instance at least, was deemed a strong element in favor of the implied revocation of the will.

Thus, the facts showed that a husband and wife while living together executed mutual wills identical in language, he devising all his property to her and she devising all her property to him. She took possession of both wills, and preserved them until a decree of divorce was rendered in her favor, after which she destroyed her will. At the time of the divorce proceedings a property settlement was had by which the husband conveyed to the wife personality and realty, in consideration of which she released him from all demands of every

nature. In holding that the husband's will was revoked by implication of law on account of the changed relations of the parties, the court bases its conclusion largely upon the ground that the property settlement raised the natural presumption that the husband intended to make no further provision for his wife. It is said: "To hold the will unrevoked under these circumstances would be repugnant to that common sense and reason upon which law is based. I do not think the common law is so unbending as to lead to this result. . . . The natural presumption arising from these changed relations is the reasonable one, and the one which in law implies a revocation. The question is not to be controlled by a possible presumption, but by the reasonable presumption. The possibility, therefore, that the deceased might have desired that the remainder of his property should go to his divorced wife, cannot be considered in determining the question of an implied revocation in this case. Such disposition of his property would be unusual and contrary to common experience." *Lansing v. Haynes*, 95 Mich. 16, 35 Am. St. Rep. 545, 54 N. W. 699.

But in *Baacke v. Baacke*, 50 Neb. 18, 69 N. W. 303, the subsequent granting of a divorce to the wife of a testator, and the settlement of her property rights, it is declared, will not work a revocation of the will; whether it would revoke the will as to the wife's legacy is expressly not determined, since the question was not at issue.

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Zilley, 1 N. J. Eq. 489, testator directed interest to be paid to Thomas Bullock and Rebecca, his wife. They were divorced after testator died. Held, the word 'wife' was descriptive, designating the person, and that Rebecca took under the will. Judge Penrose, in *Mellon's Estate*, 28 W. N. C. 120: We may conjecture, but we cannot be certain, that the inducing cause of the provision for this claimant was that she was testator's wife. We do know she is the individual in testator's mind when the will was executed. The case of *Charlton v. Miller*, 27 Ohio St. 298, 22 Am. Rep. 307, arose under the provisions of testator's will bequeathing to 'my intended wife, Elizabeth Jennings, the sum of one thousand dollars, to be paid to her by my executors one year after my decease.' The execution of the will was followed by the marriage of testator with the legatee. Eight months thereafter she deserted him. Five years later he obtained a divorce on the ground of such desertion, and he died five years after the divorce. Held, in awarding the legacy to the claimant, that, 'undoubtedly the contemplated marriage of the parties and a desire to make a provision for the plaintiff as his wife were prompting causes of the will, but whether these were the only motives . . . we cannot tell. . . . To defeat the bequest we must then not only add to the will conditions that are neither expressed nor necessarily implied therein, but must rebut the presumption against any intended revocation of the will arising from the testator's acquiescence therein for nearly five years after he was abandoned by his wife before he obtained a divorce.' In *Sharpe's Estate*, 15 W. N. C. 419, testator created a trust for his son, he to receive the interest during life, and, in case of his death, for the use and benefit of his wife, Ada, and child, or children, in the same manner until the children attained lawful age, when the corpus was to be divided equally between the wife, Ada, and children, and in case of no surviving children the half part of the corpus to the son's wife, Ada, the other half to testator's surviving children. The will was dated October 5, 1871, at which time the testator was living with his son and the son's wife, Ada. On October 19, 1872, in the lifetime of the testator, upon the application of the wife, they were divorced *a vinculo*, having no children. The son was remarried, and died leaving a widow, Emma, and child. The divorced wife, Ada, remarried, and was living with her second husband at the time of the adjudication. The auditing judge, Hanna, P. J., awarded one half the corpus to the legatee, Ada, holding that the effect of the divorce was immaterial, referring to *Burton v. Sturgeon*, 69 L. R. A.

34 L. T. N. S. 706; *Fitzgerald v. Chapman*, 33 L. T. N. S. 587; *Bullmore v. Wynter*, 49 L. T. N. S. 309; the court further stating that, the testator survived the divorce making no alteration in his will, that the divorce did not convert the legacy into a lapsed or void legacy. The court, by Judge Penrose, affirmed the adjudication on an additional and different theory, but it did not disturb the conclusions stated by the auditing judge. In the recent case of *Broirn v. Ancient Order of U. W.* 208 Pa. 101, 57 Atl. 176, the facts, as stated in the opinion, are: John P. Brown, in October, 1877, became a member of a subordinate lodge of the Ancient Order of United Workmen, and had a benefit certificate insuring his life in the sum of \$2,000, payable at his death to Mattie Brown, his wife. In 1893 she obtained an absolute divorce from him, and in the same year he married Annie Z. Whaley. He died December 22, 1901, leaving to survive his widow, Annie Z. Brown, with one child: three children of his first wife, Mattie Brown, the beneficiary, who also survived, and who had possession of the benefit certificate. No change was made in the beneficiary. The decedent had contributed toward the support of his divorced wife and her children until his death. The judgment in favor of the divorced wife, the beneficiary named, was sustained. True, the facts are somewhat different, and the adjudication of the rights of the parties in passing upon the charter and laws of this beneficial organization are not similar to the questions raised under this will: still this similarity does exist: At the time she was made beneficiary she was his wife. She was within the class recognized by the laws of the society. At the time of his death she was not his wife. The divorce severed their relations. Brown could have changed his beneficiary. That he did not had its weight in the decision of the court, Mr. Justice Mestrezat saying: 'It is manifest . . . that John P. Brown intended that his first wife should continue to be the beneficiary . . . after they had been separated by the divorce proceedings. . . . The divorce was granted eight years before his death. Yet he allowed these years to go by without a surrender of the policy and a change of the beneficiary, or without disclosing any desire to make such change. . . . Under the circumstances it is evident that he never intended or desired to exercise his power of appointment, and thereby deprive his first wife of the benefit of the policy issued by the defendant company.'

"The contention that the divorce absolutely severed the marriage relations is correct. If this claim were based on that relation alone, it would be summarily dismissed.

But it arises from an entirely different cause. Its basis is the deliberate, mature act of the testator, made when the end of the marriage relation had begun; an act that he continued to ratify during the months that the divorce proceedings were pending, in every step of which he had notice, which act he continually reaffirmed during the long period after the divorce, ending only with his death. It does not follow that, because the divorce made these parties as strangers to each other, so far as their marital rights were concerned, that therefore the testator's deliberate act in making his devise, which did not necessarily depend on the marriage relation, a void or lapsed devise. The facts here do not bring this case within the rule that the law works a revocation where the changed relations raise a reasonable presumption of a change of intention in the testator's mind. To strike down his expressed intention, and substitute therefor a presumption of his change of intention, would lead to a result unwarranted in principle or precedent. Why the testator did not alter his will cannot be known. He had almost two years in which to change it. Although divorced, the devisee was not a stranger to him or to his blood. She was the mother of his only child. Both remained unmarried to his death. Her subsequent marriage did not, so far as the record shows, enter into any consideration, and is immaterial. There was no change or alteration in his estate when the will took effect. The principal object of his bounty, his only son, who takes the remainder (by far the greater portion) of his estate, still continued as the chief object of care. His will, made after the separation, taking effect at his death, is presumptive legal evidence that he was satisfied, and so intended the disposition of his property. He could, after the divorce, have made a new will with the same devise to the same person or any other devise to any other person: that he did not do so is persuasive that he intended the devise to Mary Brown Jones, his former wife, the mother of the child born to them both, to remain in effect. In Schouler on Wills, § 427, it is said: 'In short, revocation of a particular will by mere inference of law or presumption is limited to a very few instances in our modern practice; while, on the other hand, changes in the condition of the testator's affairs or through the mortal chances to which both he and his beneficiaries are exposed may work out a very different settlement and distribution of his estate after his death from what the will purported to arrange. Modern legislation itself repudiates in England and many of our states the whole theory of a presumed intention to 60 L. R. A.

revoke on the ground of an alteration in circumstances, and what is left of that theory aside from such statutes it would be very difficult to say.' To hold, under the facts in this case, that the divorce revoked this bequest, would not be in accordance with statutory regulation, and would be extending the doctrine of an implied revocation beyond any authoritative adjudication, and would be contrary to the express and implied intention of the testator."

Exceptions to this ruling were dismissed by the Orphans' Court, Hawkins, P. J., filing the following dissenting opinion:

"If Mr. Jones had died intestate, it must be conceded that this claimant would have had no standing here. Her right to claim in distribution would have depended on the continuance of the marital relation, and that had been terminated by her act as completely as though she had died before Mr. Jones. The law gave her the option of qualified or absolute divorce, and, having chosen the latter, she would voluntarily have relinquished her whole interest in his estate. The statute of divorce prescribes that, upon the dissolution of marriage, 'all and every the duties, rights, and claims accruing to either of the parties at any time theretofore in pursuance of said marriage shall cease and determine,' and to this extent is part of the law of distribution. And why not apply this broad principle to wills? Because, says counsel, there can be no implied revocation without statutory prescription; and divorce is not prescribed. But it is fully established that change of circumstances raises a presumption of change of intention, and works a revocation of a will; and this presumption is said to be so strong that it may not be rebutted by parol evidence, on the ground that this would be productive of the evils which were intended to be averted by the statute of fraud. *Marshall v. Marshall*, 11 Pa. 430. There are subordinate reasons everywhere, said the court in *Young's Appeal*, 39 Pa. 115, 80 Am. Dec. 513, varying the rule according to the laws of descent. The positive rules are given sometimes by statute and sometimes by judicial decision; and the most positive of them are sometimes changed merely incidentally by a change in the laws of descent. For the law does not do or require vain things. It has accordingly been held again and again that testator's sale of a thing specifically given is an implied revocation *pro tanto*, notwithstanding the absence of statutory prescription. 1 Wms. Exrs. 242. So, it was held in *Carey's Appeal*, 75 Pa. 201, that revocation may be implied from change of domicile. No one can doubt that refusal to accept a legacy will work revocation *pro tanto*. *Re Bryce*, 194 Pa. 135, 44 Atl. 1076. And so in *Lee's*

Estate, 207 Pa. 218, 56 Atl. 425, it was held that a decree of divorce implied the revocation of a coverture trust upon the ground that 'the law has severed the matrimonial bond as effectually as death could have done.' If this claimant had died before Mr. Jones, there can be no doubt that the gift must have failed, for she would not have been within the statute of lapse; and divorce is the equivalent of death. If divorce be the equivalent of death in such will (*Flory v. Becker*, 2 Pa. St. 470, 45 Am. Dec. 610), it must be so in every will in which marital rights are involved. Implied revocations, said Chancellor Kent (4 Com. 521), 'are founded upon the reasonable presumption of an alteration of the testator's mind arising from circumstances since the making of the will, producing a change in his previous obligations and duties. . . . There is not, perhaps, any code of civilized jurisprudence in which this doctrine of implied revocation does not exist, and apply when the occurrence of new social relations and moral duties raises a necessary presumption of a change of intention in the testator.' It is immaterial, said the court in *Young's Appeal*, 39 Pa. 115, 80 Am. Dec. 513, whether this principle of the common law 'was derived from the Roman law or from our human instincts of justice; certainly it is now a legitimate element of our common law, and we would not have received it but for those instincts. The Romans received it before us because they were before us, and because they, too, were human.' It seems clear, therefore, that there may be implied revocation of wills outside of statutory prescription.

'The pivotal question, then, is whether or not the change of conditions since the making of this will produced such a change in testator's previous moral obligations and duties as raises a reasonable presumption of alteration of his mind, and implies revocation of the bequest which he had made to his wife? If the gift was made because of the existence of the marital relation, divorce would certainly take away the reason for it; and without the reason which inspired, the legatee could have no equity to claim it. It is immaterial whether her husband made a will or not; for, her application having been a voluntary and absolute renunciation of 'all and every the duties, rights, and claims accruing . . . in pursuance of the marriage,' she took the risk, and should abide the consequence. It is safe to assume that the gift would not have been made if the beneficiary had not stood in the relation of wife. It may be that Mr. Jones's misconduct was so gross as to justify his wife leaving him, and that under the spur of remorse he made the will as a peace

offering. But it would be asking too much of human nature to expect the husband to make such a gift in anticipation of his wife's application for divorce and remarriage. 'The natural presumption arising from these changed relations,' said the court in *Lansing v. Haynes*, 95 Mich. 16, 35 Am. St. Rep. 545, 54 N. W. 609, 'is the reasonable one, and the one which in law implies a revocation. The question is not to be controlled by a possible presumption, but by the reasonable presumption. The possibility, therefore, that the deceased might have desired that the remainder of his property should go to his divorced wife, cannot be considered in determining the question of an implied revocation in this case. Such disposition of his property would be unusual, and contrary to common experience,' and the grounds of divorce may be such as to make her claim 'repugnant to that common sense and reason upon which the law is based.'

'There is obviously an essential difference between a gift to 'my wife, Mary Brown Jones,' and a gift to 'Mary Brown Jones,' without more. Irrespective of technical rules, no one would hesitate to infer that the first was descriptive of the marital relation, and imported on its face that the gift was made because of that relation; and that the latter was descriptive of the individual, and imported an absolute gift. The difference of description would imply difference in purpose. So there is a material difference between a gift to a testator's wife and a gift to the wife of another in this: That the former necessarily implies recognition of a marital duty, and is therefore dependent on its continued existence; while the latter implies no more than a purpose of identification of the object of bounty. The question in this case is not who was intended to take, —for Mr. Jones cannot be supposed to have had in contemplation a future wife,—but the character in which this legatee was intended to take, whether because of her marital relation to testator or simply as an individual. If given because of the marital relation, as the description imports, she can take it in no other character than as widow. It is suggested that to produce this effect an express condition of continuance of the marriage relation must have been attached to the gift: but there is no apparent reason why an implied condition should not be just as effective; and the form of this gift implies continuance. Not only does the description of the legatee import on its face a conditional gift, but the quantity of the gift implies that testator had in view the intestate law, and therefore marital right, as the reason. There is a well-settled principle that a widow will be presumed to take under the intestate law, rather than under

her husband's will, where her interest is the same in either event. *Davison's Appeal*, 95 Pa. 394. The statute furnishes the general rule of distribution, and the will is simply declarative, and therefore no election is necessary; and, conversely, the testator must be presumed to have given in the same right in which this interest is taken by his widow, and therefore because of relationship to his widow as such. While it is said that this estate consisted in part of realty, the natural inference is that the gift of 'one third' of the estate, which consisted largely of personality, was suggested by the intestate law, and that consequently Mr. Jones had in view his wife's marital right under that law as distinguished from her individual right. It was also upon this principle of implied conformity to the intestate law that bequests to a mother and her children gave the mother but a life estate (*Hague v. Hague*, 161 Pa. 643, 41 Am. St. Rep. 900, 29 Atl. 261); and a legacy by a father to a child is understood as a portion, because it is a provision by a parent for his child (*Miner v. Atherton*, 35 Pa. 528). And it is upon a similar principle that a legacy is considered to have been given in satisfaction of a debt, rather than as an independent gift, where there is identity in amount. An intent to give because of the marital relation is therefore apparent.

"What Mr. Jones did or failed to do after the divorce was granted has nothing to do with the question involved here. If the divorce worked a revocation, it could not be republished in any manner other than that prescribed by the statute of wills. Many wills have been revoked *pro tanto* by implication—as, for example, in case of ademption—without a suggestion that testator was required to make it effectual by a written modification of his will. The case of *Brown v. Ancient Order of U. W.* 208 Pa. 101, 57 Atl. 176, is clearly distinguishable from this in that it was based upon a contract whose terms made change of beneficiary dependent on the act of the assured. Why Mr. Jones did not do what he was not required to do, the evidence fails to show. He may not have been in a condition after the divorce to have taken action, or he may have been advised or thought it unnecessary; but, in any event, he owed no duty to this claimant. It may be conceded that there are English cases inconsistent with this view,—some of them arising on marriage articles, and some on wills; but the cases even there were not harmonious. Vice Chancellor Malins said of *Boreham v. Bignall*, 8 Hare, 131, the leading case, that the court evidently thought, from the peculiar language used, that there was an intention to benefit the particular wife of his nephew, 60 L. R. A.

then living, and that the court might well have come to a different conclusion. In *Garratt v. Niblock*, 1 Russ. & M. 629, it was held that by the expression 'my beloved wife' testator must have meant a particular wife; and so in *Re Bryan*, 2 Sim. N. S. 103, the language of the gift was held to point out a particular husband. *Re Lyne*, L. R. 8 Eq. 65. On the other hand, where there was a devise to testator's nephew for life, with remainder to the nephew's wife for life, with remainder to children of his nephew by said wife, it was held to extend to the nephew's second wife. *Peppin v. Bickford*, 3 Ves. Jr. 570. In a somewhat similar case Vice Chancellor Malins reached the same conclusion. Attention is called to the fact that Sir George Jessel, master of the rolls in a subsequent case disapproved of this decision; but he was noted for his disregard of precedent, and his *dictum* might not stand against the ruling of a court of superior jurisdiction. Two cases were also cited on behalf of claimant from supreme court reports in this country against implied revocation by divorce; but an examination of these cases will show that they are not applicable here. In the first (*Bullock v. Zille*, 1 N. J. Eq. 489) the bequest was not to the testator's wife, but to his son, 'Thomas Bullock, and Rebecca, his wife,' and the decision was rested upon four grounds suggested by the peculiar language of the will as showing testamentary intent to make an absolute gift. No authorities were cited. In the other case (*Charlton v. Miller*, 27 Ohio St. 298, 22 Am. Rep. 307) the bequest was made in contemplation of marriage, and the court very properly held that it did not depend on marriage, and could not, therefore, be lost by divorce. Even those cases which deny implied revocation by divorce concede that a slight indication of a different intent will prevail, and are therefore distinguishable from the present case on this ground. On the other hand, the case of *Lansing v. Haynes*, 95 Mich. 16, 35 Am. St. Rep. 545, 54 N. W. 699, cited for the estate, is a strong authority in support of the doctrine of implied revocation by divorce. Mr. Lansing and wife executed mutual wills of their respective estates, and were afterward divorced. Pending the suit in divorce they entered into an agreement of division and release of their property, but no reference was made therein to their wills; and on Mr. Lansing's death an issue was raised of implied revocation on Mrs. Lansing's presentation of the will. In a very able opinion by Mr. Justice Grant the court held that, because of the absence of any reference to the will, the agreement did not amount to an express revocation under their statute, but that an implied revocation

arose from the divorce. 'By the decree of divorce in this case,' said the court, 'the parties became strangers to each other, and neither owed to the other any obligation or duty thereafter. There was therefore a complete change in these relations;' and the case fell within the principle laid down by Chancellor Kent, as above quoted. No Pennsylvania supreme court decision has been found in conflict with this view. The case of *Brown v. Ancient Order of U. W.* 208 Pa. 101, 57 Atl. 176, cited on behalf of claimant, is, as already suggested, distinguishable from this by the fact that the right of the beneficiary had been fixed by contract, subject to a new designation on the part of the assured, which was never made, whereas revocation here arose by implication of law, and there was no republication as prescribed by statute. The case may, therefore, to use the language of the court in *Lansing v. Haynes*, 95 Mich. 16, 35 Am. St. Rep. 545, 54 N. W. 699, be decided on the 'common sense and reason upon which the law is based.'

"None of the judges who deny implied revocation by divorce attempts to reconcile his position with the common-law doctrine of implied revocation of will from change of circumstances, and logically they are irreconcilable, for there can be no change of circumstance more radical than that produced by divorce. If ademption will imply revocation, much more should this. A husband, as such, may show the greatest generosity in testamentary disposition; but it is not in human nature to give to her who has held his domestic faults up to public gaze as a means of dissolving marriage. Who would for a moment believe that, if Mr. Jones were living to-day, he would give Mrs. Speer 'one third' of his estate? To ask is to answer the question. Independence, of the personal question, consideration for his son's interest would have a deterrent effect. The divorce caused such change in circumstances that his son became presumptively the sole object of testamentary obligation. And, on the other hand, it is impossible to understand how, in view of Mrs. Speer's renunciation, she can consistently claim what, without the existence of the marital relation, would never have been given. She has no equity to recognition.

"For these reasons I would disallow this claim."

Messrs. Watson & Freeman, George C. Wilson, and William D. Evans, for appellant:

There is no difference in principle whether the marriage is destroyed by death or by the sentence of the law.

Flory v. Becker, 2 Pa. St. 470, 45 Am. 69 L. R. A.

Dec. 610; *Lee's Estate*, 207 Pa. 218, 56 Atl. 425; *Miltimore v. Miltimore*, 40 Pa. 156.

The language of the will itself, and the circumstances surrounding the testator when the will was made, show that the testator intended this gift to his wife in her character or relationship as such, and not otherwise.

A legatee must answer the description and character contained in the will.

2 Wms. Exrs. *1089.

The will speaks from the death of the testator.

Act June 4, 1879, P. L. 88, § 1; 2 Wms. Exrs. *1089; *Anshutz v. Miller*, 81 Pa. 212; *Bell v. Smalley*, 45 N. J. Eq. 478, 18 Atl. 70; *Hitchins v. Morrisson*, L. R. 40 Ch. Div. 30; *Seibert's Appeal*, 18 W. N. C. 276, 6 Atl. 105.

The bequest to Mary Brown Jones has been revoked by implication by reason of the changed relations produced by her obtaining a divorce from the testator since the making of the will.

Lansing v. Haynes, 95 Mich. 16, 35 Am. St. Rep. 545, 54 N. W. 699.

Messrs. Seymour, Patterson, & Siebeneck, for appellee:

After final separation, a husband made bequest to "my wife Mary." Afterward they were divorced. He survived the decree by twenty months, but made no change in the will. These facts indicate that he intended the will to stand.

Irish v. Smith, 8 Serg. & R. 580, 11 Am. Dec. 648; *Brown v. Ancient Order of U. W.* 208 Pa. 101, 57 Atl. 176; *Padelford's Estate*, 190 Pa. 48, 42 Atl. 381; *Charlton v. Miller*, 27 Ohio St. 298, 22 Am. Rep. 307.

The word "wife," standing before the word "Mary," is intended to identify her from other "Mary Joneses," and not to imply a condition that she must remain his wife.

Williams v. Neff, 52 Pa. 336; *Hardy v. Smith*, 136 Mass. 328; *Anshutz v. Miller*, 81 Pa. 212; *Morse v. Mason*, 11 Allen, 36; *Schult v. Moll*, 132 N. Y. 122, 43 N. Y. S. R. 484, 30 N. E. 377; *Bullock v. Zilley*, 1 N. J. Eq. 489; *Johnson v. Johnson*, 1 Tenn. Ch. 621.

The term "wife" relates to the wife at the date of the will.

Garratt v. Niblack, 1 Russ. & M. 629; 2 Jarman, Wills, 1876 ed. *380; *Re Bryan*, 2 Sim. N. S. 103; *Franks v. Brooker*, 27 Beav. 635; *Bullock v. Bennett*, 7 De. G. M. & G. 283; *Violet v. Brookman*, 26 L. J. Ch. N. S. 308; *Anshutz v. Miller*, 81 Pa. 212; *Fitzgerald v. Chapman*, 33 L. T. N. S. 587; *Babcock v. Smith*, 22 Pick. 61; *Bullmore v. Wynter*, 48 L. T. N. S. 309; *Mellon's Estate*, 28 W. N. C. 120; *Sharpe's Estate*, 15 W. N. C. 419.

The divorce did not affect the gift.

Charlton v. Miller, 27 Ohio St. 298, 22 Am. Rep. 307; *Brown v. Ancient Order of U. W.* 208 Pa. 101, 57 Atl. 176; *Fitzgerald v. Chapman*, 33 L. T. N. S. 587; *Babcock v. Smith*, 22 Pick. 61; *Bullmore v. Wynter*, 48 L. T. N. S. 300; *Mellon's Estate*, 28 W. N. C. 120; *Sharpe's Estate*, 15 W. N. C. 419; *Cara v. Alexander*, 48 Conn. 492, 40 Am. Rep. 187; *Boddington v. Clairat*, 48 L. T. N. S. 110; *McKnight v. Read*, 1 Whart. 222; *Dilley v. Matthews*, 8 L. T. N. S. 762; *Steele v. Thompson*, 14 Serg. & R. 88.

To raise implied revocation, new moral duties must accrue after date of will,—only such being marriage and birth of issue.

Young's Appeal, 39 Pa. 115, 80 Am. Dec. 513; *Marston v. Roe*, 8 Ad. & El. 14; 4 Kent, Com. 521.

The statute limits such revocation to either marriage or birth of issue *pro tanto*, and excludes any other change.

Coates v. Hughes, 3 Binney, 498; *Clingan v. Mitchellree*, 31 Pa. 33; *Heise v. Heise*, 31 Pa. 246; *Walker v. Hall*, 34 Pa. 483; *Dixon's Appeal*, 55 Pa. 424; *McCulloch's Appeal*, 113 Pa. 247, 6 Atl. 253.

The word "wife" merely identifies the beneficiary with particularity, and does not imply any condition.

Theobald, Wills, 1881, 2d ed. p. 210; *Standen v. Standen*, 2 Ves. Jr. 589; *Re Blackman*, 16 Beav. 377; *Doe ex dem. Gains v. Rouse*, 5 C. B. 422; *Re Ingle*, L. R. 11 Eq. 578; *Re Petts*, 27 Beav. 576; *Giles v. Giles*, 1 Keen, 685; *Boreham v. Bignall*, 8 Hare, 131; *Re Burrow*, 10 L. T. N. S. 184; *Re Cahn*, 3 Redf. 31; *Rishton v. Cobb*, 9 Sim. 615; *Morse v. Mason*, 11 Allen, 36; *Hardy v. Smith*, 136 Mass. 328; *Johnson v. Johnson*, 1 Tenn. Ch. 621; *Schult v. Moll*, 132 N. Y. 122, 43 N. Y. S. R. 484, 30 N. E. 377; *Bullock v. Zilley*, 1 N. J. Eq. 489; *Williams v. Neff*, 52 Pa. 326; *Bain v. Lescher*, 11 Sim. 397.

Potter, J., delivered the opinion of the court:

The questions presented by this appeal, stated by the appellant, are: (1) Does a legacy in these words: "one third to my wife, Mary Brown Jones," lapse when the wife, subsequent to the date of the will, at her own instance, obtains a divorce *a vinculo matrimonii*? (2) Is a bequest "to my wife, Mary Brown Jones," revoked by implication by reason of absolute divorce? We take up these questions in order.

What is there in the facts of this case to support the claim that the legacy has lapsed? The person named as legatee did not die in the lifetime of the testator, nor did any other event occur in the lifetime of the testator, which, under the language of the will, would render the testamentary gift

inoperative. The donee survived the testator, and is alive, and has both capacity and willingness to take under the will. But it is suggested in the argument that, while not physically dead, the donee, by her own act in obtaining the decree of divorce, ended the marital relation as absolutely as death would have done. This consequence did follow the divorce, in so far as the duties, rights, and claims accruing to her by reason of the marriage are concerned. With respect to the determination of these rights, and these alone, is divorce the equivalent of death. The decree in divorce took away only what the law gave to her when the marriage was contracted. This was the right to support, and to dower in his estate if she survived him. After the entry of the decree the testator was no longer bound to provide for her, and she had no further claim upon his estate. What the law gave, it took away; nothing more. The beneficiary is not here claiming anything which accrued to her in pursuance of her marriage. She is here only as a legatee, and is asking for that only which the testator gave to her of his free grace, and as a matter of bounty. That which he gave to her in his will was his own to give or to withhold, as he saw fit. A bequest needs no consideration to support it. As a legatee she stands upon the same footing as any other individual, and her relation to the testator has nothing to do with the case, unless he chose to make it an element in the bestowal of the gift. Did he do so? The provision in the will is as follows: "I direct that my funeral expenses and all debts be promptly paid, and that my estate be divided as follows: One third to my wife, Mary Brown Jones, and the balance to my son, Thomas Miffin Jones." The will was dated April 24, 1899, and Mary Brown Jones was then the wife of the testator. On February 6, 1900, the said Mary Brown Jones began proceedings in divorce, and the decree was granted to her on September 19, 1900. Thomas M. Jones, Jr., the testator, lived about one year and eight months after the divorce was granted, and died on May 17, 1902. Mary Brown Jones did not remarry during the lifetime of the said Thomas M. Jones, Jr., but she did marry about six months after his death. It will be noticed that the gift was to "my wife, Mary Brown Jones," without any conditions or limitations. The testator gives the one third of his estate to a particular person, naming her, and further identifying her by the statement that she is his wife. That is in substance what he says. He make no stipulation that she shall remain his wife, or be such at the time of his death. We are clear that such use of the word "wife" as is here made, is de-

scriptive only, and does not imply any continuing condition.

"The mere fact that a gift is made to a named legatee in a certain character—as, for instance, to my wife, A—does not avoid the legacy if the legatee does not happen to fill the character." Theobald, Wills, 5th ed. p. 247. In *Bullock v. Zilley*, 1 N. J. Eq. 489, the words "his wife," as applied to complainant, were held to be mere words of description of the individual, and not as defining the capacity in which she was to benefit. In *Mellon's Estate*, 28 W. N. C. 120, where the beneficiary was named as "T. W., the husband of my said daughter," the word "husband" was held to be a description of the person, and not of the character in which he was to take. The reasoning of Judge Penrose fits accurately this case. He said: "We may conjecture, but we cannot be certain, that the inducing cause of the provision for Thomas Waller was that he was the husband of the testator's daughter. The relationship, however, could not have been the sole motive, since the gift is to the individual by name, and not to him simply as husband; nor is there, as in *Bell v. Smalley*, 45 N. J. Eq. 478, 18 Atl. 70, the evidence of intention afforded by a restriction of the bounty to the time during which the beneficiary remains unmarried. We have no right to say, therefore, that the gift was subject to the condition that the donee should at the time it took effect, be the husband of the daughter." In *Brown v. Ancient Order of U. W.* 208 Pa. 101, 57 Atl. 176, where a certificate was payable at the death of John Brown to his wife, Mattie Brown, we held that it was for the individual, Mattie Brown, without regard to the fact of her continuing to be the wife of the member, and subsequent divorce did not forfeit her right. The husband there had the power to change the beneficiary at any time, and we held that the fact that he did not do so during a period of eight years between the divorce and his death made evident his intention not to deprive his first wife of the benefit of the policy. "Where a man retains a revocable instrument with full opportunity of revoking it, and does not revoke it, there is a strong presumption that he wishes it to stand." Tilghman, Ch. J., in *Irish v. Smith*, 8 Serg. & R. 573, 11 A. n. Dec. 648.

We are clear that the will indicates that the testator intended the gift for the individual, Mary Brown Jones, who was at that time his wife, and identified by him as such. We think the bequest is unrestricted, and that the words "my wife" are, as we said above, only descriptive, and do not import a condition that the beneficiary shall remain his wife. Nor do we doubt that, as 69 L. R. A.

to the object of the legacy, the will speaks from its date. *Anshutz v. Miller*, 81 Pa. 212. "Prima facie a gift to the wife of A, who had a wife living at the date of the will, goes to that wife, and no other. . . . If there is anything on the face of the will to show that an existing person is referred to, the case is clear." Theobald, Wills, 249.

Nor is there anything in the act of June 4, 1879 (P. L. 88), to the contrary. Under the requirements of that act it is "with reference to any real or personal estate embraced in it" that every will shall speak as of the testator's death. In *Robeno v. Marlatt*, 136 Pa. 35, 20 Atl. 512, the court below said, on page 37: "It is claimed, however, that the act of June 4, 1879, bars their [after-born children] right. This act has received judicial construction, the results of which are that as to the condition of the donees the will speaks as of the date; as to the subjects of the testamentary disposition, the will is construed as of the death; as to the objects,—that is, the persons who are to take under it,—and their condition, the will speaks as of its date; as to the testator's condition, it is to be considered as of its date. The act is restricted in its effect to the real and personal property passing under it." And this statement was affirmed by this court.

But, turning to the second question presented here, it is elaborately argued that, as matter of law, the bequest to Mary Brown Jones was impliedly revoked by reason of the divorce. No authority has been cited in support of the proposition that divorce in itself is sufficient to work a revocation of a will, and we are not aware that any exists. The only case which has been cited by counsel as sustaining this position is *Lansing v. Haynes*, 95 Mich. 16, 35 Am. St. Rep. 545. 54 N. W. 699. But examination shows that the Michigan statute allows the court to determine whether the subsequent changes in the condition or circumstances of the testator are sufficient to work an implied revocation of the will. And the decision in that case rested also upon the fact that pending the divorce proceeding there was a settlement of the property rights of the parties. A division of the real estate was made, each deeding to the other. An agreement was also made by which the husband conveyed to the wife certain personal property, and she agreed to release him from all demands of every kind or nature. The agreement stated that it and the deeds executed by them were intended as a property settlement between them. This was a practical satisfaction of the bequest, and amounted to an ademption. As we read this decision, it was controlled by the fact of the settlement of property rights between the parties, and

not by the divorce itself. At common law the doctrine of implied revocation of a will from change of circumstances did not include divorce. In fact, the instances were few under the common law in which an alteration of circumstances was held sufficient to justify an implied revocation. Both at common law and under the statutes of most of the states, it is only certain definite changes in the condition or family relations of the testator which impliedly revoke a will executed before such changes. The great weight of authority is that no changes beyond the few which have been many times specifically enumerated and recognized as sufficient for the purpose can have this effect. Page, Wills, § 280. A will may be so easily revoked by the testator in his lifetime that the courts have been slow in permitting changes in circumstances to do by implication what the testator may so readily do for himself. In *Wogan v. Small*, 11 Serg. & R. 141, Tilghman, Ch. J., said: "There is one case, and only one, in which it has hitherto been thought proper to decide that the revocation of a will might be implied from an alteration of circumstances, and that is, where the testator married and had a child subsequently to the making of his will; but both circumstances must concur. . . . The danger of this principle of implied revocation is very great, and that is the reason why, although very strong cases of hardship have occurred, the judges have never ventured to advance beyond that one step which they have taken. We have the less reason to resort to implied revocations as our legislation have provided for the case of subsequent marriage or children by the act of April 19, 1794 [3 Smith's Laws, p. 143]. . . . Once establish the judicial habit of examining the situation of a man's fortune or family and revoking his will because he has made an absurd or an inhuman disposition of his property, or because we may suppose he was ignorant of the state of his affairs or of the law, and no man's will is safe." These words were weighty then; they should be equally so now.

The opening sentences in *Marshall v. Marshall*, 11 Pa. 430, are *obiter dicta*, for there was no occasion in that case to consider the question of what was sufficient to justify an implied revocation of a will. That subject was not before the court. The testator in that case, after devising one tract of land to one son and another tract of land to another son, subsequently sold the first tract. It was urged that this would work a revocation of the whole will. But the court decided that the sale affected only the devise of the tract in question, and the residue of the will remained in full force. It was a case of ademption, which applies only

to the subject-matter of testamentary disposition. When the subject-matter bequeathed is sold, or disposed of, it is thereby completely extinguished, and nothing remains to which the words of the will can apply. The principle of ademption is entirely distinct from that of an implied revocation of the terms of the will. Ademption has to do with the subject-matter of the bequests, while the doctrine of implied revocation is founded upon a presumed neglect of duty upon the part of the testator, or upon a change in his family relations. Ademption involves action upon the part of the testator the doing of some act with regard to the subject-matter which interferes with the operation of the words of the will. That is, he anticipates the gift there made by bestowing it during his lifetime upon the legatee, or disposes of the subject-matter in some way which puts it out of the question to follow his directions as set forth in the will. Nothing of that kind has been done in the present case. The testator has not interfered with his estate in any way inconsistent with the terms of his will.

The statutory rules in Pennsylvania as to the revocation of wills are reviewed by Read, J., in *Walker v. Hall*, 34 Pa. 483, and on page 487 he says: "We have in reality substituted for the common-law rule one of our own, depending entirely upon our statutory enactments;" and he concludes with the statement that our rules are not open to the doctrine of implied presumption. In *Young's Appeal*, 39 Pa. 115, 80 Am. Dec. 513, the court held that the testamentary paper was executed under a special power, and not under the statute of wills. Whatever is there said as to a change in circumstances which create new moral duties amounting to implied revocation is *obiter dicta* in so far as it goes beyond the conditions enumerated in the statutory enactments. The decision was that the will was revoked by the birth of a son to testatrix after the making of the will. While it was the disposition of an equitable estate, yet it followed the principle of the statute.

We are by no means singular in holding to the doctrine that the changed condition of the testator must be within the conditions named in the statutes, for this view prevails largely in other states. For instance, in *Re Comassi*, 107 Cal. 1, 28 L. R. A. 414, 40 Pac. 15, it is said: "In order to determine whether a will has been properly executed or revoked, or whether, after its execution, there has been such a change in the status or personal relations of the testator as in law will effect its revocation, we have only to determine whether, in the one case, there has been a compliance with the requirements of the statute, or, in the other

case, whether the changed condition of the testator is within the condition named in the statute. . . . [Cites Code.] The effect of these provisions is to do away with the doctrine of implied revocation, which was for so many years a subject of controversy in the English courts, and which in many of the states of this country is still permitted under a clause in their statutes, authorizing a revocation to be 'implied by law for subsequent changes in the condition . . . of the testator.'" And in *Davis v. Fogle*, 124 Ind. 41, 7 L. R. A. 485, 23 N. E. 860: "It is manifestly true no act, thing, or deed will revoke a will once duly executed, unless it comes within the provisions of the statute providing for the revocation of wills." In *Noyes v. Southworth*, 55 Mich. 173, 54 Am. Rep. 350, 20 N. W. 891, the court says: "There is no sound reason that we can perceive why, in the absence of statutes, implied revocations should be extended." And in *Schouler on Wills*, § 427, it is said: "In short, revocation of a particular will by mere inference of law or presumption is limited to a very few instances in our modern practice. . . . Modern legislation itself repudiates in England and some of our states the whole theory of a presumed intention to revoke on the ground of an alteration in circumstances, and what is left of that theory aside from such statutes it would be very difficult to say." A case much like the present is *Card v. Alexander*, 48 Conn. 492, 40 Am. Rep. 187. There the bequest was to "my wife Amelia." A year and a half after the execution of the will the testator obtained a divorce from his wife for her misconduct, and four years afterwards died, without changing his will. It was held that the bequest was not to be regarded as conditioned upon the wife continuing to be such until his death, and that the divorce did not, as matter of law, impliedly revoke the will. The circumstances of the divorce in that case spoke more strongly against the claimant than here. In the present case it was the misconduct of the testator which caused the divorce.

We can see nothing in the facts of this case which would justify any extension of the doctrine of implied revocation. The rea-

son which lies behind the doctrine as defined both in the common law and by the statutes is that some obvious injustice may be prevented; that some moral duty, which has been overlooked, it is presumed, by the testator, may be discharged. What would be the result of holding in this case that the change in circumstances worked a revocation? Only this: the whole estate of testator would go to his son, to the entire exclusion therefrom of his former wife and the mother of his child. Can it be said that the obtaining by the wife of a divorce by reason of the misconduct of the testator entailed upon him any moral duty to destroy the provision which he had made in his will for the woman who was for years his faithful wife, in order to pile up far more than a competency for their child? The only inference which can be drawn from the record in this case is that the testator, and he alone, was responsible for the rupture of the marital ties. It may well be, then, that by the provision in his will he intended to make some reparation for the sorrow and distress he brought upon his wife. To impute to him such intention would be more kind than to presume, as is urged in the argument, that he was filled with resentment, and became possessed by an ignoble purpose which he failed to carry out. He must have known that he could change or destroy his will at any time; yet he did not do so. We agree with the conclusions reached and stated by the auditing judge in his careful and able opinion, that "to hold under the facts in this case that the divorce revoked this bequest would not be in accordance with statutory regulations, and would be extending the doctrine of an implied revocation beyond any authoritative adjudication, and would be contrary to the express and implied intention of the testator."

The specifications of error are overruled. The decree of the orphans' court is affirmed and this appeal is dismissed, at the cost of the appellant.

Mitchell, Ch. J., dissenting:

I would reverse this judgment for the reasons so ably set forth in the opinion of Judge Hawkins.

IOWA SUPREME COURT.

Ellen DOYLE

v.

Sarah Elizabeth ANDIS *et al.*, Appts.

(....Iowa....)

1. A fee simple is vested in the first taker under the rule in *Shelley's Case* by a conveyance to one "during his natural life, and then to his heirs."
2. The rule in *Shelley's Case* is part of the common law of Iowa.

(Sherwin, Ch. J., and Weaver, J., dissent.)

(January 20, 1905.)

APPEAL by defendants from a judgment of the District Court for Tama County in plaintiff's favor in an action brought to quiet title to certain real estate. *Affirmed*. The facts are stated in the opinion.

Messrs. Willett & Willett and Marsh & Cook, for appellants:

The same rule of construction and interpretation of the rule in *Shelley's Case* should be applied to deeds of conveyances of real estate that is now applied to questions arising under the construction and interpretation of wills, by this court; and the rule is not "applicable to the habits and conditions of our society, and in harmony with the genius, spirit, and objects of our institutions."

All that is necessary to get without the rule, and convey to children or kinsmen, is to add to words applicable to those persons, who, in the natural course of events, will become heirs, a designation broader or narrower than express an estate tail or in fee, say children, sons, etc.

Andrew, Am. Law, pp. 1013, 1014; 4 Kent Com. 218.

The rule in "*Shelley's Case*" has never been in force in Iowa.

Hill v. Smith, Morris (Iowa) 79; *Wagner v. Bissell*, 3 Iowa, 409; *Pearson v. International Distillery*, 72 Iowa, 357, 34 N. W. 1.

Messrs. Struble & Stiger, for appellee: The words used make a case which comes within the rule in *Shelley's Case*.

Pierson v. Lane, 60 Iowa, 61, 14 N. W. 90; 4 Kent, Com. 225.

The rule is in force in this state.

NOTE.—For other cases in this series as to the rule in *Shelley's Case*, see *Fowler v. Black*, 11 L. R. A. 670, and *note*; *Vanollinder v. Carpenter*, 2 L. R. A. 455, and *note*; *Re Browning*, 3 L. R. A. 209; *Starnes v. Hill*, 22 L. R. A. 598; *McIlhinny v. McIlhinny*, 24 L. R. A. 489; *Gralinger v. Gralinger*, 36 L. R. A. 186; *Wool v. Fleetwood*, 67 L. R. A. 444, and *Brown v. Brown*, 67 L. R. A. 629.

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The rule in *Shelley's Case* is a part of the common law, and, as part of the common law, is in force in every state in which the common law has been adopted.

Tiedeman, Real Prop. p. 425; 2 Washb. Real Prop. pp. 596–607; *Trumbull v. Trumbull*, 149 Mass. 200, 4 L. R. A. 117, 21 N. E. 366; *Polk v. Faris*, 9 Yerg. 209, 30 Am. Dec. 407.

The laws of this state back to the beginning of the territory recognize and assume that the common law is in force in this state.

O'Ferrall v. Simplot, 4 Iowa, 399; *Baker v. Scott*, 62 Ill. 86; *Polk v. Faris*, 9 Yerg. 209, 30 Am. Dec. 400; 2 Bl. Com. 114.

The feudal system was one which favored entailments and suspensions of the right of alienation. Its effect was the perpetual holding by certain families of the landed estates.

This attempt of the common people and the law makers was bitterly opposed by the nobles who succeeded in having passed the law known as "the statute *de donis conditionalibus*," 13 Edw. 1. chap. 1.

This was a law by which, when an estate was granted to a man and to certain heirs, the estate became vested in the heirs and the grantee could not alienate it.

Later the rule in *Shelley's Case* came in vogue, and superseded the statute *de donis conditionalibus*, and removed the restraint placed upon the grantee by casting on him the entire estate when property was granted to him and his heirs.

The statute *de donis conditionalibus* is not in force in Iowa as part of the common law.

Pierson v. Lane, 60 Iowa, 60, 14 N. W. 90.

Since the rule in *Shelley's Case* stands in contradistinction to the statute *de donis conditionalibus* by force of sound logic, the rule in *Shelley's Case* is in harmony with the spirit of our institutions, and applicable to the habits and conditions of our society.

Baker v. Scott, 62 Ill. 96.

The rule is based upon public policy and commercial convenience, sufficiently broad and deep to cause it to survive, for a period of five hundred years, the rage of legislative innovation and all the changes and fluctuations of the most eventful era of the world, and still to challenge the willing obedience and enlightened support of the most learned and able minds of Great Britain and the United States. It is a rule or canon of property which, so far from being at war with the genius of our institutions or with the liberal and commercial spirit of the age, which, alike, abhor the locking up and the

rendering inalienable real estate and other property, seems to be in perfect harmony with both.

Polk v. Farris, 9 Yerg. 209, 30 Am. Dec. 406; *Wescott v. Binford*, 104 Iowa, 651, 65 Am. St. Rep. 530, 74 N. W. 18.

Unless the rule has been abrogated by statute, it must be in force as a part of the common law. It has too long received the recognition of the courts of England and of this country to be disregarded.

Brislain v. Wilson, 63 Ill. 175; *Tiedeman*, Real Prop. 425; 2 Washb. Real Prop. p. 596.

The rule is one of property, and not of construction.

McIlhinny v. McIlhinny, 137 Ind. 411, 24 L. R. A. 489, 45 Am. St. Rep. 192, 37 N. E. 147; *Fowler v. Black*, 136 Ill. 363, 11 L. R. A. 670, 26 N. E. 596; *Baker v. Scott*, 62 Ill. 87.

The law has attached to the words a fixed and definite meaning; and, when a grantor uses words to which the law has attached a particular meaning, he is conclusively presumed to have used those words with intent to give them their legal effect.

Trumbull v. Trumbull, 149 Mass. 202, 4 L. R. A. 117, 21 N. E. 366; *Leathers v. Gray*, 96 N. C. 548, 2 S. E. 455; *Hileman v. Bouslaugh*, 13 Pa. 344. 53 Am. Dec. 474.

If once it is conceded that the word was used in its strict legal sense, nothing can avert the operation of the rule.

Allen v. Craft, 109 Ind. 476, 58 Am. Rep. 425, 9 N. E. 919; *Sykes v. People*, 127 Ill. 117, 2 L. R. A. 461, 19 N. E. 705.

Ladd, J., delivered the opinion of the court:

In the year 1862 Robert P. Andis conveyed the land in controversy to Samuel S. Andis "during his natural life and then to his heirs." Subsequently the grantee named transferred the land by warranty deed to another, under whom the plaintiff, through mesue conveyances, holds title. Samuel S. Andis died in 1899 and the defendants are his heirs at law. To the petition, stating the foregoing facts and asking that title be quieted in plaintiff, a general demurrer was interposed, and submitted to the court on the theory that, while the language of the deed to Samuel S. Andis brings it within the rule in *Shelley's Case*, that rule does not obtain in this state. It was overruled.

Many definitions of that rule have been given. That adopted by Chancellor Kent is generally regarded as both accurate and comprehensive: "When a person takes an estate of freehold, legally or equitably, under a deed, will, or other writing, and in the same instrument there is a limitation by way of remainder, either with or without the interposition of another estate, of an in-

terest of the same legal or equitable quality, to his heirs or heirs of his body, as a class of persons, to take in succession, from generation to generation, the limitation to the heirs entitles the ancestor to the whole estate." *Preston, Estates*, 263. Analyzing this definition somewhat, it appears that (1) there must be an estate of freehold in the first taker; (2) the estate in freehold and in remainder must be created by the same instrument; (3) these estates must be of the same nature, both legal or both equitable; (4) the word "heirs," or other words equivalent in meaning, is essential to the limitation over in order to create an estate in fee simple; and (5) the limitation must be to the heirs of him who first takes the freehold. The estate for life, created in the first donee, must be limited precisely as it would descend at law, in order to vest the fee. Little difficulty has been experienced in determining the sufficiency of the estate of the ancestor. It may be for the life of the devisee or grantee, or of another person, or for the joint lives of several persons, and may be absolute or determinable on contingency, and may arise by express devise or necessary implication of law. 2 *Jarman*, Wills, 1181.

The trouble has arisen in ascertaining whether the words employed in the instrument in disposing of the remainder are words of limitation (that is, measuring the duration and defining the extent of the estate of the taker of the freehold), or words of purchase (that is, pointing out and designating the objects of the conveyance or gift of the remainder to whom it passes directly from the grantor or deviser). Mr. Hays, in his famous essay on the "Construction of Limitations to Heirs," adds another division, that of words descriptive of individuals, and then explains the three: "First, as words of limitation, their office is to measure the duration and mark out the devolution of the ancestor's estate. Thus, if land be given to A and the heirs of his body, the word 'heirs' is a word of limitation, because it is merely subservient to the purpose of ascertaining the force and direction in point of transmission of a gift made originally to A, who, as the sole object and motive of bounty, first attracted and absorbed the entire quantity of an estate not otherwise destined to benefit his heirs than as, in the way of the law, they were included in himself. Secondly, as words of purchase, they at once indicate the objects and limit the scope of the gift. Thus, if land be given to the heirs of the body of A, the word 'heirs' is a word of purchase, because the heirs are themselves the original objects of the gift; yet the word 'heirs' is not satisfied by the person or persons first answering the

description of heirs or coheirs, but is of equal capacity with the same word used as a word of limitation. So, if land be given to A for life, with remainder to the heirs of his body, the intention is manifest to use the word 'heirs' as a word of purchase, and not of limitation. In order to determine whether the word 'heirs' is meant to be a word of limitation or of purchase, according to the above exposition of those terms, we have only to ask whether it is adjoined as an incident to a gift made to the ancestor, or used as the substantive term of an independent disposition. Where the ancestor is dead, or no estate is given to him, or an estate is by other words expressly limited to him (as in the case put at the close of the preceding paragraph), the word 'heirs' must always be designed to confer a distinct benefit on persons sustaining that character, and consequently to operate as a word of purchase. It is obvious that this cannot be the point on which learning and ingenuity have exhausted their powers, although, from the language of the disputants, the subject of contention would appear to be whether the word 'heirs' was to be construed a word of limitation or of purchase. Thirdly, the words in question, when used as descriptive of individuals, are wholly deprived of their natural energy, and sink down to the level of 'children,' etc., . . . in which predicament no greater potency can be attributed to them than belongs to the terms with which they are now associated. They ascertain the objects, but in ascertaining the objects their force is entirely spent. The nature and extent of the estate to be taken must be sought for in the context, or, if that be wanting or be silent, in the implication of law. They cannot be more operative than the terms which they represent, and whose operation, as we have already seen, is simply to describe a class of individuals."

Mr. Hargrave, said to be the most lucid expounder of the rule, has discriminated clearly between conditions when the rule ought and ought not to be applied: When it is once settled that the donor or testator has used words of inheritance according to their legal import, has employed them intentionally to compromise the whole line of heirs to the tenant for life, and has really made him the terminus or ancestor by reference to whom the succession is to be regulated, then it will appear that, being considered according to those rules of policy from which it originated, it is perfectly immaterial whether the testator (or donor) meant to avoid the rule or not, and that to apply it, and to declare the words of inheritance to be words of limitation, vesting the inheritance in the tenant for life, as the

ancestor and terminus to the heirs, is a mere matter of course. But, on the other hand, if the words of inheritance were not used in their full and proper sense, so as to include the whole inheritable blood, and make the tenant for life the ancestor or terminus for the heirs, but the testator intended to use the word "heirs" in a limited, restrictive, untechnical sense, and to point at such individual person as should be the heir, etc., of the tenant for life at his decease, and give a distinct estate of freehold to such single heir, and to make his or her estate of freehold the ground work for a succession of heirs, and constitute him or her the ancestor terminus and stock for the succession to take its course from,—in every one of these cases the premises are wanting upon which only the rule in *Shelley's Case* interposes its authority, and that rule becomes quite extraneous matter. So, then, in order to ascertain, in every case, whether or not the rule is applicable, the inquiry simply is, In what sense did the testator or donor use the words? If in the former sense, the rule always applies, notwithstanding a positive declaration that it shall not. If in the latter sense, the rule is as invariably foreign to the case, the remainder is contingent until the death of the tenant for life, and the party named as heir takes by purchase. 1 Hargrave, Law Tracts, 575, 577.

Enough has been said to recall the nature and operation of the rule. Even this much has seemed unnecessary, in view of its commanding place in the law of real property. No rule of the common law has undergone the exhaustive investigation, thorough discussion, and severe criticism to which the rule in *Shelley's Case* has been subjected; and yet it has survived nearly six hundred years of controversy in England, and has been generally accepted by the courts of this country as a part of that rich inheritance of common law upon which our jurisprudence is founded. No one now pretends to fix the date of its origin. The conditions for which it was intended to operate as a remedy are mere matters of conjecture. Some have thought that it was devised in feudal times to give the lord his profits of tenure (either wardship or relief) upon the descent to the heirs, of which he would be deprived were the remainder to pass to the heirs as purchasers; but Sir William Blackstone in *Perrin v. Blake*, 4 Burr. 2579, 10 English Ruling Cases, 689, declares, that of this he has never met with a single trace in any feudal writer and then adds: "There is hardly an ancient rule of real property but what has in it more or less of a feudal tincture. The common-law maxim of descent, the convey-

ancing by livery of seisin, the whole doctrine of copyholds, and a hundred other instances that might be given, are plainly the offspring of the feudal system; but, whatever their parentage was, they are now adopted by the common law of England, incorporated into its body, and so interwoven with its policy that no court of justice in this kingdom has either the power or (I trust) the inclination to disturb them." In the same opinion he expressed the belief that the rule was first established to obviate the mischief of too frequently putting the inheritance in abeyance or suspense, and that it was founded somewhat upon "a desire to facilitate the alienation of land, and to throw it into the track of commerce, one generation sooner, by vesting the inheritance in the ancestor, than if he continued as a tenant for life and the heir was declared a purchaser." Mr. Hargrave, in his celebrated *Tracts*, suggests still another reason: That the rule in *Shelley's Case* is a part of an ancient policy of the law to guard against the creation of estates of inheritance with qualities, incidents, and restrictions foreign in their nature, and to preserve the marked distinction between the acquisition of a title by descent and by purchase, and to prevent the former from being stripped of its proper incidents and disguised with the qualities of the latter, whereby the estate would become a compound of descent and purchase,—an amphibious species of inheritance or freehold, with unlimited succession to the heirs without the properties of inheritance. Hargrave, *Law Tracts*, 489, 551.

Certain it is that the power of alienation and that of vested estates were favored doctrines of the common law, and as such were promoted by the rule in *Shelley's Case*. If of feudal origin, its purpose must have been to defeat in part the feudal policy that every grantee or devisee should take his estate *per forma doni*, the terms of which were to be construed *stricti juris*, in conformity with the idea of the ancient Roman law, contained in the Twelve Tables, by which a man, in conveying an estate to another, created all his rights by the terms of the conveyance. All estates were regarded, under the feudal system, as mere gifts or concessions on the part of the lords or barons to their vassals, and in the centuries it held sway, and as a result of this policy, many of the tenures became extremely burdensome, combining, as has been well said, the strangest comminglings of liberty and oppression to be found in any age. In irrepressible conflict with these conditions was the common law, favoring the fullest investigation and ample in its elasticity to devise a remedy for every wrong. In the 60 L. R. A.

necessities of those times, for a principle which would unfetter these estates and defeat the indeterminate tenures, the rule in *Shelley's Case* may have originated. It was applied as early as A. D. 1325, in a case cited in *Perrin v. Blake*, and Lord Coke, in the margin of his *Commentaries* on Littleton, refers to numerous decisions in the Year Books of Edward III., which, in the words of Blackstone, "do most explicitly warrant the doctrine extracted from them by that great and learned judge." Though the principle had long been recognized, it appears not to have attracted general attention until A. D. 1590, when definitely stated by Lord Coke in the case from which its name is derived. 1 Coke, 93b. The discussion then became "so vehement and so protracted," according to the celebrated requiem of Chancellor Kent, "as to rouse the specter of haughty Elizabeth." The agitation then seems to have subsided somewhat for nearly one hundred years, when it was again awakened in 1770 by *Perrin v. Blake*. That case arose in Jamaica, and was brought before the Privy Council of England at a time when Lord Mansfield was the only law lord who attended. He deemed the question involved of too great importance to be decided by his single opinion, and a feigned case was prepared and submitted to the King's bench. After being twice argued three of the judges, including Mansfield, agreeing that the case was within the rule in *Shelley's Case*, were for repudiating it, while one, Yates, was for applying it. A fierce controversy arose. Pamphlets were written assailing and in defense of Lord Mansfield, one of those in his behalf evoking a bitter reply from Mr. Fearne, author of the great work on Contingent Remainders, and Junius, in his envenomed letters, accused him of attempting to subvert the laws of England. It is said by Lord Campbell in the "Lives of the Chief Justices" that the bar of the entire Kingdom was divided into factions for several years, known as "Shelleyites" and "Anti-Shelleyites." An appeal was taken to the Exchequer Chamber, where, after being several times argued, seven of the justices, including Sir William Blackstone, sustained and applied the rule, and one, Chief Justice De Grey, concurred in the views of Lord Mansfield. That decision was followed by *Jesson v. Doc*, 2 Bligh, 1, 10 English Ruling Cases, 714, decided shortly afterwards, which has since been regarded as confirming the rule as a part of the laws of England, though in *Roddy v. Fitzgerald*, 6 H. L. Cas. 823, determined as late as 1858, there were several dissenting opinions. In *Jordan v. Adams*, 9 C. B. N. S. 483, it was severely criticised by Justice

Cockburn, but adhered to as a rule of property.

We have briefly referred to the history of the rule as tending to answer the contention now urged that it ought to be rejected as likely to result in defeating the intention of the testator or grantor, and be cause not in harmony with the spirit of our institutions. These questions were settled in England long after the period of the special usefulness of the rule in curtailment of the wrongs of feudal tenures, or its alleged application for the protection of the lords and barons in their profits, had passed away. Undoubtedly the doctrine of *stare decisis* played an important part, but in the decisions and numerous pamphlets the merits were thoroughly discussed. Throughout the long controversy the argument most persistently urged was that it was out of harmony with the spirit of the laws of England, in that it tended to defeat the manifest intention of the instrument to which applied. If anything in the habits of our people or in the genius of our institutions essentially differentiates their situation from that of the English people in the time of *Perrin v. Blake*, *Jesson v. Doe*, or *Roddy v. Fitzgerald* in respect to this rule, it has not been called to our attention. Undoubtedly there are differences which bear somewhat upon the consequences of its application, but it may be safely asserted that there are none which have enlarged or re-enforced the objections in principle then pressed with such learning and skill. Will anyone contend that it is not the policy of the law now, as in the days of Coke and Blackstone, to favor unfettered inheritances, the free alienation of property, and its subjection according to equitable liability to the debts of ancestors? Is it not still the policy of the law that inheritances shall vest rather than be held in abeyance? Do we not yet favor those incidents of estates in fee, that the widow be accorded her dower and the husband his curtesy? Is there a single reason for rejecting the rule now and in this state that was not pressed by the great lawyers and jurists when it was finally imbedded in English jurisprudence as a part of the common law? We have discovered none. To the claim that it operated to defeat the intention, Blackstone responded in *Perrin v. Blake* that "the misapprehension of a testator in thinking the remainders were contingent when they were not so cannot alter a rule of law. . . . The result of the whole matter is that, the testator having declared his intent that his son shall not alien his land, he to that extent gives his son an estate to which the law has annexed the power of alienation, an estate to himself for life, with remainder to the heirs of his body. Now, what is a court of justice

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to conclude from hence? Not that a tenant in tail, thus circumstanced, shall be barred of the power of alienation. This is contrary to fundamental principles. Not that the devise shall take a different estate from what the legal signification of the words imports. This, without other explanatory words, is contrary to all rules of construction. But plainly and simply this,—that the testator has mistaken the law, and imagined that a tenant for life, with first interposed estate, and then a remainder to the heirs of his body, could not sell or dispose of this interest." Fearne, in his work on Contingent Remainders, declared that, "when a case arises fulfilling the requirements for the application of the rule, it is not against the intention of the testator. It is only applicable when the intention of the testator has been discerned by the ordinary canons of descent." In *Jesson v. Doe*, Lord Redesdale said: "That the general intent should overrule the particular [as has been stated by Lord Eldon] is not the most accurate expression of the principle of decision. The rule is that technical words shall have their legal effect unless from subsequent inconsistent words it is very clear that the testator meant otherwise." Lord Thurlow, in *Jones v. Morgan*, 1 Bro. Ch. 220, observed that, if the donor meant that every other person who should be heir should take, he meant, what the law would not suffer him to do, to make the heir take as purchaser.

The same thought has been well expressed by Mr. Justice Elliott in the recent case of *Allen v. Craft*, 109 Ind. 476, 58 Am. Rep. 425, 9 N. E. 919: "It has seemed to many that there is a conflict between the rule declaring that the intention of the testator must govern and the rule in *Shelley's Case*: but this appearance of conflict fades away when it is brought clearly to mind that, when the word 'heirs' is used as a word of limitation, it is treated as conclusively expressing the intention of the testator. Where it appears that the word was so used, the law inexorably fixes the force and meaning of the instrument." See *Leathers v. Gray*, 96 N. C. 548, 2 S. E. 455. Even were it to be conceded that the intention is often defeated by the application of the rule, it is to be said that this is in harmony with the policy of the law, which forbids the testator to make a will, or grantor a deed, that will invest the first taker with a freehold and his heirs as purchaser with an estate in fee simple by way of a contingent remainder: and, if such an estate is attempted, the law will defeat it, be the intention ever so plainly expressed. As said in *Walker v. Vincent*, 19 Pa. 369, the court correctly says: "The law does not pretend to carry out the intention

of the testator in all cases; for many testators show a very clear intention to shackle the estates granted by them to a degree that is totally incompatible with any real enjoyment of them, and which the law does not allow. Hence, many of the rules of law are designed to control and frustrate the most manifest intent. The great merit of the rule in *Shelley's Case* is that it frustrates, and is intended to frustrate, unreasonable restrictions on titles; for, when an estate is declared to be a fee simple or fee tail, it is at once made subject to a limitation in its proper form, no matter how clear may be the testator's intention to the contrary." The oppositions to the rule have been based largely on sentiment, and few, if any, cases of actual hardship will be found in the books. Planting themselves on the premises that its operation worked the defeat of the real intention of the grantor or testator, as expressed in the conveyance or will, its detractors have assailed it with vituperation and invective, forgetting that numerous other rules of real-estate law, accepted without question, have precisely the same effect, and that the intention, to be effective, must be consistent with the rules of law. A man cannot by will create a perpetuity, nor could he put a freehold in abeyance at the common law, nor can he limit a fee with a fee, nor make a chattel descend to heirs, no matter how clearly his intention to do so be expressed. See *Carr v. Porter*, 1 McCord, Eq. 60.

It is denounced as an anachronism handed down from the feudal ages, but this criticism applies as well to many of the most cherished principles of the common law. Again it is said that men ignorant of the rule may, in preparing wills or deeds, unintentionally employ language which will compel its application. Such persons are quite as likely to overlook the forms prescribed for the execution of such instruments, and thereby defeat the purposes of the testator or grantor, and yet no one has demanded that the statutes prescribing these shall be repealed. So, too, language is often incorporated in a will, possibly in ignorance of the accepted canons of construction, which this court has deemed itself bound to follow, notwithstanding the protests that the testator must have intended otherwise. *Law v. Douglass*, 107 Iowa, 606, 78 N. W. 212; *Hambel v. Hambel*, 109 Iowa, 459, 80 N. W. 528; *Meyer v. Weiler*, 121 Iowa, 51, 95 N. W. 254. If courts have entertained contradictory views on the applicability of the rule, the same may be said of many others. That a principle is difficult of application has never been regarded as furnishing a sound reason for rejecting it entirely. As an illustration, see 69 L. R. A.

Archer v. Jacobs, 125 Iowa, 467, 101 N. W. 195. Other rules might have proved quite as satisfactory as those of the common law, and equally as well or better adapted to the administration of justice. It may be that the oncoming years will demonstrate much of our system to have been crude and imperfect. But the duty of this court is to administer law as found, and, even though it be confident of possessing the wisdom essential to successfully reform and improve many of its rules, the Constitution has conferred the authority so to do upon another branch of government. It is true the common law was adopted only in so far "as applicable to the habits and conditions of our society, and in harmony with the genius, spirit, and objects of our institutions." This does not mean that every rule must be subjected to the peculiar test, whether it is better suited than some other to our situation, but whether differences between conditions here and in England render it inapplicable. Thus, in *Wagner v. Bissell*, 3 Iowa, 396, the common-law rule requiring every man to keep his cattle within his close, which was necessary in a thickly settled country, was declared in 1856 not to obtain here as against a universal custom to allow cattle to roam at large over the unsettled prairies. And in *Pierson v. Lane*, 60 Iowa, 60, 14 N. W. 90, the statute *de donis* was denounced as inimicable to the genius and spirit of our institutions, in that its object "was to place restraints upon alienation and create perpetuities for the purpose of maintaining a landed aristocracy." It ran counter to the policy of our government, and for that reason was rejected. The reverse must be true of the rule in *Shelley's Case*; for its object, as said in *Kiene v. Gmehle*, 85 Iowa, 312, 52 N. W. 232, was "to prevent the tying up of estates in land, so as to withhold them from alienation for long periods of time." As remarked before, if there is anything in our situation which renders this rule less appropriate to our situation than it was to that of the English people at the time of the severance of the two countries, we have been unable to discover it. Merely the existence of an aristocracy there is not alone enough; otherwise, the common law in its entirety must be rejected. In *Hilcman v. Bouslaugh*, 13 Pa. 344, 53 Am. Dec. 474, Chief Justice Gibson protested that "the rule in *Shelley's Case* ill deserves the epithets bestowed on it in the argument. Though of feudal origin, it is not a relic of barbarism, or a part of the rubbish of the Dark Ages. It is a part of a system; an artificial one, it is true, but still a system, and a complete one. The use of it while fiefs were predominant was to secure the

fruits of the tenure, by preventing the ancestor from passing the estate to the heir as a purchaser through a chasm in the descent, disencumbered of the burdens incident to it as an inheritance; but Mr. Hargrave, Mr. Justice Blackstone, Mr. Fearn, Chief Baron Gilbert, Lord Chancellor Parker, and Lord Mansfield ascribe it to the concomitant objects of more or less value at this day, among them the unfettering of estates, by vesting the inheritance in the ancestor, and making it alienable a generation sooner than it otherwise would be. However that may be, it happily falls in with the current of our policy. By turning a limitation for life, with remainder to heirs of the body, into an estate tail, it is the handmaid, not only of *Taltarum's Case*, but of our statute barring entails by a deed acknowledged in court; and, where the limitation is to heirs general, it cuts off what would otherwise be a contingent remainder, destructible only by a common recovery. In a masterly disquisition on the principles of expounding dispositions of real estate, Mr. Hayes, who has sounded the profoundest depths of the subject, is by no means clear that the rule ought to be abolished even by the legislature; and Mr. Hargrave shows in one of his Tracts that to ingraft purchase on descent would produce an amphibious species of inheritance, and confound a settled distinction in the law of estates. It is admitted that the rule subverts a particular intention in perhaps every instance; for, as was said in *Roe ex dem. Thong v. Bedford*, 4 Maule & S. 363, it is proof even against an express declaration that the heirs shall take as purchasers. But it is an intention which the law cannot indulge consistently with the testator's general plan, and which is necessarily subordinate to it. It is an intention to create an inalienable estate tail in the first donee, and to invert the rule of interpretation, by making the general intention subservient to the particular one. A donor is no more competent to make tenancy for life a source of inheritable succession than he is competent to create a perpetuity or a new canon of descent. The rule is too intimately connected with the doctrine of estates to be separated from it without breaking the ligaments of property." And in *Polk v. Paris*, 9 Yerg. 209, 30 Am. Dec. 400, Mr. Justice Reese, for the supreme court of Tennessee, declared that "whatever may have been the origin of the rule, or how well soever it may seem adapted to attain the selfish objects or gratify the grasping cupidity of the feudal lord, it happens to have been obviously based also upon principles of public policies and commercial convenience sufficiently broad and deep to cause it to survive for the period of near five-hundred years the rage of legislative innovation and all changes and fluctuations of the most eventful era of the world, and still to challenge the willing obedience and enlightened support of the most learned and able minds of Great Britain and the United States. It is a rule or canon of property, which, so far from being at war with the genius of our institutions or with the liberal and commercial spirit of the age, which alike abhor the locking up and rendering inalienable real estate and other property, seems to be in perfect harmony with both. It is owing, perhaps, to this circumstance that the rule—a Gothic column found among the remains of feudalism—has been preserved in all its strength to aid in sustaining the fabric in the modern social system."

That the evils thereof are more imaginary than real is apparent from the fact that this court has up to the present time avoided the necessity of saying whether it should be recognized as a part of the common law of this state. It was first mentioned in *Zuver v. Lyons*, 40 Iowa, 510, and held not to apply, for that the ancestor had taken a trust estate and the heirs the legal estate, and the two could not unite in an estate of inheritance. In *Hanna v. Hawes*, 45 Iowa, 437, the rule was held not to be "applicable because the testator did not vest the legal estate in Mrs. Little with a limitation over to the heirs of her body." The conveyance was by an executor, and was subject to restrictions in the will that at her death the property was "to go to the heirs of her body, and, if none, to be divided equally between the surviving children of her mother." Manifestly by "heirs of her body" was meant her children as such, and not heirs generally. In *Slemmer v. Crampton*, 50 Iowa, 303, the devise was to Maria A. Avery, "to be used, occupied, and enjoyed by her after she becomes of the age of legal majority, during her natural life only; . . . and it is my further will that after the death of my daughter Maria said lands and lot shall go to the heirs of her body free and clear of all liens and encumbrances thereon." The rule was held not to apply, for that the testator "intended the heirs to be the root of a . . . new descent, and the denomination of heirs of the body was merely descriptive of the persons who were intended to take." As even the use and enjoyment did not pass *in præsentia* upon testator's death, much may be said in support of the construction that the devise was directly to the "heirs of her body" as a class. See *De Vaughn v. Hutchinson*, 165 U. S. 566, 41 L. ed. 827, 17 Sup. Ct. Rep. 461; *Horne v. Lyeth*, 4 Harr. & J. 435. While the rule was invoked in *Pierson v. Lane*, 60 Iowa, 60, 14 N. W. 90, the court held that it had

no application where the first taker took the fee simple as a fee tail, as in that case. The conveyance was "to Minerva Pierson and the heirs of her body begotten by her present husband, George W. Pierson." This was held to be a conditional fee, not affected by the statute *de donis*, which was declared to be inimicable to the genius and policy of our institutions and to have been converted into a fee absolute by the birth of the requisite heirs. The remark in *Broliar v. Marquis*, 80 Iowa, 49, 45 N. W. 395, that the rule was applied in the above case, was evidently inadvertent. In *Kiene v. Gmehle*, 85 Iowa, 312, 52 N. W. 232, the devise to Emilie, daughter of the testator, was of a life estate, with the remainder over to her children. True, it was "to descend and vest in such heirs of her body begotten, in fee simple." The condition, however, was annexed that, if she die without heirs of her body begotten, the estate was to "descend and vest in equal parts to the heirs at law of said testators," and the case was ruled by *Hanna v. Hawcs*, 45 Iowa, 437. The opinion is somewhat inconsistent, for that in one portion it apparently treats the rule as one of construction, and in another as emphatically declared it a rule of property. The latter seems to have been the final conclusion, as the writer, in stating the reasons of the rule, observed: "It is to prevent the tying up of estates in land, so as to withhold them from alienation for long periods of time. If the intention of the donor or deviser is within the provision of this statute or the rule in *Shelley's Case*, it is not sanctioned by the law, and will not be given effect; but, if otherwise, it will." Again quoting approvingly from *Hileman v. Bouslaugh*, 13 Pa. 351, 53 Am. Dec. 474, "the ascertainment is left to the ordinary rules of construction peculiar to wills; but, when the intention thus ascertained is found to be within the rule, there is but one way. It admits not of exceptions." As it has been regarded as a rule of property for more than five hundred years, a contrary view ought not to be imputed to the writer of the opinion. The rather should the criticism of authorities holding the rule "independent of the intention of the donor or deviser" as "not sanctioned by reason of the current of adjudicated cases" be thought to refer to animadversions of the rule as not being in harmony with the intention; for that, when language within the rule is employed, it is conclusively presumed to express the donor's or grantor's intention. The devise construed in *Zuritz v. Preston*, 96 Iowa, 52, 64 N. W. 668, was, after the first taker, "to go and be equally divided between his lawful heirs and next of kin," and manifestly, because of such division, was not within the rule. In 69 L. R. A.

Wescott v. Binford, 104 Iowa, 645, 65 Am. St. Rep. 530, 74 N. W. 18, the devise was to Hannah Wescott for life, and upon her death the property was to be divided between testator's three children; William Edwin Westcott taking the east third of the lot "during the term of their natural lives," but without power to convey "for a longer period than during their natural lives, respectively." At death their respective portions were to descend to their heirs, respectively, said heirs to have absolute title to their respective portions. The authorities were reviewed, and the conclusion reached that "it cannot be said that they show that it has been adopted or should be enforced in this state," and, later, that "we do not find it necessary to determine whether the rule in *Shelley's Case* is in force in this state, but hold that, if it be in force, it cannot defeat the intent of a testator as expressed by the language of his will." The conclusion that the language of the will did not bring it within the rule in *Shelley's Case* is undoubtedly correct, but might well have been put on another ground. See *Brown v. Brown*, 125 Iowa, 218, 67 L. R. A. 629, 101 N. W. 81; *Meyers v. Anderson*, 1 Strobb. Eq. 344, 47 Am. Dec. 537; *McIntyre v. McIntyre*, 16 S. C. 290. This case is authority, then, on two propositions only: (1) That the rule had never been recognized as in force in this state; and (2) that the language of the will did not bring it within the rule. The court did not undertake to pass upon the question now before us, and it may be regarded as *res integra*.

In the courts of last resort of twenty-five states the rule in *Shelley's Case* has been adjudged a part of the common law and enforceable as such. See article in 25 Am. & Eng. Enc. Law, pp. 639 *et seq.* In but one has it been declared merely a rule of construction. *Smith v. Hastings*, 29 Vt. 240. Mistakes of this character in other states have been corrected by subsequent decisions. Maine was severed from Massachusetts after the abolition of the rule, and for this reason it does not obtain in the former state. In but one, Kentucky, has it been held to be out of harmony with the institutions of this country. *Turman v. White*, 14 B. Mon. 560. The very fact that it has been abolished in whole or in part in twenty-seven states is strong confirmation that it was thought not to have been so inconsistent with the conditions existing as not to have been adopted as a part of the common law. For centuries it has been recognized as a rule of property, and ought not now to be swept away. As stated in *Horne v. Lyeth*, 4 Harr. & J. 432: "To disregard rules of interpretation sanctioned by a succession of ages and by the

decisions of the most enlightened judges, under pretense that the reason of the rule no longer exists or that the rule itself is unreasonable, would not only prostrate the great landmarks of property, but would introduce a latitude of construction boundless in its range and pernicious in its consequences."

Affirmed.

Weaver, J., dissenting:

For the reasons herein stated, I cannot concur in the foregoing opinion:

1. The rule in *Shelley's Case* has never been recognized or enforced in this state. As the opinion concedes this to be true, and that the citation which has sometimes been made of *Pierson v. Lane*, 60 Iowa, 60, 14 N. W. 90, and one or two other cases as sustaining the rule is in error, I need take no time to demonstrate the correctness of this proposition.

2. It has been expressly condemned and repudiated by this court. To make this clear beyond cavil let us first illustrate the substance and effect of the rule in its practical operation. In a vast majority of cases it is applied to a will or conveyance of land in which the owner attempts to give or devise a life estate to a named beneficiary, with a remainder in fee to the heirs of such life tenant. Under such state of facts the rule in *Shelley's Case* steps in to say that the remainder given to the heirs must be defeated, and that he who was given a life estate only shall be vested with the entire fee. Bearing this distinctive feature of the rule in mind, a brief reference to our decisions will demonstrate the correctness of my assertion that we have again and again distinctly denied its force as a rule of property in this state. In *Slemmer v. Crampton*, 50 Iowa, 302, we held that a devise of lands to A during her natural life only, and after her death to her heirs, should be construed to mean just what it said, and that A took nothing more than the life estate, which it was clearly intended she should have. This holding was in clear disregard of the rule in *Shelley's Case* according to every approved ancient statement of its effect. 1 Preston, Estates, 363; 2 Washb. Real Prop. 6th ed. § 1613; *Hileman v. Bouslaugh*, 13 Pa. 351, 53 Am. Dec. 475; *Roe ex dem. Thong v. Bedford*, 4 Maule & S. 363. In *Kiene v. Gmehle*, 85 Iowa, 312, 52 N. W. 232, we have another and more emphatic ruling in the same direction. There the devise of lands was to Emilie Mack for life, and at her death to descend to her heirs in fee simple. This made a clear case for the application of the rule if it was to be recognized in this state, and the claimants under Mrs. Mack insisted upon its benefit; 40 L. R. A.

but we said that, if *Shelley's Case* was to be recognized as an authority at all, it would be treated as a rule of construction only, and that, where the intent to pass merely a life estate to the first taker is clear, it must prevail. In this connection we spoke as follows of the general principle, which has never been repudiated by this court until the accomplishment of that result by the majority opinion in the present case: "Courts may not give effect to any other result than that intended. To do so would be to make a will for the testator. Neither may they defeat the intention when it is lawful. There are some respectable authorities that hold that the rule in *Shelley's Case* is independent of the intention of the donor or devisor; that it is absolute and imperative. Such application of the rule is not sanctioned by reason or the current of adjudicated cases in this country." Again in *Zavitz v. Preston*, 96 Iowa, 52, 64 N. W. 668, we said: "Whether the rule in *Shelley's Case* is in force in this state we need not determine. It certainly cannot be invoked to defeat the intent of the testator." So, too, in *Wescott v. Binford* 104 Iowa, 645, 65 Am. St. Rep. 530, 74 N. W. 18, we carefully reviewed all our previous cases bearing on the rule, and announced the conclusion that it cannot be said of them that it has been adopted or should be enforced in this state. We further said that to give the word "heirs" a technical meaning, and thus frustrate the intention of the testator by giving the first taker a fee, instead of a life estate, is not "in harmony with the best rules of interpretation, nor with the weight of authority, nor to be founded in reason, nor to be demanded by anything in the letter or spirit of the laws of this state or the condition and policy of its people and their institutions. The conditions which the rule was designed to meet do not exist here, and to hold that it applies to the will under consideration would be to go counter to the rules of interpretation which this court has always applied to wills, to overrule in effect many cases which we have decided, and to some of which we have referred, and to establish a rule which has been so unjust in its operation as to be abandoned or modified by nearly all of the states in which it was once in force." The opinion also combats the idea that the rule is one of property, and not of interpretation, and cites our cases to show that such doctrine is not favored in this state.

3. Save in a limited sense, the common law of England, by virtue of which alone the rule in *Shelley's Case* ever had being, has never been adopted in Iowa. In many and perhaps most, of the states of the Union statutes were early enacted adopting the

entire system of the common law as of the date of the first settlement of this country or of the date when we attained national independence. It has been necessary, therefore, for such states, in order to get rid of the rule in *Shelley's Case* and other debris from past ages and primitive conditions, to effect such purpose by statute. Iowa has never attempted any legislative adoption of the common law, and this court has steadily held that only so much of that system will be here recognized and enforced as is suitable to the habits and conditions of our society and in harmony with the genius and objects of our institutions. *Wagner v. Bissell*, 3 Iowa, 396; *Ex parte Holman*, 28 Iowa, 88, 4 Am. Rep. 159; *Pierson v. Lane*, 60 Iowa, 60, 14 N. W. 90. Brought to this test, the rule in *Shelley's Case* must be condemned. In design and in practical effect it is wholly at variance with the spirit which pervades our Constitution, laws, and accepted social theories. I confess to some degree of surprise to find the majority twice repeating the suggestion that there is nothing "in the spirit or genius of our institutions which essentially differentiates them" from those of the English people at the time of our separation from the mother country. If such be the case, then the Revolutionary fathers should be called down from their pedestals and relegated to the list of conspirators against human rights. English institutions of that day were founded upon and permeated by the idea, not yet extinct, that a lauded aristocracy is an essential order of society, to the preservation of which Parliament and the courts were pledged; and the rule in *Shelley's Case* was unquestionably one of the devices conceived and framed as a means to that end. It served to prevent the subdivision and distribution of lands, and to cement their concentration in the hands of the few. The inability of the majority to discover any difference between such institutions and those of a people where the multiplication of landowners is believed to be essential to the general welfare does not appear to have troubled the Supreme Court of the United States, which says that in England the rule in *Shelley's Case* "is in accordance with the established law of descent, the general sentiment of the people, their public policy, and the spirit of their institutions. It helps to conserve the power and splendor of the ruling classes by keeping property in the line of descent which the rule prescribes. Our policy is equality of descent and distribution. Such is the sentiment of our people, and such is the spirit of our institutions." *Daniel v. Whartenby*, 17 Wall. 630, 21 L. ed. 661.

If this opinion of the highest court of our land is correct, and it cannot be successfully denied, then Iowa's "ruling classes" will have occasion to felicitate themselves on the opportunity which we now give them to keep their lands "in the line of descent" and prevent undue encouragement of the plebeian classes to become independent proprietors. The easy facility with which in this case we are overturning our former decisions and abandoning principles which have long been well settled makes reference to the precedents of no avail; but I cannot refrain from saying that, while adopting and applying many of the cardinal principles of the common law of real property, we have hitherto refused to recognize the binding force of many rules invented by the English courts and lawyers to maintain the ascendancy of the great proprietors. As a marked instance of this we may recall the entailment of lands at common law.—a scheme by which the title was passed to a grantee or devisee and to the heirs of his body in direct line of descent, failing which at any time, no matter how far in the future, the title reverted to the grantee. This device was just as firmly ingrafted upon English law as was the rule in *Shelley's Case*. The one is no more foreign to our institutions than the other. The states which adopted the common law by act of the legislature bound themselves to both, and in most cases have since abolished both. Iowa has never abolished either by statute, and, if one is to be recognized, then for equally good (or bad) reasons we should give force to the other. Yet in *Pierson v. Lane*, 60 Iowa, 60, 14 N. W. 90, we found that the entailment of land titles is inconsistent with the theory upon which society is here founded and refused to give it effect. So we might proceed to enumerate an almost endless list of rules and so-called principles pertaining to real property and titles which no court thinks of enforcing, although no attempt has been made at their formal abolition. It has long been our boast that the common law is a ceaseless evolution, adapting itself to the changing conditions of successive generations. "It is not an unchangeable code, like that of the Medes and Persians, but a system that has grown up with the growth of civilization, and is capable of being molded to meet the wants of society in every stage of its progress." *Herter v. Mullen*, 159 N. Y. 34, 44 L. R. A. 703, 70 Am. St. Rep. 517, 53 N. E. 700. In *Mentzer v. Western U. Teleg. Co.* 93 Iowa, 757, 28 L. R. A. 72, 57 Am. St. Rep. 294, 62 N. W. 1, we adopted this sentiment, and added: "Should it [the common law] ever fail to be adjustable to the new conditions, which age and experience bring, then its usefulness is over, and a new social compact must be entered into."

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If the truth there so eloquently and convincingly stated is now to be ignored, and our sanction given to the resurrection in all its ancient vigor of a rule which we have said was "designed to meet conditions which do not here exist," and is "so unjust in its practical operation" as to lead to its general abandonment, the tributes we have paid to the progressive character of the law should be frankly withdrawn, and the terms of the new social compact have our serious consideration.

4. The rule has been abolished or become obsolete in a great majority of the states of the Union, and, in voluntarily adopting it at this late day, we put ourselves out of harmony with the law as it exists in sister jurisdictions. Of the forty-five states, twenty-seven have abolished the rule by statute, although in seven of them the abolition is held to apply to wills, and not to deeds. In several of the new states the question of its existence has never been raised, and no statute abolishing it has been passed; the states evidently being satisfied that the rule is already extinct without the aid of legislative action. This decision will bring to their attention the important truth that some forms of evil may go into "desuetude" for an indefinite length of time without becoming "innocuous." In Vermont, not included in the foregoing classification, it has never been allowed as rule of property. *Smith v. Hastings*, 29 Vt. 240; *Blake v. Stone*, 27 Vt. 475. The principal states in which the courts have notably recognized the rule are Pennsylvania, Maryland, Indiana, and Illinois, and in at least two of these it has been greatly encroached upon by decisions which have sought to relieve it of some of its admittedly harsh features. *McIlhinny v. Mollhinny*, 137 Ind. 411, 24 L. R. A. 489, 45 Am. St. Rep. 186, 37 N. E. 147; *Ridgeway v. Lanphear*, 99 Ind. 253; *Belslay v. Engel*, 107 Ill. 182. Elliott, J., of the Indiana court thus indicated his view of the rule: "Whatever reasons may have once existed for it in England have even there long since ceased, and no good reason is perceived for its incorporation into the legal policy of this country." *Siceloff v. Redman*, 20 Ind. 251. Mr. Freeman says that questions respecting the rule possess "more of historic interest than practical value." Note to *Polk v. Faris*, 30 Am. Dec. 400. The rule itself comes from an age of which Blackstone says: "Its ingenuity perplexed all theology with the subtlety of scholastic learning and bewildered philosophy with its mazes of metaphysical jargon." The same singular tendency was manifested in the law of tenures, and there was built up a system of real-estate law filled with nice distinctions and refined reasoning, the 69 L. R. A.

great body of which is at this time of as little living interest as are those ancient disputations concerning the number of angels which can comfortably stand upon the point of a needle. Most of these mystifying, doubt-breeding characteristics of English land tenures have disappeared with the darkness of the age in which they had their birth. Chancellor Kent's celebrated "requiem," of which the opinion speaks, was inspired by his discovery that even at that early date the rule in *Shelley's Case* had ceased to exist, and he calls his flowery eulogy upon its ancient defenders a "humble monument to departed learning." Does it not border upon sacrilege for us, who should be foremost in showing honor to the great chancellor, to remove the monument which he so reverently erected and exhume that departed learning which he then laid to rest? The inquiry which the majority make, whether the "unfettering" of estates and the vesting of inheritances are not still the policy of the law, is wholly irrelevant to the question before us. When the law underliakes to say to the donor that his gift of a life estate to A, with remainder to his heirs, shall be defeated and distorted into a gift to A of the entire fee, but that a life estate to A, with remainder to B or to the children of B, will be respected and enforced, it is transparent folly to pretend that the result in the first instance is to be justified upon the assumption of some deep underlying purpose to hasten the "unfettering of estates." If a deed or will be obscure or ambiguous, and there is a manifest uncertainty whether the estate given was intended as a life estate or fee, then the supposed policy to which the inquiry refers may lead the court to decide in favor of the latter construction; but where there is no ambiguity there is no policy of the law which inclines the courts to disregard or defeat a clearly expressed intention.

5. The spirit of our laws and great body of our adjudicated cases sustain the proposition that the first duty of the court is to ascertain the intent of the donor, and, if that intent be lawful, to enforce it. Now, a landowner has an undoubted perfect legal right to give the property to A for life and to heirs of A, the remainder in fee; and this is true, even where the rule in *Shelley's Case* prevails, providing only he makes use of a choice of words which avoids the technical pitfalls which that rule spreads in his path. Why, then, in this one instance, should a lawful intent, clearly expressed, be selected for defeat, when in all others we feel religiously bound to effectuate it? In all the infinite variety of litigation arising from matters of contract and upon the construction of written instruments through

which title to property is traced (save, only, as this rule creates an unnatural exception), the intent of the parties to the writing is the one aim of judicial inquiry. To that end we have said, so repeatedly that citations are unnecessary, the entire writing will be considered, each part in light of all the others, and the words will be given their popular meaning or their technical signification according as it may appear they were intended to be understood. The rule in *Shelley's Case* strikes at the foundation of this principle and foists upon the writing an interpretation wholly foreign to the maker's purpose. That such is the case is not seriously denied by the majority. They say, however, that, while it does serve to defeat the "particular intent" of the donor, it gives force to his "general intent." Just what that phrase means as here applied I am wholly unable to comprehend. The donor expresses his intent to give to A a life estate in certain property, and after his death to the heirs of A in fee. The "particular" intent is plain enough. It is not open to any doubt. What hidden "general" intent can be extracted from this provision, the accomplishment of which makes it necessary to destroy the remainder given to the heirs and give the fee to him from whom it was expressly withheld? Indeed, upon this point the majority opinion yields all that the most strenuous opponent of the rule may claim when it says that by its application "the words in question are wholly deprived of their natural energy." This sonorous euphemism, when duly studied, will be seen to mean simply this: That the rule is designed not only to defeat the expressed intent, but to impose upon the words of the donor a meaning utterly foreign to such intent. In other words, it not only defeats the will or deed made by the property owner, but proceeds to make for him another will or deed which never had the assent of his mind. Such a proposition is not to be defended as a matter of principle, nor should any court give effect thereto, unless required by statute or by undoubted controlling precedent, neither of which overruling circumstances confront us in this case. The following from the report adopted by the State Bar Association of Pennsylvania, an organization which counts among its members many great lawyers and a state where practical experience has demonstrated the effect of the rule, is worthy of much consideration. The State Bar Association of Pennsylvania by a large majority indorsed a movement for the abolition of the rule, saying: "That this rule always defeats the real intention of the grantor or testator is freely admitted by everyone. Of what avail are the canons of construction? The words

may plainly show the intent, but they no longer have weight. It matters not what hardships are inflicted, what injustice is done, or how it may frustrate the plans of the testator. This relic of barbarism is in supreme control, and its power will continue until abridged by legislation. So long as this imperious rule is permitted to hold sway, there will be uncertainty as to the effect of grants and devises on this line, and the result must be contention in the courts to ascertain whether the intention of the testator falls under the guillotine of that rule. Feudal tenures have long since been abolished. We know them not in Pennsylvania, and why should we continue in force a rule which, as now enforced, every judge and every court admits is antagonistic to and destructive of the idea of allowing the owner free will in the disposition of his property." Report Pa. State Bar Asso. 1898, p. 32.

6. Though the rule claims origin so far back that its history cannot be precisely traced, and has been the object of indiscriminate, if not idolatrous, adulation upon part of its defenders, and although the cases in which the courts have struggled with it are numbered by the thousands, it is still so obscure in its statement and so difficult of apprehension that it has been and must be, wherever it prevails, a more fruitful source of strife and litigation than any other one question affecting land titles. No clearer or more learned statement of the nature of the rule has been or can be made than is contained in the majority opinion; and when I say it constitutes a labyrinthine puzzle, in which the whole profession may enter and no two lawyers find the same exit, it casts no reflection upon those who formulated the statement, but simply demonstrates the inherent weakness and uncertainty of the proposition which they attempt to defend. The most skilful of the captive brickmakers in Egypt could not make bricks without straw, and the most expert legal dialectician who undertakes to clothe the rule in *Shelley's Case* with the varnish of plausibility finds himself confronted with a poverty of material compared with which the destitution of the oppressed Israelites was a wasteful abundance. If, then, in such case, they who enter the lists of apologists betake themselves to the thick mists of black-letter learning, it is not so much from choice as from the necessities of the position they have assumed. In that uncertainty is found one of the most persuasive reasons why this state, thus for happily free from the perplexities which inevitably follow recognition of the rule, should not be subjected to its influence. The definitions of the principle by courts and law writers are numerous, varying only

in the degree of obscurity in which they are clouded. The centuries of its history have been insufficient for its advocates to find common ground on which to stand in its practical application, and the lawyer who sets out to discover the "weight of authority" upon many of its phases soon finds himself lost in an impenetrable forest of varying precedents and discordant opinions.

A few years since a young lawyer, seeking "more light" upon the subject, addressed a request to the American Law Review, then edited by Seymour D. Thompson and Leonard A. Jones, both eminent law writers, asking for "a good, plain, common sense, easy-to-be-understood definition of the rule" in *Shelley's Case*, and received answer as follows: "Not having the capacity to understand the rule in *Shelley's Case*, or to acquire an understanding of it by any degree of diligence within the limits of a lifetime, we find ourselves unable to comply with the modest request of our esteemed correspondent." [27 Am. L. Rev. 622.] Lord Macnaghten says, in *Van Grutten v. Foxwell*, [1897] A. C. 668, that learned writers on the subject are not agreed as to the mode in which the rule operates. Sir Edward Sugden despairingly declares that "no man can reconcile the decisions." *Montgomery v. Montgomery*, 3 Jones & L. 47. In *Perrin v. Blake*, Mr. Justice Blackstone spoke of the rule as being flexible, and left some room for construction in accord with the manifest intent of the testator. After his death Lord Macnaghten (*Van Grutten v. Foxwell*) and Lord Thurlow (3 Jur. Ex. 363) were at much pains to explain that Blackstone did not really mean what he said, and that the rule is as inflexible and unyielding as the law of gravitation. 9 Wash. L. Rep. 258, says that from the date of the ingraftment of the rule upon the common law "it has been the source of perplexity to the courts, and of endless annoyance to the bar, as well as absolute wrong to the testator and heirs, has perverted, changed, and abrogated the intention of donors, and thereby proved a Pandora's box of legal troubles and the destruction of the peace of families and the consumer of their estates." In Pennsylvania the rule has been adhered to from the early history of the state, and there, if anywhere, we should look for the law to be settled. An experienced lawyer of that state, writing in 36 Am. L. Reg. N. S. 239, tabulates not less than 100 cases involving the rule, decided by the supreme court of Pennsylvania, in which the same words "heirs," "heirs of the body," "issue," "children," and other similar forms of expression have been construed with such variant and contradictory results that he justly declares that before a member of the

profession undertakes to draw a deed or will giving the first taker an estate for life with remainder to his issue, heirs, or children (a perfectly legal method of conveying or transmitting title, if one is fortunate enough to select the right form of words, he should "stop, look, and ponder, for the beaten path is treacherous." After reviewing the cases, he comes to the very just conclusion that, even after the lawyer has given to the preparation of such instrument the best thought of which he is capable, his confidence in its being construed according to its intent must rest solely on the dubious hope that the court will follow one line of its decisions rather than the other. This condition is typical of the state of the case law of every jurisdiction where the rule has been applied, and it fully justifies the same lawyer's summing up: "A rule of law may be gray with age, and therefore venerable; but it may also be gray with mildew." Mr. Fearne, in his preface to his great work on Contingent Remainders, says that "one of the greatest judges who ever lived tells us that such is the number and character of the decisions on the rule in *Shelley's Case* and its kindred topics that the mind is overwhelmed by their multitude and the subtlety of the distinctions between them." Judge Lyman P. Trumbull, of national fame as a lawyer and statesman, says the rule in *Shelley's Case* "has contributed more than all other causes combined to defeat the wishes and purposes of persons who have attempted to dispose of their estates by will," and characterizes it as "a rule coming down from the Dark Ages and promulgated by some judge in the case of one Shelley, declaring that the word 'heirs' in a will or deed was, in certain cases, a word of limitation, and not of purchase, whatever that means. Where and for what purpose this rule was promulgated nobody exactly knows, and its meaning nobody except one learned in blackletter law understands, and it is doubtful if he does. To the common mind the rule is nonsense." 27 Am. Law Rev. 321.

Let us note some of the intricacies in which the subject has become involved. While, according to the letter of the rule, a gift to A, with remainder to his heirs, will vest A with the entire estate, and give the heirs nothing, and yet it is held that, if the word "heirs" is found to have been used as the equivalent or synonym of "children," the donor's intent will prevail, and A will take a life estate only. *Shimer v. Mann*, 99 Ind. 190, 50 Am. Rep. 82; *Criswell's Appeal*, 41 Pa. 288. So, too, it has often been held that a remainder over to the "child," or "children," or "issue," of the life tenant, will not enlarge the life tenancy into a fee. *Chambers v. Payne*, 59 N. C.

(6 Jones, Eq.) 276. But let us beware. This avenue of escape is also beset with thorns. If, upon reading the instrument, the court thinks that you used the word "child," "children," or "issue" as the equivalent or synonym of "heirs," then the rule steps in to destroy the life estate you attempted to create, and gives the entire title to a person you did not intend should have it. 2 Flintoff, Real Prop. 128; *Robinson v. Robinson*, 1 Burr. 38; *Doe ex dem. Jones v. Davies*, 4 Barn. & Ad. 43; *Lees v. Mosley*, 1 Younge & C. Exch. 589; *Roddy v. Fitzgerald*, 6 H. L. Cas. 823; *Simpers v. Simpers*, 15 Md. 160. So it has been held that if to the limitation to "heirs" there be added the words "share and share alike," or other similar expressions, the rule may be avoided. *Mills v. Thore*, 95 N. C. 362; 2 Minor, Inst. 404; *Shreve v. Shreve*, 43 Md. 382; *Taylor v. Cleary*, 29 Gratt. 453; *Burges v. Thompson*, 13 R. I. 712. Exactly the opposite conclusion has been reached by many other authorities. *DeVaughn v. Hutchinson*, 165 U. S. 566, 41 L. ed. 827, 17 Sup. Ct. Rep. 461; *Doe ex dem. Cock v. Cooper*, 1 East, 229; *Jesson v. Doe*, 2 Bligh, 1; *Grimes v. Shirk*, 169 Pa. 83, 32 Atl. 113. A devise to husband and wife for life, with remainder to their heirs, falls within the rule. *McFeely v. Moore*, 5 Ohio, 465, 24 Am. Dec. 314; *Auman v. Auman*, 21 Pa. 343. A devise to a husband for life, with remainder to his heirs by his present wife, falls without rule. *Den ex dem. Creswick v. Hobson*, 2 W. Bl. 695; *Vernon v. Wright*, 7 H. L. Cas. 35.

Indeed, without threading this maze any further,—and we have here scarcely entered its border,—we may say that about the only method by which the donor can give a life estate to another, with a remainder to the heirs of the donee, and feel reasonably sure that his purpose will not be judicially thwarted, is to create the life estate and the remainder by separate instruments; and this method is probably not open to one who wishes to pass the estate by will, instead of by deed. 1 Fearn, Contingent Remainders, 71; 1 Preston, Estates, 309; *Moore v. Parker*, 1 Ld. Raym. 37; *Coape v. Arnold*, 31 Eng. L. & Eq. 133; 2 Washb. Real Prop. 6th ed. § 1605. It is but little short of the ludicrous to find that this rule, to which its adherents have for ages invited attention as the product of profound wisdom and as an indispensable safeguard of property rights and promoter of wise public policy, is, when reduced to its lowest terms, a simple declaration that you shall not by a single written instrument do that which you may lawfully and effectually accomplish by two. Every one of the five distinctions by which the rule is surrounded—and I have mentioned but a 69 L. R. A.

mere fraction of them—is an open door to untold litigation. There is not another doctrine connected with the law of real estate which has been productive of so much strife, not another which the courts have involved in such obscurity and uncertainty, and not another of which it can be so truly said that its application is invariably a triumph of injustice.

7. The final argument of every apologist for that rule is that it is intended to prevent the tying up of estates, and is therefore in accord with the general policy of our laws.

A little reflection will reveal the fallacy of the argument. It is not the policy of our laws to restrict, invalidate, or discourage the creation of life estates. On the contrary, we have by express statute provided, not only that the property owner may suspend the power of sale for the lifetime of a person in being, but for twenty-one years thereafter. Neither has it ever been the policy of the common law to discourage or destroy life estates for the purpose of "removing clogs" upon the alienability of lands. During all the years since the rule in *Shelley's Case* came into being, the right to create life estates in almost every conceivable method (save only the one form at which that rule is aimed) has been recognized, upheld, and enforced by the courts with unvarying regularity. Thus it happens that, while forbidding the donor to give a life estate to A, with a remainder to A's heirs, he has been at perfect liberty to give a life estate to A, with remainder to the heirs of A's wife, or to the heirs of A's mother-in-law, or to the heirs of an entire stranger. The same common law permitted the piling of one life estate upon another in the most puzzling confusion. It created life estates for the benefit of the surviving wife, and husband, and for the tenant in tail after the possibility of issue has ceased. It construed every deed which omitted the magic word "heirs" as conveying a mere life estate. It upheld the entailment of estates and the law of primogeniture, and all the other elaborate and multifarious devices by which the alienability of lands was held in check and the estates of great families preserved, even at the expense of their creditors. In view of this history, the faith which can discover in the rule in *Shelley's Case* a benevolent design to facilitate transfers of title comes clearly within St. Paul's definition: "The substance of things hoped for; the evidence of things not seen." Even in England, with all its conservative adherence to the traditions of the law, the lawyers are ceasing to deceive themselves by this sort of sophistry. In a recent [1871] paper read before the Juridical Society of London, Sir George Bowyer says: "The celebrated rule in *Shelley's*

Case, which has caused so much discussion, is based on feudal reasons which are now obsolete." 3 Juridical Society Papers, 543. So, also, in most states in which the rule still prevails, the courts no longer assert such defense of the rule, but candidly admit it has no foundation in the present order of things. As an instance, the Indiana court says there "was not much reason for its [the rule] at the time of its adoption, and none at all under the existing system of tenures and conveyances." *Ridgeway v. Lanphear*, 99 Ind. 253. If the creation of life estates be inimical to the welfare or prosperity of the people, it is within the power of the legislature to regulate or prohibit them. It has not done so, and the court is not constituted the guardian of the people, with power to enact rules of property which the law-making power does not see fit to adopt. On the contrary, the creation of a fee, the enjoyment of which is postponed to the termination of a life estate, being within the conceded power of the landowner, the court should feel in duty and in conscience bound to protect its exercise, and not go out of its way to recall a disused and discredited principle to defeat it.

8. It is the just and appropriate tendency of the laws of this country to promote simplicity of contract and the easy creation and transfer of titles to property, and to ignore the merely technical, wherever it is necessary to attain the ends of substantial justice. In England conveyancing is, or has been, largely the work of skilled men constituting a learned profession, and under such circumstances it is perhaps a fair presumption that technical words are intended to have a technical effect. In this country, and especially in the western states, the great majority of deeds and wills are drawn or executed by others than lawyers or men having expert knowledge of conveyancing. Justices of the peace, notaries, bank clerks, and sometimes clergymen and physicians, prepare these instruments for their patrons and neighbors. The inherent ineradicable vice by which the rule in *Shelley's Case* is differentiated from all our hitherto accepted rules of law is that it gives to words a meaning and effect diametrically opposed to their universally accepted meaning among the people, including people of education and experience who use and understand the English language, and thus creates a snare by which the average person, learned and unlearned, finds it impossible to express his intent, no matter how lucidly it be stated, with any certainty that it will be respected by the courts. The average grantor and most of the scribes never heard of *Shelley's Case*. They have all heard the word "heirs," and know what it means in ordinary parlance,

but have yet to discover that none but a veteran lawyer can write that word in a deed or will without danger of defeating the intention which to the ordinary mind has been expressed with the utmost clearness. For a well-to-do person to desire to give a life estate in land to a child, with a remainder over to the offspring of such child, is a matter of everyday occurrence in almost every neighborhood. He has both the legal and moral right to thus fence against the weakness or misfortune of the child, and at the same time preserve the inheritance for the grandchildren. The statute which gives voice to the public policy of the state expressly permits him to suspend the absolute power of controlling and conveying the property for the period of a life in being and twenty-one years thereafter. Code, § 2901. His object is a laudable one, and, if carried into effect, tends to the public benefit, in that it insures the objects of his bounty against becoming public charges. Now, let us note the experience of the farmer or business man, who goes, as he is quite sure to do, to a nonprofessional conveyancer and asks to have prepared an instrument which shall secure certain property to his son for life, and after the son's death to his children or heirs absolutely. The conveyancer, rashly believing that, if he draws an instrument which states exactly what the father wishes to do, the law will uphold and enforce the clearly expressed intention, writes: "Know all men by these presents, that I, A B, in consideration of the love and affection I bear to my son, C D, hereby grant and convey to the said C D the following described lands, . . . to have and hold for and during the term of his natural life, and after the death of my said son to his heirs in fee simple." The father, having executed this instrument and put the son in possession, fondly supposes that his benevolent purpose is now assured. But, if the rule in *Shelley's Case* is still the law of his jurisdiction, he may awake the next day to see that land seized and sold for the son's debt, or to see the son himself squander the entire inheritance in the nearest bucket shop or upon a horse race. Too late he goes with his troubles to a lawyer, who, after dusting his Kent's Commentaries and making sure that he correctly remembers the rule, tells his client there is no hope. "It is true," he says, "you intended to give your son a simple life estate in the land, and it is equally true you stated that intention in so many plain English words; but unfortunately you gave the remainder after his death to his 'heirs.' If, instead of this word, you had said 'children,' or 'wife and children,' or had described these persons by their individual names or had made the heirs of a stranger, instead of your son, the objects of your

bounty, the property might have been saved; but you failed to understand that it is sometimes a legal mistake to clearly express a legal intention. Of course, these 'children' will be 'heirs' of your son if they survive him, and you supposed the terms to be convertible, but *nemo est hæres viventis*. Having used that fatal word, the fact that every person of common sense and intelligence understands that you did not mean to give this land to your son absolutely, the fact that you had the unquestioned legal right to give him a life estate only, and the fact that you have expressed that intention with all the clearness and exactness of which our mother tongue is capable, all these things count as nothing, and the inheritance you designed for your helpless grandchildren must go to swell the list of offerings upon the altar of *Shelley's Case*." If he is so constituted that the hall-mark of the Dark Ages is a sufficient passport to his confidence, he will find food for comfort in learning that he has simply come in collision with "a Gothic column found among the remains of feudalism," and in any event he will have cause to congratulate himself upon the narrow escape from the grave responsibility of "producing an amphibious species of inheritance."

The disposition which this man sought to make of his property was natural, commendable, and lawful. Why should the court make it unnecessarily difficult, and construct or adopt artificial and oppressive rules to thwart the purpose of the donor? If the rule in *Shelley's Case* had never existed, and it was now proposed for the first time, every court and lawyer in the United States would respond with a prompt and emphatic protest against a plan so inconsistent with the spirit of our civilization and so abhorrent to the principles of reason and justice. As this state has never been subject to its influence, we should be no less prompt and earnest in denying it a place in our legal system. The suggestion made by the majority that few instances are likely to arise requiring this court to apply the rule adds nothing to the argument. Few demands have hitherto been made for the enforcement of the rule in *Shelley's Case*, simply because the great body of the profession has taken this court at its word that such rule is not recognized as the law of Iowa. Now that we have announced otherwise, it requires no prophet's vision to foresee the rapid increase in such litigation. Of the further suggestion that there are other rules and principles of real-estate law coming from feudal times which are admittedly in force, though having no apparent justification in modern conditions, I have only to say that, conceding this to be true, I am still unable to admit the soundness of the logic 69 L. R. A.

which justifies the adoption of an admittedly vicious rule by showing that we are already burdened with others equally bad.

In my opinion the judgment of the district court should be reversed.

Sherwin, Ch. J.: I concur in the dissenting opinion of Mr. Justice Weaver.

Petition for rehearing overruled.

WISCONSIN LUMBER COMPANY
v.
GREENE & WESTERN TELEPHONE
COMPANY, *Appt.*

CITIZENS' NATIONAL BANK
v.
SAME, *Appt.*

SECURITY BANK
v.
SAME, *Appt.*

(.....Iowa.....)

1. A judgment will not be reversed because it was tested by what was called a motion to strike, instead of by demurrer, although the practice is improper, where the motion has been treated by the parties as in effect a demurrer.
2. The right to move to strike paragraphs of answer is not waived by filing demurrers, where, after the demurrers are filed, the petition is amended, and the answer is then amended to meet the new matter in the petition.
3. A corporation cannot accept stock subscriptions secured by its officers, and repudiate the promise to take back the stock under certain circumstances.
4. A corporation has power to make valid contracts for the repurchase of its own stock in the absence of charter restrictions.
5. A corporation cannot refuse to perform its contract to allow subscribers to stock free passes, or to repurchase the stock at the price paid, on the ground that it is contrary to public policy.
6. A corporation cannot refuse to carry out its contract to repurchase the stock of certain subscribers upon certain contingencies on the ground that other stockholders were not given the same right to return their stock; at least where there is no

NOTE.—As to power of corporation to deal in its own stock generally, see *note* to Hall v. Henderson, 61 L. R. A. 621.

As to estoppel of corporation to set up plea of *ultra vires*, see First Nat. Bank v. Guardian Trust Co. 70 L. R. A.—, and cases in footnote thereto.

showing of any prejudice to the other stockholders.

7. That a written tender is not kept good as required by statute will not defeat a judgment directing the repurchase of stock according to contract, if the shares were produced in court at the trial, and filed with the clerk.

(December 13, 1904.)

APPEALS by defendant from judgments of the District Court for Cerro Gordo County in favor of plaintiffs in actions brought to recover the value of certain shares of stock which defendant had agreed to repurchase from plaintiffs. *Affirmed.*

Statement by Deemer, Ch. J.:

Actions to recover the par value of certain shares of stock in the defendant company, pursuant to a contract whereby the defendant promised and agreed that, in the event it sold any of its connections, franchises, or business in the state of Minnesota, it would repurchase of the plaintiffs and pay the par value of any shares of stock in the company owned and held by them. The three actions are based on identical contracts and arrangements, and are the same, except as to parties and the number of shares held by them. The defendant filed answers in each case, to which the plaintiffs separately filed motions to strike and demurrers. The motions were each sustained, and, defendant electing to stand upon its answers, judgment was rendered against it in each case as prayed. Defendant appeals.

Messrs. Cliggett, Rule, & Keeler and J. J. Clark, for appellant:

The demurrer waived the right to file the motion.

White Oak v. Oskaloosa, 44 Iowa, 512; 1 Boone, Code Pl. § 249; *New York Ice Co. v. Northwestern Ins. Co.* 21 How. Pr. 234, 12 Abb. Pr. 74; *Russell v. Chambers*, 31 Minn. 54, 16 N. W. 458; *Smith v. Countryman*, 30 N. Y. 655.

The motion to strike out the answer was an improper method of testing the sufficiency of the matters of defense presented.

Clark v. Cress, 20 Iowa, 50; *Evans v. Robbins*, 29 Iowa, 472; *Hall v. Harris*, 61 Iowa, 500, 13 N. W. 665, 16 N. W. 535; *Walker v. Pumphrey*, 82 Iowa, 487, 48 N. W. 928; *State ex rel. McDonald v. DeKruif*, 72 Iowa, 488, 34 N. W. 607; *Irvine v. Yeager*, 74 Iowa, 174, 37 N. W. 136; *Wattels v. Minchen*, 93 Iowa, 517, 61 N. W. 915; *Van Sickle v. Keith*, 88 Iowa, 9, 55 N. W. 42; *Rhoadebeck v. Blair Town Lot & Land Co.* 62 Iowa, 370, 17 N. W. 582; *Bowman v. Chicago, St. P. & K. O. R. Co.* 69 L. R. A.

86 Iowa, 490, 53 N. W. 327; *Gjerstadengen v. Hartzell*, 8 N. D. 424, 79 N. W. 872; *Hurd v. Ladner*, 110 Iowa, 263, 81 N. W. 470; *Childs v. Griswold*, 15 Iowa, 438; *Wade v. Bridges*, 24 Ark. 569; *Pacific Factor Co. v. Adler*, 98 Cal. 271, 25 Am. St. Rep. 106, 27 Pac. 36; *Aitken v. Clark*, 15 Abb. Pr. 319; *Davis v. Louisville & N. R. Co.* 108 Ala. 660, 18 So. 687; *Wilson v. Marks*, 18 Fla. 322; *Orne v. Cook*, 31 Ill. 238; *State ex rel. Nave v. Newlin*, 69 Ind. 108; *Burk v. Taylor*, 103 Ind. 399, 3 N. E. 129; *Savage v. Chalkiss*, 4 Kan. 319; *Armstead v. Neptune*, 56 Kan. 750, 44 Pac. 998; *Littlejohn v. Greeley*, 13 Abb. Pr. 311, 22 How. Pr. 345; *Smith v. American Turquoise Co.* 77 Hun, 192, 28 N. Y. Supp. 329; *Mason v. Dutcher*, 24 N. Y. Civ. Proc. Rep. 345, 33 N. Y. Supp. 689; 1 Boone, Code Pl. § 256; *Finch v. Finch*, 10 Ohio St. 501; *State use of Wyandot County v. Harper*, 6 Ohio St. 607, 67 Am. Dec. 363; *Walter v. Fowler*, 85 N. Y. 621; *McCammack v. McCammack*, 80 Ind. 387; *Jackson v. Lebar*, 53 Cal. 257.

Without bringing stock into court for defendant, written tender was of no avail.

Code, § 3061; *Johnson v. Triggs*, 4 G. Greene, 97; *Freeman v. Fleming*, 5 Iowa, 460; *Mohn v. Stoner*, 11 Iowa, 30, 14 Iowa, 115; *Warrington v. Pollard*, 24 Iowa, 281, 95 Am. Dec. 727; *Shugart v. Pattee*, 37 Iowa, 422.

The agreements for free passes and to repurchase the stock were fraudulent and void as to the company, other stockholders, and creditors, against good public policy, and void; and defendant had a right to make such defense.

2 Clark & M. Priv. Corp. § 397; *Melvin v. Lamar Ins. Co.* 80 Ill. 446, 22 Am. Rep. 199; *White Mountains R. Co. v. Eastman*, 34 N. H. 124; *Blodgett v. Morrill*, 20 Vt. 509; *Robinson v. Pittsburgh & C. R. Co.* 32 Pa. 334, 72 Am. Dec. 792; *Downie v. White*, 12 Wis. 176, 78 Am. Dec. 731; *Upton v. Tribilcock*, 91 U. S. 45, 23 L. ed. 203; *Brigham v. Mead*, 10 Allen, 245; *Buffalo & N. Y. City R. Co. v. Dudley*, 14 N. Y. 336; *Seymour v. Sturges*, 26 N. Y. 134; *Sawyer v. Hoag*, 17 Wall. 610, 21 L. ed. 731; *Tuckerman v. Brown*, 33 N. Y. 297; 88 Am. Dec. 386; *Ogilvie v. Knox Ins. Co.* 22 How. 380, 16 L. ed. 349; *Osgood v. Laytin*, 3 Keyes, 521; *Connecticut & P. Rivers R. Co. v. Bailey*, 24 Vt. 465, 58 Am. Dec. 181; *Marshall Foundry Co. v. Killian*, 99 N. C. 501, 6 Am. St. Rep. 539, 6 S. E. 680.

On petition for rehearing.

A motion to strike out cannot legally be made to perform the office of a demurrer.

Burk v. Taylor, 103 Ind. 399, 3 N. E. 129; *Gjerstadengen v. Hartzell*, 8 N. D.

424, 79 N. W. 874; *Pacific Factor Co. v. Adler*, 90 Cal. 110, 25 Am. St. Rep. 106, 27 Pac. 36; *Wattels v. Minchen*, 93 Iowa, 519, 61 N. W. 915; *Irwin v. Yeager*, 74 Iowa, 177, 37 N. W. 136; *State ex rel. McDonald v. De Kruif*, 72 Iowa, 489, 34 N. W. 607; *Walker v. Pumphrey*, 82 Iowa, 491, 48 N. W. 928.

Mr. A. A. Adams for appellee.

Deemer, Ch. J., delivered the opinion of the court:

The cases were not tried together, nor were they submitted in this court as one; but, as the questions arising are common to each case, they will be disposed of in one opinion.

Each of the plaintiffs purchased and paid for certain shares of stock in the defendant telephone company, upon the express agreement that each should receive for every share of stock one stockholder's pass, good over all the lines and free exchanges of the defendant, as and for a dividend on each share. It was further stipulated that in the event plaintiffs ceased using these passes, or assigned or transferred any of their stock, the plaintiffs or their assignees should thereupon and thereafter be entitled to dividends on their stock, the same as any other shareholder. As a part of the same transaction, it was expressly agreed by the defendant company that, in the event it sold, assigned, or transferred any of its connections, franchises, or business in the state of Minnesota, it would, upon demand, repurchase, from plaintiffs, at the par value thereof, any of the shares of stock then held by them; and plaintiffs, on their part, agreed to accept in payment therefor the par value aforesaid. These contracts were each made in the name of the defendant company, under its corporate seal, by its secretary and president. It is alleged in the petitions that the defendant sold its Minnesota lines, connections, franchises and business to one Averill, or to the United Telephone & Telegraph Company; and it is also alleged that from and after August 21, 1901, the transferee of this Minnesota business refused to recognize plaintiffs' passes, and denies them the right to use the lines and free exchange connections purchased by it. Plaintiffs thereupon demanded of defendant that it repurchase the stock as agreed, and tendered the same to it. Defendant refused to repurchase, and thereupon these actions were commenced to recover the agreed par value, with interest, according to the terms of the contracts.

The answers, which are identical, are long, and made up of many divisions and

paragraphs. We shall not set them out *in extenso*, but content ourselves with stating the substance thereof, in connection with the claims now made by the defendant regarding the sufficiency thereof.

Aside from a point of practice which we shall hereafter note, defendant's contentions are (1) that the agreements to repurchase and for free passes were unauthorized by the defendant, and that its officers who made the agreements had no authority to do so; (2) that there was no consideration for the agreements to repurchase; and (3) that, as there were a number of other persons who held stock in the defendant company, who had no right to free passes, and no such agreements for repurchase, and who purchased their stock without notice or knowledge of the agreements with plaintiffs, and as these agreements operated to diminish the value of the earnings and the assets of the company, to the prejudice of these other stockholders and the creditors of the company, said promises of free passes and of repurchase were an undue and unjust discrimination in the plaintiffs' favor, to the prejudice of other stockholders and the general public, and therefore void as against public policy. The second matter of defense was withdrawn by the defendant, and it elected to rely upon the first and third. After the submission of the demurrer, plaintiffs filed amendments to their petitions, to meet the second point made by the defendant, and to this defendant filed a general denial as a part of its answers. Thereupon plaintiffs filed motions to strike the first and third divisions of the answers, because they contained irrelevant and immaterial matter, did not state any defensive or issuable facts, and for the further reason that these divisions each showed completed transactions of which the defendant had had the benefit, and that it was now estopped from repudiating the same. The motions to strike were sustained, but no specific rulings seem to have been made upon the demurrers. The practice point made by the defendant is that the plaintiffs waive their right to file motions by demurring to the answers, and that a motion to strike is an improper method of testing the sufficiency of matters pleaded in defense. Conceding the correctness of both propositions,—and that they are technically correct none will deny,—still this court has never been very insistent upon technical accuracy in the use of names given to such pleadings as are here involved. *Chase v. Kaynor*, 78 Iowa, 449, 43 N. W. 269; *Seiffert & W. Lumber Co. v. Hartwell*, 94 Iowa, 576, 58 Am. St. Rep. 413, 63 N. W. 333; *Rhodabeck v. Blair*

Town Lot & Land Co. 62 Iowa, 368, 17 N. W. 582. As to the alleged waiver by the filing of the demurrers, it appears that, after the demurrers had been submitted, plaintiffs filed amendments to their petitions, and to these defendant filed amendments to its answers. This being true, the right to move was not waived. But, even if it were, plaintiffs had the right to amend these demurrers, which is practically what they did in filing what they denominated motions to strike. No motion was filed to strike these motions, and no objection seems to have been taken at the time to the manner in which the questions were sought to be raised. The motions were treated by all parties as, in effect, amendments to the demurrers, in so far as they related to divisions 1 and 3 of the answer; and, while undoubtedly misnamed, this will not constitute reversible error. See authorities hitherto cited.

2. The first divisions of the answers pleaded want of authority in the officers of the corporation to execute the contracts referred to and relied upon in the petitions, and want of power or legal authority to make the same. There is no denial of the execution of the contracts by the president and secretary in the name of the corporation and under its corporate seal, and this must be taken as a conceded fact: but it is claimed that the answers raise an issue as to the authority and power of the agents and of the corporation to make such contracts. We take it that the pleader intended to raise two questions thereby: First, want of authority in fact; and, second, want of legal power in law.

As to the first proposition, it clearly appears, from the implied color which the answers must give in order that the defense may be considered at all, that these officers did in fact make the contracts as alleged in the petition, under the seal of the corporation, and that the defendant corporation has had and enjoyed the benefits of such contracts. This being true, the corporation cannot accept and ratify the contracts in so far as they were beneficial to it, and repudiate them in so far as they imposed any liability on its part. It accepted plaintiffs' money on the strength of these contracts, and cannot, while retaining the same, be heard to say that its officers had no authority to make the contracts under which it was received. This is horn-book law, and we need only cite in its support *Field v. Eastern Bldg. & L. Asso.* 117 Iowa, 185, 90 N. W. 717; *Moore v. First Ruthven Circuit M. E. Church*, 117 Iowa, 33, 90 N. W. 492; *Melledge v. Boston Iron Co.* 5 Cush. 158, 51 Am. Dec. 59; *Philadel-*

phia, W. & B. R. Co. v. Howard, 13 How. 307, 14 L. ed. 157. The contract being under the seal of the corporation, and the signature of the corporation and its officers being undenied, it will, of course, be presumed not only that the contract was in fact executed, but that its officers had power to make it. *Blackshire v. Iowa Homestead Co.* 39 Iowa, 625. This point as to actual authority or adoption by ratification assumes, of course, that the contracts were such as the officers might have been authorized to perform.

The next proposition, as to legal power or authority, raises incidentally the question of *ultra vires*; that is to say, defendant pleaded want of legal authority in its officers to make the contract in question. As pleaded in the answer, this is largely a legal conclusion of the pleader, and might well be disregarded upon this ground; but, treating the point as properly raised, we have this state of facts: There is no showing as to the charter rights of the defendant; that is, there is nothing appearing therein which expressly prohibits the making of such contracts as are here involved. We have to deal, then, with its implied powers. The contracts made between the parties provide for two things: First, the payment of what is in the nature of guaranteed dividends; and, second, the repurchase of the stock by the corporation under certain conditions. With the first we now have nothing to do, as plaintiffs are not asking for dividends or their equivalent, nor are they in any manner relying upon that provision of the contracts. In so far as this record shows, they have received all the dividends to which they are entitled. At any rate, they are not asking for any here. They seek in these actions to enforce the agreements as to the repurchase of their stock. This agreement is entirely distinct from the agreement to pay dividends. In this connection it is entirely immaterial whether they received any of the promised dividends or not, or as to whether or not that part of the agreement is of any validity. The contracts for dividends and for repurchase of the stock are divisible in so far as the point now under consideration is concerned; that is to say, want of legal power to make the contracts to repurchase the stock. As to that point, it is well settled in this jurisdiction that, in the absence of charter restrictions, a corporation has power to make valid contracts for the repurchase of its own stock. *Iowa Lumber Co. v. Foster*, 49 Iowa, 25, 31 Am. Rep. 140; *West v. Averill Grocery Co.* 109 Iowa, 488, 80 N. W. 555; *Rollins v. Shaver Wagon & Carriage Co.* 80 Iowa, 390, 20 Am. St. Rep. 427, 45 N. W. 1037. See also

City Bank v. Bruce, 17 N. Y. 510; *Johnson County v. Thayer*, 94 U. S. 631, 24 L. ed. 133. So that, in so far as legal power and authority is concerned, the first division of the answers tenders no defense.

3. The second division of the answers, pleading want of consideration, was withdrawn, and to it we give no further attention. *

4. In the third division the point is made not only that the officers had no authority, but that the entire scheme was and is *ultra vires*, contrary to public policy, and void. It is claimed that the agreement to repurchase the stock at par, and to pay dividends in passes, constitutes a fraud upon, and an unjust discrimination in favor of these plaintiffs against, the other stockholders, and that such contracts were beyond the power of the corporation. This defense, as will be noticed, is made by the corporation itself, which has received all of the benefits of the transaction on its part. The agreement for free passes and to pay dividends is out of the case, save as it may bear on the question of fraud in the transaction, for, as already stated, that part of the contract has, so far as this case is concerned, been fully executed, and is *functus officio*. But it is contended that the agreement to repurchase, which is as yet executory in character, cannot be enforced, for that, if it be recognized and sustained, it may and will diminish the earnings and assets of the company, to the prejudice of other stockholders and creditors. This is, in our judgment, the only debatable question in the case. There is no claim of any actual fraud in the transaction, and no suggestion of any secrecy with reference to the agreement. Moreover, there is no statement either in pleadings or argument that the stock is not worth what the defendant agreed to repurchase it for. Reliance is placed solely on statements to the effect that the other stockholders had no such privileges or agreements, and that said agreements to repurchase diminished the value of the earnings and the assets of the company, to the prejudice of other stockholders and creditors. It goes without saying that the enforcement of these contracts will take the amount paid for the repurchase of the stock out of the earnings and assets of the company. But this is true in every case where a corporation is permitted to repurchase its own stock. However, its stockholders' liability is reduced by that amount, and, in the absence of fraud or a plea of insolvency on the part of the corporation, we do not see how either the stockholders or creditors are prejudiced, unless it appears that the corporation

agreed to pay more for the stock than it was worth. No claim of this kind is made in the defendant's answer, save by way of a general statement of a legal conclusion that the earnings and assets will be diminished, to the prejudice of defendant's stockholders and creditors. No facts are pleaded, however, which will justify any such inference. No actual fraud or secrecy is pleaded, but it is argued that such a transaction is contrary to public policy. The cases differ in many respects from most of those cited by counsel for the defendant company. In most of them the subscriber for stock was endeavoring to escape liability on his contract by reason of a contract or an understanding that he was not to be liable thereon, or that his liability was contingent or for only a part of the amount of the subscription price. This case involves no such question. Here the defendant corporation is endeavoring to escape liability on a contract for repurchase, of which it had the full benefit, because of some actual or implied fraud, or because the contract is void as being against public policy. We fail to see that any question of public policy is involved. A corporation may guarantee dividends upon its stock if it is so minded. To hold otherwise would be to set aside many contracts of the kind, which no one heretofore has thought of questioning. The free use of its lines was given as and for dividends, and the plaintiffs had the right at any time to renounce that part of the agreement and to accept regular dividends. It is not contrary to public policy for a corporation to repurchase its own stock. This has many times been held, not only by this court, but in other jurisdictions as well. Of course, fraud will defeat any contract; but no actual fraud is pleaded, nor is there any attempt to plead facts from which fraud might be inferred. At best, there is a mere suggestion or inference of fraud, but no sufficient facts are pleaded from which such inference may legitimately be drawn. There is, as we have said, no showing that the corporation is insolvent, and no attempt to plead or show that the stock is not worth what defendant agreed to give for it. True, other stockholders were not given the rights accorded to these plaintiffs, but this in itself is no reason for not enforcing the contracts against the corporation itself, for there is no showing of any prejudice to other stockholders. It may be that their stock is worth more than par. As to this, we are not advised. But in the absence of direct averment we cannot presume any thing in defendant's favor in order to defeat these contracts, that it may escape from what appear on their face to be valid obligations. Having received the benefits of

these contracts, it does not lie in defendant's mouth to plead the invalidity thereof because *ultra vires*. *Field v. Eastern Bldg. & L. Asso.* 117 Iowa, 185, 90 N. W. 717. See also *Fremont Carriage Mfg. Co. v. Thomson*, 65 Neb. 370, 91 N. W. 378; *Watts v. Equitable Mut. Life Asso.* 111 Iowa, 90, 82 N. W. 441. The defendant is not a mutual company: it is purely a stock concern; and we know of no reason of public policy or of sound morals which inhibits it from making such contracts as are here sought to be enforced, in the absence of some showing of fraud or *mala fides*. The public has no interest in such matters. Perhaps a case might be made where other stockholders or creditors could intervene, or in which creditors could enforce some liability against the plaintiffs, or object to the enforcement of the contracts, but no such questions are presented by this record. Plaintiffs paid full value for their stock when they purchased it, and were induced to purchase through the promises and agreements of the defendant, its officers and agents. To now allow the defendants to repudiate its agreements would be offering a premium upon wrongdoing. The plea of *ultra vires* is not looked upon with favor, and, when a corporation has received the benefits growing out of a contract, such contract will be enforced against it, unless it be entered into through fraud, or there be persuasive considerations of public policy involved. Neither of these appears in the defendant's answer. As fully sustaining our conclusions on this point, see *Field v. Eastern Bldg. & L. Asso.* 117 Iowa, 185, 90 N. W. 717; *Wright v. Pipe Line Co.* 101 Pa. 204, 47 Am. Rep. 701; *Chester Glass Co. v. Dewey*, 16 Mass. 94, 8 Am. Dec. 128; *Manchester & L. R. Co. v. Concord R. Corp.* 66 N. H. 100, 9 L. R. A. 689, 3 Inters. Com. Rep. 319, 49 Am. St. Rep. 582, 20 Atl. 383; *Union Nat. Bank v. Matthews*, 98 U. S. 621, 25 L. ed.

188. In order to recover in this case, plaintiffs are not required to rely upon an illegal contract. The agreement to repurchase the stock was neither *ultra vires*, illegal, nor immoral. There was no actual fraud, and no facts are stated from which fraud may legitimately be inferred. Stockholders may, in equity, sometimes set aside *ultra vires* acts done by a corporation, which the corporation itself may not take advantage of. *New Orleans, M. & T. R. Co. v. Ellerman*, 105 U. S. 166, 26 L. ed. 1015; 4 Thomp. Corp. §§ 4483 *et seq.* But in such cases it must be shown that the conduct of the officers or directors works a substantial injury. However, speculation on this point is unnecessary, for the questions are not here at issue. We reach the conclusion that the third division of the answer presents no defense.

5. Lastly, it is argued that the court erred in rendering judgments against the defendant for the reason that the plaintiffs did not tender and bring their shares of stock into court at the time the judgments were rendered. This point does not seem to have been made in the lower court, and, of course, cannot be taken advantage of here. But we find that plaintiffs did make a written tender; that they, in their petitions, renewed these tenders, but the defendant refused to receive the stock back; and that on the trial plaintiffs produced the shares of stock in court, and filed them with the clerk. These facts are sufficient to justify the judgment, although the first written tender was not kept good as required by statute (Code, § 3061). *Williams v. Triplett*, 3 Iowa, 518.

There is no prejudicial error in the records, and the judgments are each and all affirmed.

Petition for rehearing overruled.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

DAVIS CALYX DRILL COMPANY,
Plff. in Err.,
v.

Annie L. MALLORY *et al.*, Exrs., etc., of
Smith H. Mallory, Deceased.

(137 Fed. 332.)

*1. An implied warranty that an article will be fit for a particular purpose may

*Headnotes by SANB RN, Circuit Judge.

be inferred from a contract to make or furnish it to accomplish that specific purpose, because the accomplishment of the purpose is the essence of this contract.

2. But no implied warranty of such fitness arises out of a contract to make or supply a described and definite article, although the vendor knows that the vendee is purchasing it to accomplish the specific purpose, because the essence of this contract is the delivery of the specific article, and not the accomplishment of the purpose.

NOTE.—As to implied warranty of fitness of property bought for special purpose, see also, in this series, note to *McQuaid v. Ross*, 22 L. R. A. 187, and the later cases of *Bierman v. City* 49 L. R. A.

Mills Co. 37 L. R. A. 799; *Gardner v. Winter*, 63 L. R. A. 647; and *Rollins Engine Co. v. Eastern Forge Co.* 68 L. R. A. 441.

3. A vendee contracted with a manufacturer, in writing, to buy and pay for one class F3 drill made by the latter, and described in its catalogue, and certain other specific machinery and tools, for an agreed price. Before this contract was made, the vendee informed the vendor that he wanted the drill and machinery to bore holes through certain described strata in land in the county of Lucas, in the state of Iowa, and the manufacturer assured him that its class F3 drill would do this work as rapidly and economically as a diamond drill. But the written contract was silent upon this subject. The vendee relied upon this assurance of the manufacturer, and made the contract. *Held*, there was no implied warranty that the drill and its machinery would be suitable to bore holes through the specific described strata in Lucas county, Iowa.

4. When the written agreement of the parties is complete in itself, the conclusive legal presumption is that it embodies the entire engagement of the parties, and the manner and extent of their obligations, and parol evidence of other terms relating to the same subject-matter is inadmissible to extend, modify, or contradict it.

5. An implied warranty of the fitness of a machine to do a particular work does not include a warranty that it will do the work as rapidly or economically as some other specified machine. Such a covenant can be introduced by express contract only, and parol evidence of it is excluded by a written contract of sale which is silent on the subject.

(*Phillips, District Judge, dissents.*)

(April 11, 1905.)

ERROR to the Circuit Court of the United States for the Southern District of Iowa to review a judgment in favor of defendants in an action brought to recover the contract price of certain machinery sold and delivered to defendants' testator. *Reversed.*

Statement by **Sanborn**, Circuit Judge:

On June 25, 1902, the Davis Calyx Drill Company, a corporation, made a written contract with S. H. Mallory to furnish him free on board the cars at Tarrytown, in the state of New York, one class F3 drill, which is described in its catalogue; and certain specific machinery, tools, and articles, for which Mallory promised to pay \$2,450. Mallory has since died, and the defendants are the executrices of his will. The Calyx company made and delivered the drill, the machinery, and the articles according to the contract, and this is an action to recover their purchase price. Two defenses were interposed,—fraudulent misrepresentation and the breach of an implied warranty by the plaintiff. The court withdrew the former defense, and submitted the latter to the jury. There was evidence which had a tendency to establish these facts: The plaintiff

was a corporation engaged in the manufacture of drills and other machinery at Tarrytown, in the state of New York. Mallory was engaged in prospecting for coal and lands in Lucas county, in the state of Iowa, and William Haven was his agent. Haven had used a diamond drill for this purpose prior to June, 1902, but he objected to it because it would frequently fail to produce any core for the reason that the coal was soft, and the diameter of the core was only 1 inch. He was desirous of obtaining a drill which would produce a larger core. He heard of the Davis Calyx drill, procured one of the plaintiff's catalogues, went to Tarrytown, and saw one of the plaintiff's drills in operation with a shot bit; but he could not form any opinion upon the question whether or not it was fit to work in the strata in earth in Lucas county, in the state of Iowa. The drill was provided with a cutter and a shot bit, and these were exchanged in the operation to accommodate the drill to the hardness of the material through which it was to pass. Haven met the secretary and the general manager of the plaintiff. He described to them the strata through which a drill must pass in boring holes upon the land of Mr. Mallory, and explained to them that he desired to get a machine which would produce a larger core than a diamond drill, and would operate as economically and rapidly. They told him that their machine was just the drill he wanted. They showed him pieces of stone through which it had passed, and stated to him that it would sink 25 or 30 feet per day; that it would operate as economically and as rapidly as a diamond drill, and would get a larger core. Thereupon Haven made the contract in suit on behalf of his principal, Mallory, in reliance upon these representations, and upon the judgment of the officers of the plaintiff, expressed in this way. The plaintiff furnished the drill and all the other specific machinery, tools, and articles, described in the contract, and furnished an expert to set up and operate the drill. But the machine would not work satisfactorily. It would sink only 8 or 10 feet per day on the average, while a diamond drill would bore into the same ground at the rate of 25 feet per day. The plaintiff claimed that these facts evidenced an implied warranty that the drill would be fit and suitable to bore holes through the strata in Lucas county, Iowa, underneath his land, as rapidly and economically as a diamond drill. All the testimony relative to this alleged warranty was received over the objections of the plaintiff, and was contradicted by testimony which it produced. The court instructed the jury, in effect, that if Haven correctly described to the secretary and general manager of the plaintiff the

strata through which the drill was to be sunk under the land of Mallory, and if the secretary and general manager knew where the drill was to be used, and stated that it would do as much work there, and do it as economically, as a diamond drill, then the plaintiff had made an implied warranty that the drill would work in this way, and that, if it did not do so, the defendants had a right to rescind the contract, to return the drill, and to recover the expenses which they or their decedent had incurred in their attempt to operate it. The plaintiff excepted to this portion of the charge, and to the introduction of the evidence relative to the alleged warranty, and there was a verdict for the defendants.

Argued before *Sanborn*, Circuit Judge, and *Philips and Riner*, District Judges.

Messrs. Joseph C. Mitchell and Francis M. Hunter, for plaintiff in error:

Where there is a written contract of sale, complete in itself, which contains no warranty, and no fraud, accident, or mistake is alleged, it is not competent for the purchaser, by allegation and proof, to show a parol warranty of the quality of the property. If the writing amounts to a contract of sale, and contains no warranty, parol evidence is not admissible to add a warranty thereto.

Mast v. Pearce, 58 Iowa, 579, 43 Am. Rep. 125, 8 N. W. 632, 12 N. W. 597; *Seitz v. Brewers' Refrigerating Mach. Co.* 141 U. S. 510, 35 L. ed. 837, 12 Sup. Ct. Rep. 46; *De Witt v. Berry*, 134 U. S. 306, 33 L. ed. 896, 10 Sup. Ct. Rep. 536; *Warbasse v. Card*, 74 Iowa, 306, 37 N. W. 383, *Brintnall v. Briggs*, 87 Iowa, 538, 54 N. W. 531.

Where "the article ordered was to be of a particular design or pattern, well defined and understood between the parties, and the article made and delivered in pursuance of the contract conforms to the pattern or model, there is no warranty implied further than that it should be of good workmanship and material."

Cosgrove v. Bennett, 32 Minn. 371, 20 N. W. 359; *Milwaukee Boiler Co. v. Duncan*, 87 Wis. 120, 41 Am. St. Rep. 33, 58 N. W. 232; *Grand Ave. Hotel Co. v. Wharton*, 24 C. C. A. 441, 49 U. S. App. 108, 79 Fed. 43; *Goulds v. Brophy*, 42 Minn. 109, 6 L. R. A. 392, 43 N. W. 834; *Wheaton Roller-Mill Co. v. John T. Noye Mfg. Co.* 66 Minn. 156, 68 N. W. 854; *Cunningham v. Hall*, 4 Allen, 268; *Wisconsin Red Pressed-Brick Co. v. Hood*, 54 Minn. 543, 56 N. W. 165; *White v. Adams*, 77 Iowa, 285, 42 N. W. 199; *Fairbanks, M. & Co. v. Baskett*, 98 Mo. App. 53, 71 S. W. 1113; *McCray Refrigerator & Cold Storage Co. v. Woods*, 99 Mich. 269, 41 Am. St. Rep. 599, 58 N. W. 320.
69 L. R. A.

Messrs. Theodore M. Stuart and Washington I. Babb, for defendants in error:

Where an article, especially an article of machinery, is unknown to the purchaser,—that is, he has not sufficient information concerning such article, or its capacity, or manner of operation to form an opinion or judgment as to whether or not it will or can be made to work satisfactorily or with reasonable rapidity and economy at a certain place and in certain kinds and character of materials, wherein he desires and expects to use it,—and, before contracting for the purchase of such article from the manufacturers, he fully informs such manufacturer of the locality where he desires and expects to use it, and also of the kind and character of materials in which he expects to use it and, with full knowledge of such facts, the manufacturer states that his said machine will operate in such locality and materials with reasonable rapidity and economy; and the purchaser, relying upon the judgment of the manufacturer, contracts with him to manufacture and furnish him with such machine,—then, and in such case, and under such circumstances, an implied warranty arises on the part of such seller that the machine to be furnished can and will operate in said locality and in said materials as represented by him, or with reasonable rapidity and economy.

Kellogg Bridge Co. v. Hamilton, 110 U. S. 108, 28 L. ed. 86, 3 Sup. Ct. Rep. 537; *Grand Ave. Hotel Co. v. Wharton*, 24 C. C. A. 441, 49 U. S. App. 108, 79 Fed. 43; *Parsons Band Cutter & Self Feeder Co. v. Mallinger*, 122 Iowa, 703, 98 N. W. 580; *Alpha Checkcrauer Co. v. Bradley*, 105 Iowa, 537, 75 N. W. 369; *Blackmore v. Fairbanks, M. & Co.* 79 Iowa, 289, 44 N. W. 548; *Timken Carriage Co. v. Smith*, 123 Iowa, 554, 99 N. W. 183; *Burnett v. Hensley*, 118 Iowa, 578, 92 N. W. 678; *Latham v. Shipley*, 86 Iowa, 543, 53 N. W. 342; *Eversole*, Enc. Iowa Law, § 981; *Benjamin, Sales*, § 1002, note 40; *Merriam v. Field*, 24 Wis. 640; *Leopold v. Van Kirk*, 27 Wis. 152; *Roe v. Bachelder*, 41 Wis. 360; *Wilcox v. Owens*, 64 Ga. 601; *Lanz v. Wachs*, 50 Ill. App. 262; *Kennebrew v. Southern Automatic Electric Shock Mach. Co.* 106 Ala. 377, 17 So. 545; *Zimmerman v. Druecker*, 15 Ind. App. 512, 44 N. E. 557; *Lee v. J. B. Sickles Saddlery Co.* 38 Mo. App. 201; *Omaha Coal, Coke & Lime Co. v. Fay*, 37 Neb. 68, 55 N. W. 211; *Overton v. Phelan*, 2 Head, 445; *Brenton v. Davis*, 8 Blackf. 318, 44 Am. Dec. 769; *Rodgers v. Niles*, 11 Ohio St. 53, 78 Am. Dec. 290; *Southern Brass & Iron Co. v. Exeter Machine Works*, 109 Tenn. 67, 70 S. W. 614; *Ottawa Bottle & Flint-Glass Co. v. Gunther*, 31 Fed. 208; *Fox v. Stockton Combined Harvester & Agri.*

Works, 83 Cal. 333, 23 Pac. 295; *Rogers v. Hanson*, 35 Iowa, 286; *McClung v. Kelley*, 21 Iowa, 508; *Jones v. Just*, L. R. 3 Q. B. 197; *Brown v. Edgington*, 2 Mann. & G. 279; *Pease v. Sabin*, 38 Vt. 432, 91 Am. Dec. 364; *Port Carbon Iron Co. v. Groves*, 68 Pa. 149; *Geltu v. Rountree*, 2 Pinney (Wis.) 379, 54 Am. Dec. 138; *Walton v. Cody*, 1 Wis. 420; *Creasy v. Gray*, 88 Mo. App. 454; *McCormick Harrestring Mach. Co. v. Nicholson*, 17 Pa. Super. Ct. 188; *William Anson Wood Mower & Reaper Co. v. Thayer*, 50 Hun, 516, 3 N. Y. Supp. 465; *McClamrock v. Flint*, 101 Ind. 278; *Woodle v. Whitney*, 23 Wis. 55, 99 Am. Dec. 102.

Sanborn, Circuit Judge, delivered the opinion of the court:

An implied warranty that an article will be fit for a particular purpose may be inferred from a contract to make or supply it to accomplish that purpose, because the accomplishment of the purpose is the essence of the undertaking. But no such warranty arises out of a contract to make or supply a specific, described, or definite article, although the manufacturer or dealer knows that the vendee buys it to accomplish a specific purpose, because the essence of this contract is the furnishing of the specific article, and not the accomplishment of the purpose. In other words, a warranty that a machine, tool, or article sold is fit and suitable to accomplish a particular purpose or to do a specific work may be implied when the manufacturer or dealer knows the purpose or work to be effected, and the purchase of the machine, tool, or article is in reality an employment of the vendor to do the work by making or furnishing a machine, tool, or article, to effect it. *Kellogg Bridge Co. v. Hamilton*, 110 U. S. 108, 116, 28 L. ed. 86, 89, 3 Sup. Ct. Rep. 537; *Breen v. Moran*, 51 Minn. 525, 53 N. W. 755; *Leopold v. Van Kirk*, 27 Wis. 152, 156; *Brenton v. Davis*, 8 Blackf. 318, 44 Am. Dec. 769; *Omaha Coal, Coke, & Lime Co. v. Fay*, 37 Neb. 68, 75, 55 N. W. 211; *Lee v. J. B. Sickles Saddlery Co.* 38 Mo. App. 201, 205; *Rodgers v. Niles*, 11 Ohio St. 53, 57, 78 Am. Dec. 290; *White v. Adams*, 77 Iowa, 295, 297, 42 N. W. 199.

But no implied warranty that a machine, tool, or article is suitable to accomplish a particular purpose or to do a specific work arises where the vendor orders of the manufacturer, or purchases of the dealer, a specific, described, or definite machine, tool, or article, although the vendor knows the purpose or work which the purchaser intends to accomplish with it, and assures him that it will effect it. Such an assurance is but the expression of an opinion,

when it is followed by a written contract, complete in itself, which is silent upon the subject. The extent of the implied warranty in such a case is that the machine, tool, or article shall correspond with the description or exemplar, and that it shall be suitable to perform the ordinary work which the described machine is made to do. *Seitz v. Brewers' Refrigerating Mach. Co.* 141 U. S. 510, 518, 519, 35 L. ed. 837, 840, 841, 12 Sup. Ct. Rep. 46; *Keates v. Cadogan*, 2 Eng. L. & Eq. 320, 10 C. B. 591; *Grand Ave. Hotel Co. v. Wharton*, 24 C. C. A. 441, 443, 49 U. S. App. 108, 79 Fed. 43, 45; *Morris v. Bradley Fertilizer Co.* 12 C. C. A. 34, 35, 28 U. S. App. 87, 64 Fed. 55, 56; *Leake, Contr.* 4th ed. 261, 262; 1 *Parsons, Contr.* 586, 587; *Union Selling Co. v. Jones*, 63 C. C. A. 224, 227, 229, 128 Fed. 672, 675, 677; *McCray Refrigerating & Cold Storage Co. v. Woods*, 99 Mich. 269, 41 Am. St. Rep. 599, 58 N. W. 320; *Cosgrove v. Bennett*, 32 Minn. 371, 20 N. W. 360; *Goulds v. Brophy*, 42 Minn. 109, 6 L. R. A. 392, 43 N. W. 834; *Wisconsin Red Pressed-Brick Co. v. Hood*, 54 Minn. 545, 56 N. W. 165; *Fairbanks, M. & Co. v. Baskett*, 98 Mo. App. 53, 71 S. W. 1113; *Wheaton Roller-Mill Co. v. John T. Noye Mfg. Co.* 66 Minn. 156, 68 N. W. 854; *Milwaukee Boiler Co. v. Duncan*, 87 Wis. 120, 41 Am. St. Rep. 33, 58 N. W. 232; *J. I. Case Plow Works v. Niles & S. Co.* 90 Wis. 590, 63 N. W. 1013; *Deming v. Foster*, 42 N. H. 165, 175; *Morse v. Union Stock Yard Co.* 21 Or. 289, 14 L. R. A. 157, 28 Pac. 2; *Dushane v. Benedict*, 120 U. S. 630, 647, 30 L. ed. 810, 814, 7 Sup. Ct. Rep. 696; *Carleton v. Jenks*, 26 C. C. A. 265, 47 U. S. App. 734, 80 Fed. 937; *Alpha Checkrouer Co. v. Bradley*, 105 Iowa, 537, 546, 75 N. W. 369; *Latham v. Shipley*, 86 Iowa, 543, 53 N. W. 342; *Blackmore v. Fairbanks, M. & Co.* 79 Iowa, 289, 44 N. W. 548; *Parsons Band Cutter & Self Feeder Co. v. Mallinger*, 122 Iowa, 703, 98 N. W. 580.

If the purchaser, Mallory, or his agent, Haven, had described the strata through which he desired to drive the drill, and had ordered the Calyx company to make or to select and furnish to him a drill that would bore the desired holes through these strata as rapidly and economically as a diamond drill, for an agreed price, and the plaintiff had accepted the order, an implied warranty would have arisen that the drill to be furnished under that contract would do the work as speedily and cheaply as a diamond drill. But an accepted order to make and deliver a specific, described drill, which the vendor is engaged in making, has no such effect, although the manufacturer knows the use for which the vendee

desires to obtain it. The reason for this rule is conclusive and unanswerable. When a manufacturer or dealer agrees to make or furnish an article that will accomplish a particular purpose, the accomplishment of the purpose is the substance of his undertaking, and he is free to make or to supply any article that will do the work required. If he furnishes an article that will accomplish this purpose, he performs his contract, although the article he supplies may differ widely from that contemplated by the purchaser when he made the agreement to buy. On the other hand, when the manufacturer or dealer contracts to make or to deliver a specific and definitely described article, to enable the vendor to accomplish a known purpose, the essential part of his obligation is the delivery of the identical article described in the contract; and the delivery of a different article, although it may better accomplish the desired result, is not a performance of his agreement, and does not entitle him to recover the purchase price. The furnishing of the article described, and that alone, whether that article is fit for the known purpose to which the vendee intends to apply it or not, constitutes a compliance with the contract by the vendor, and entitles him to secure its fruits. The familiar illustration of this distinction by Maule, J., in *Keates v. Cadogan*, 2 Eng. L. & Eq. 320, 10 C. B. 591, is still the most felicitous: "If a man says to another, 'Sell me a horse fit to carry me,' and the other sells a horse which he knows to be unfit to ride, he may be liable for the consequences; but if a man says, 'Sell me that gray horse to ride,' and the other sells it, knowing that the former will not be able to ride it, that would not make him liable."

In *Kellogg Bridge Co. v. Hamilton*, 110 U. S. 108, 116, 28 L. ed. 86, 89, 3 Sup. Ct. Rep. 537, the bridge company had erected a portion of the false work requisite for the construction of a bridge across the Maumee river. Hamilton made a contract with the company to purchase the false work, the foundation of which was concealed by the river, and to complete the bridge. While he was engaged in the performance of this contract, the false work gave way, by reason of defects in its construction, and precipitated the iron upon it into the river. The Supreme Court held that the bridge company impliedly warranted that the work which it sold to Hamilton was suitable to construct the bridge upon because it built this false work, and had sold it to Hamilton to accomplish that specific purpose.

But in *Seitz v. Brewers' Refrigerating Mach. Co.* 141 U. S. 510, 512, 519, 35 L. ed. 837, 838, 841, 12 Sup. Ct. Rep. 46, the

refrigerating company had been informed before it made its agreement that Seitz was cooling his brewery with ice, that he wanted to dispense with the use of ice, that no machine would be of any value to him unless it would enable him to accomplish this result, and that such a machine must continuously cool 150,000 cubic feet of air to a temperature of 40° Fahrenheit. Thereupon the refrigerating company assured Seitz that its machine would accomplish this result, and, in reliance upon this statement, he entered into a written contract with the company to the effect that the latter should supply and put in operation in his brewery a No. 2 size refrigerating machine, as constructed by it, for the sum of \$9,450. The company made and put such a machine in his brewery, but it did not work satisfactorily, and it was incapable of cooling 150,000 cubic feet of air to 40° Fahrenheit. The Supreme Court held that this case fell under the rule that "where a known, described, and definite article is ordered of a manufacturer, although it is stated by the purchaser to be required for a particular purpose, still, if the known, described, and definite thing be actually supplied, there is no warranty that it shall answer the particular purpose intended by the buyer;" and that there was neither an expressed nor an implied warranty that the ice machine would do the work for which the manufacturer knew that it was purchased, or that it would cool 150,000 cubic feet of atmosphere to 40° Fahrenheit or to any other temperature. This decision indicates the unavoidable conclusion in the case at bar. It also answers the contention of counsel that this case is not governed by the rule that there is no implied warranty of fitness where a known, definite, and described thing is purchased, because Mallory and Haven were not familiar with, and had had no experience in the operation of, the class F3 drill which they purchased. It is not the familiarity of the purchaser with the character and work of the machine ordered, but the identity of the thing described in the contract, which brings the latter within the rule. Seitz was probably ignorant of the character and of the operation of the No. 2 size refrigerating machine which he bought, and he relied upon the assurance of the vendor that it would cool his brewery as he desired. But the machine which he ordered was identified by the description in his contract, and that description made it a known, described, and definite thing. So in the case at bar the description in the accepted order which Haven made of the class F3 drill perfectly identified it,—made it a known, described, and definite thing, within the meaning of this

rule, and brought the contract clearly under its operation.

In *Grand Ave. Hotel Co. v. Wharton*, 24 C. C. A. 441, 443, 49 U. S. App. 108, 79 Fed. 43, 45, the vendee ordered two boilers for use in its hotel. The vendor knew the use to which the vendee intended to put the articles, and knew that it must necessarily use the muddy water of the Missouri river in order to operate them. The boilers were furnished, but they would not operate with the water of the Missouri river. This court held that there was no implied warranty that they would do so, and sustained the judgment for their purchase price.

In *Milwaukee Boiler Co. v. Duncan*, 87 Wis. 120, 41 Am. St. Rep. 33, 58 N. W. 232, the purchaser informed the manufacturer before he made his order that he required a boiler that would produce 130 pounds steam, working pressure, and thereupon the latter offered to furnish a described boiler, and he accepted the offer. The boiler specified was furnished, but it failed to produce 130 pounds steam, working pressure, or to do the work for which the manufacturer knew the purchaser ordered it. The supreme court of Wisconsin decided that there was no implied warranty that it would accomplish the particular purpose for which it was bought, and said: "The distinction seems to be between the manufacture or supply of an article to satisfy a required purpose, and the manufacture or supply of a specified, described, and defined article, as in this case."

In *Goulds v. Brophy*, 42 Minn. 109, 112, 6 L. R. A. 392, 43 N. W. 834, the vendee ordered from the catalogue of the manufacturer an auger outfit to bore wells. The vendor furnished the outfit, but it was not suitable to bore the wells which the vendee desired to sink. The supreme court of Minnesota held that there was no implied warranty that it would do so, and said: "There was an implied warranty—or, more correctly speaking, condition of the contract—that it should conform to the description, and be of good material and workmanship according to that description, but none that it would answer the purpose described or supposed."

There are many authorities to the same effect, but it would be a work of supererogation to review them. The contract of the Calyx Drill Company in this case was expressed in writing. It was that it would make and deliver to the purchaser, Mallory, one class F3 drill, and certain other machines and articles, which were definitely specified in the contract. When it supplied these articles, it performed its agreement, whether they were suitable to perform the specific work of boring holes in the land con-

trolled by the vendee in Lucas county, Iowa, or not. There is no averment or proof that they were not fit to accomplish the general purpose for which they were made,—to bore holes in the earth under ordinary circumstances. The contract of the Calyx Drill Company was not that it would make and deliver a drill which would sink holes in the ground of the vendee in Lucas county as rapidly and economically as a diamond drill; and, if it had made and delivered a drill which would have done this, it would have been required, if the testimony of the defendants is true, to have furnished a different drill and different machinery from that described in its contract, and in so doing it would have failed to perform it.

The reception of the evidence and the charge of the court upon this subject were erroneous (1) because there was no implied warranty that the drill and machinery would be fit to bore holes through the specific strata in the earth in Lucas county; and (2) because, if there had been such a warranty, it would not have included a covenant that the machinery would sink them as rapidly and economically as a diamond drill. Such a covenant could be imported into the contract only by an express agreement, and such an agreement was excluded by the fact that the contract is in writing, and by the rule that, where the written contract of the parties is complete in itself, the conclusive legal presumption is that it embodies the entire engagement of the parties, and the manner and extent of their obligations, so that parol evidence of other terms is inadmissible to extend, modify, or contradict it. *Green v. Chicago & N. W. R. Co.* 35 C. C. A. 68, 71, 92 Fed. 873, 877; *McKinley v. Williams*, 20 C. C. A. 312, 319, 36 U. S. App. 749, 74 Fed. 94, 101; *Wilson v. New United States Cattle Ranch Co.* 20 C. C. A. 244, 249, 36 U. S. App. 634, 73 Fed. 994, 999; *Union Selling Co. v. Jones*, 63 C. C. A. 224, 227, 128 Fed. 672, 675.

The judgment is accordingly reversed, and the case is remanded to the court below, with instructions to grant a new trial.

Phillips, District Judge, dissenting:

I am unable to concur in the foregoing opinion. I make no question of the correctness of the general rule laid down, that, where a known and definite article is ordered of a manufacturer, although it be stated by the purchaser that it is required for a particular purpose, yet, if the known described thing be accordingly supplied, there is no warranty that it will answer the particular purpose desired by the purchaser. This for the obvious reason that the vendor undertakes by the terms of the express con-

tract to furnish only the articles both parties have designated, and therefore the contract is performed by the vendor when the article delivered corresponds with the thing described and called for. Such was the case in *Scitz v. Brewers' Refrigerating Mach. Co.* 141 U. S. 510, 35 L. ed. 837, 12 Sup. Ct. Rep. 46. In that case the parties entered into a written contract, whereby the vendor agreed to supply the vendee with a No. 2 size refrigerating machine, "as constructed by the said party of the first part." The answer in that case simply alleged that the plaintiff represented that the machine was capable of cooling certain rooms in the brewery, but the machine, when set up and operated, was not so capable, and failed to perform the work for which, upon the representations of the plaintiff, the machine had been contracted for; that the defendant contracted upon the faith of the guaranty by the plaintiff that it would cool certain rooms. The representation was that it had the capacity of cooling a space of 150,000 cubic feet of air to a temperature sufficiently low for the purpose of brewing or manufacturing beer. The evidence tended to show that, prior to the execution of the contract, plaintiff's agent had represented that the machine would cool 150,000 cubic feet of 40° Fahrenheit; that the defendant had been cooling his brewery with ice, and wished the machine to cool it to about the same extent. The evidence further showed that, perhaps before the machine was accepted, the defendant wrote to the plaintiff, and requested a guaranty from it that the machine would accomplish this result, which was refused, notwithstanding which the defendant used the machine. It was of this state of the case that the court said that the machine purchased was specifically designated in the contract, and that: "the only implication in regard to it was that it would perform the work the described machine was made to do; and it is not contended that there was any failure in such performance. This is not the case of an alleged defect in the process of manufacture known to the vendor, but not to the purchaser, nor of presumptive and justifiable reliance by the buyer on the judgment of the vendor rather than his own, but of a purchase of a specific article, manufactured for a particular use, and fit, proper, and efficacious for that use, but in respect to the operation of which, in producing a desired result under particular circumstances, the buyer found himself disappointed." Further on the court said: "The alleged antecedent representations as to whether the machine possessed sufficient refrigerating power to cool this brewery were no more than expressions of opinion, confessedly honest-

ly entertained, and dependent upon other elements than the machine itself, concerning which plaintiff in error could form an opinion as well as defendant; and the conduct of plaintiff in error in demanding, two days after the contract was executed, a written guaranty that the machine company would cool his building to 3½° Reaumur (or 40° Fahrenheit), and keep it at that all the time, and in acquiescing in the company's refusal to give the guaranty for reasons stated, and in thereupon afterwards ordering the company to go on with the work, . . . seems to us to justify no other conclusion than that reached by the verdict."

I respectfully submit that that case is not this. Here the vendee was engaged in prospecting for coal in given localities in the state of Iowa. Because of the peculiar geological formation of the earth to be bored through to reach the coal deposit, the diamond drill, customarily employed in such operations, proved to be ineffective and inadequate. Chancing to see a prospectus issued by the plaintiff manufacturer in the state of New York, commending its drills, Mallory sent his agent on to New York to interview the manufacturer. This agent informed the representative of the manufacturer fully as to the trouble Mallory encountered in using the diamond drill,—that, the coal being soft, the defendant would not get any core at all, or it would be so small that he could not judge the quality of the coal, and that what was desired was to procure a drill that would produce a larger core. This agent went to Tarrytown, where the plaintiff's machine shops were located, but it had no drills manufactured and set up so they could be seen. The agent went with plaintiff's representative to another place, and saw one of plaintiff's drills operated with a shot bit attachment, working a short distance only from the surface. He did not see it working with a "cutter," as represented. The agent could not form an opinion as to whether that drill was fitted for operating and working in the desired locality in Iowa. He told the plaintiff the general geological formation of the several coal veins, and the difficulty of getting through the different varieties,—some very hard and some very soft material. Plaintiff's agent then represented how his machine would work,—that it would go through the character of strata and geological formation in the territory where Mallory was operating; that it would work all right, operate cheaply, producing a large core instead of a small one,—and thereupon Mallory's agent closed the contract. In this case, therefore, there was an article—a machine—not in *esse*. It was to be manu-

factured to answer a purpose made known to the manufacturer, which purpose the manufacturer said his machine would accomplish. Whether or not it could do so could not possibly be known to the purchaser until the machine was put in actual operation in the field in Iowa. The vendor knew that the machine it was to manufacture would not meet the purpose of the vendee unless it could be successfully operated in the earth to be bored into through such strata to overcome the defects of the diamond drill. It was sold to accomplish this very object. Thereupon the agent of the vendor turned to his desk, and, in the form of a letter or proposition, stated, not as in the contract in the *Seitz Case*, 141 U. S. 510, 35 L. ed. 837, 12 Sup. Ct. Rep. 46, that the company agreed to furnish a machine "as constructed by the party of the first part," but "we propose to furnish you one Class F3 drill," with certain equipments, which proposition Mallory's agent instantly accepted at the bottom of the submitted letter.

If it is to be established as law that such method of concluding such transactions precludes the vendee from asserting an implied warranty that the machine to be manufactured is suitable to the use for which the manufacturer is advised the purchaser is buying it, it does seem to me that the doctrine of implied warranty can afford no protection to the confiding purchaser against the smart secretary of the manufacturer.

The case of *Grand Ave. Hotel Co. v. Wharton*, 24 C. C. A. 441, 49 U. S. App. 108, 79 Fed. 43, when read with regard to the particular facts of that case, and the qualifying language of Judge Lochren, furnishes little support to the majority opinion. There was a written contract in that case, whereby the defendant agreed to furnish and deliver to plaintiff, on the cars at Philadelphia, two certain described safety boilers, of 150 horse power each, and the services of a man to put them up, for a given sum, to be paid for as specified; the contract containing specifications of the material and the construction of the boilers in their parts. The defense interposed was that the vendor knew that the boilers were to be used in the Midland hotel at Kansas City, and that the water to be used in operating them was supplied from the Missouri river. The contention was that the company should have taken notice of the quality of that water, as to the amount of sand it contained in solution, which rendered the use of the boilers largely ineffective. Aside from the fact that there was nothing in the evidence to show any knowledge on the part of the vendor as to the peculiar properties of the water of the Missouri river as affecting the use of

the boilers, there was present in the case the affirmative fact that the hotel had in prior use similar boilers. So that the purchaser not only had its own engineer run and operate the boiler, but it had a special knowledge of the quality and properties of the Missouri river water. While there was present in the case knowledge on the part of the vendor that Missouri river water was to be used in operating the boilers, it could not be said that the vendee had any right to rely upon the fact that the vendor knew the use to which the boilers were to be put. It was of this character of case that evidence was excluded tending to show the knowledge of the plaintiff as the basis of invoking an implied warranty. It can therefore better be understood why the learned judge, while stating in the first paragraph of the opinion that, "where a manufacturer contracts to supply an article which he manufactures to be applied to a particular use, of which he is advised, so that the buyer necessarily trusts to the judgment and skill of the manufacturer, there is an implied warranty that the article shall be reasonably fit for the use to which it is to be applied," he then said: "But when a known, described, and definite article is ordered of a manufacturer, although it be stated by the purchaser to be required for a particular use, yet, if the known, described, and definite thing be actually supplied, there is no implied warranty that it shall answer the particular purpose intended by the buyer. . . . Here the purchaser contracted for a definite, well known kind of boiler; its president having then a boiler of the same kind in use." From which it is apparent that the ruling was based upon the proposition that the buyer in that case was bargaining for a specific article known to him.

Mr. Justice Harlan, in *Kellogg Bridge Co. v. Hamilton*, 110 U. S. 108, 28 L. ed. 86, 3 Sup. Ct. Rep. 537, cited in the foregoing opinion, discussing the applicability of the doctrine of implied warranty, summed up the rules as follows: "According to the principles of decided cases, and upon clear grounds of justice, the fundamental inquiry must always be whether, under the circumstances of the particular case, the buyer had the right to rely, and necessarily relied, on the judgment of the seller, and not upon his own. In ordinary sales the buyer has an opportunity of inspecting the article sold, and, the seller not being the maker, and therefore having no special or technical knowledge of the mode in which it was made, the parties stand upon the grounds of substantial equality. If there be, in fact, in the particular case, any inequality, it is such that the law cannot, or ought not to at-

tempt to, provide against. Consequently the buyer in such cases—the seller giving no express warranty and making no representations tending to mislead—is holden to have purchased entirely on his own judgment. But, when the seller is the maker or manufacturer of the thing sold, the fair presumption is that he understood the process of its manufacture, and was cognizant of any latent defect caused by such process, and against which reasonable diligence might have guarded. This presumption is justified in part by the fact that the manufacturer or maker by his occupation holds himself out as competent to make articles reasonably adapted to the purposes for which such or similar articles are designed. When, therefore, the buyer has no opportunity to inspect the article, or when, from the situation, inspection is impracticable or useless, it is unreasonable to suppose that he bought on his own judgment, or that he did not rely on the judgment of the seller as to latent defects of which the latter, if he used due care, must have been informed during the process of manufacture. If the buyer relied, and, under the circumstances, had reason to rely, on the judgment of the seller, who was the manufacturer or maker of the article, the law implies a warranty that it is reasonably fit for the use for which it was designed; the seller at the time being informed of the purpose to devote it to that use. . . . In the cases of sales by manufacturers of their own articles for particular purposes, communicated to them at the time, the argument was uniformly pressed that, as the buyer could have required an express warranty, none should be implied. But plainly such an argument impeaches the whole doctrine of implied warranty, for there can be no case of a sale of personal property in which the buyer may not, if he chooses, insist on an express warranty against latent defects.”

In that case there was a written contract as to what the parties were to do in completing the bridge, in connection with the work already done by the bridge company. There was no express warranty about the character of the work the bridge company had already done. But the bridge company knew that Hamilton was to use the structure for a particular purpose. Its internal construction and adaptability were known to the bridge company, but presumptively could be known to Hamilton only after using it. Of this situation the learned judge said: “The buyer did not, because, in the nature of things, he could not, rely on his own judgment: and, in view of the circumstances of the case and the relations of the parties, he must be deemed to have relied on the judgment of

the company, which alone of the parties to the contract had or could have knowledge of the manner in which the work had been done. The law therefore implies a warranty that this false work was reasonably suitable for such use as was contemplated by both parties. It was constructed for a particular purpose, and was sold to accomplish that purpose; and it is intrinsically just that the company, which held itself out as possessing the requisite skill to do work of that kind, and therefore as having special knowledge of its own workmanship, should be held to indemnify its vendee against latent defects arising from the mode of construction, and which the latter, as the company well knew, could not by any inspection discover for himself.”

In *Pullman's Palace Car Co. v. Metropolitan Street R. Co.* 157 U. S. 94, 39 L. ed. 632, 15 Sup. Ct. Rep. 503, the contract for the building of the cars by the Pullman company was in writing, containing specifications as to the thing to be made and shipped,—as much so as in the case at bar. Notwithstanding the fact that the contract provided for an inspection of the cars after completion, by the purchaser's expert engineer, before they were delivered, it was contended by the vendee, when sued for the purchase money, that there was an inherent defect in the brakes furnished for the cars, not discoverable by inspection, and that there was an implied warranty of such latent defects in the cars. As the Pullman company was advised that the cars to be manufactured were to be operated on a particular line of road, with peculiar, acute curves, requiring brakes especially adapted thereto, it was held that there was an implied warranty on the part of the manufacturer that the brakes constructed by it as a part of the machinery would meet the requirements of the purchaser. Inasmuch as the defendant had accepted the cars, and the only defect was the insufficiency of the brakes, which the vendee had the means of supplying, it was ruled that it could recoup for the difference which it would cost to equip the cars with such obtainable brakes.

The utility of the machinery furnished by the plaintiff company in this case consisted entirely in the adaptability of the drill bit to accomplish the required boring in the peculiar strata formation where Mallory was exploring for coal. While the plaintiff submitted in writing an itemized specification of the equipment to be furnished by it, and the cost thereof, and Mallory agreed by the acceptance to pay the sum specified, it was practically contemporaneous with the information given the manufacturer by the purchaser as to the particular use to which it was to be applied, and with the knowl-

edge that, unless it accomplished the desired work, it would be practically useless to the purchaser. It does seem to me, therefore, that if there can be a case where the law writes into the executory contract, where the manufacturer undertakes to manufacture a machine with full knowledge of the

purpose for which it is bought, a warranty that it is fit for the specified use, and when the manufacturer knows that the vendee is relying upon the manufacturer's superior knowledge of the fitness of the machine, this is clearly a proper case for the application of this wholesome rule of law.

IOWA SUPREME COURT.

Ben B. COTANT

v.

BOONE SUBURBAN RAILWAY COMPANY, *Appt.*

(125 Iowa, 46.)

1. A railway company which expressly or by implication invites its passengers to use a stile over a wire fence in leaving its grounds is bound to use at least ordinary care in seeing that it is fit for the purpose intended, although the stile was not erected by it, and the defective part is not on its property, but where it has no right to go to make inspection or repairs.
2. Damages for future suffering because of a negligent injury may be allowed where plaintiff is still suffering at the time of trial, and experts testify that the injury will probably be permanent.
3. The questions of the provision of a reasonably safe and accessible exit from a railroad terminal, and of the negligence of a passenger injured by attempting to use a stile over a wire fence for that purpose, are for the jury, where the evidence shows that there was an opening through the fence 40 rods away, and another 400 or 500 feet away, not in sight, which might have been closed on the day of the accident.
4. Passengers have a right to assume that means of egress from the carrier's terminal grounds are reasonably safe.
5. A carrier cannot delegate to another the duty of seeing that the means of egress from its terminal grounds are reasonably safe.

(April 6, 1904.)

APPEAL by defendant from a judgment of the District Court for Boone County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Affirmed.*

The facts are stated in the opinion.

Messrs. W. W. Goodykoontz and Dowell & Parrish, for appellant:

The street railway company did not erect

the stile; had not assumed control thereof; it had no right to enter on the grounds of the North Western Railway Company, either to inspect, repair, or rebuild the stile; and it therefore owed the plaintiff no duty to inspect, repair, or rebuild it.

3 *Thomp. Neg.* § 3352; *Veeder v. Little Falls*, 100 N. Y. 343, 3 N. E. 306; *Quimby v. Boston & M. R. Co.* 69 Me. 340; *Texas & N. O. R. Co. v. Dessommes* (Tex.) 15 S. W. 806.

Messrs. C. T. Cotant and Gamoe & Hollingsworth, for appellee:

Plaintiff was not required to take more than a casual observation of the stile before attempting to cross it. He would be justified in assuming defendant had done its part.

Pennsylvania Co. v. Marion, 123 Ind. 415, 7 L. R. A. 687, 18 Am. St. Rep. 330, 23 N. E. 973; *Lucas v. Pennsylvania Co.* 120 Ind. 205, 16 Am. St. Rep. 323, 21 N. E. 972.

The conduct of defendant placed plaintiff in the position in which he was, and what would amount to ordinary care on plaintiff's part would be negligence when viewed from the standpoint of defendant.

Hall v. Murdock, 114 Mich. 233, 72 N. W. 150.

Plaintiff would not be compelled to forego the use of the stile, even though there were some apparent dangers in its use, if he exercised care commensurate with the added danger.

Pennsylvania Co. v. Marion, 123 Ind. 415, 7 L. R. A. 687, 18 Am. St. Rep. 330, 23 N. E. 973.

Where a person is injured, without neglect on his part, by a defect in a way or passageway over which he has been induced to pass, for a lawful purpose, by an invitation, express or implied, he can recover damages for the injury sustained, against the party so inviting, or being in fault for the defect.

NOTE.—As to duty of carrier to provide safe means at entrance to and exit from its stations, see also, in this series, *Delaware, L. & W. R. Co. v. Trautwein*, 7 L. R. A. 435.

As to measure of care which a carrier must exercise to keep its platforms and approaches

safe, see *note* to *Johns v. Charlotte, C. & A. R. Co.* 20 L. R. A. 520.

As to duty to maintain safe approaches beyond its premises, see *note* to *Skottowe v. Oregon Short Line & U. N. R. Co.* 16 L. R. A. 393,

Tobin v. Portland, S. & P. R. Co. 59 Me. 183, 8 Am. Rep. 415; *Carleton v. Franconia Iron & Steel Co.* 99 Mass. 216; *Skottowe v. Oregon Short Line & U. N. R. Co.* 22 Or. 430, 16 L. R. A. 593, 30 Pac. 222; *Corrigan v. Elsinger*, 81 Minn. 42, 83 N. W. 492; *Breeze v. Powers*, 80 Mich. 172, 45 N. W. 130; *Stewart v. Cincinnati, W. & M. R. Co.* 89 Mich. 315, 17 L. R. A. 539, 50 N. W. 852; *Burnett v. Burlington & M. R. Co.* 16 Neb. 332, 20 N. W. 280; *Lillstrom v. Northern P. R. Co.* 53 Minn. 464, 20 L. R. A. 587, 55 N. W. 624; *Emery v. Minneapolis Industrial Exposition*, 56 Minn. 460, 57 N. W. 1132.

Deemer, Ch. J., delivered the opinion of the court:

Defendant owns and operates an electric railway from the city of Boone to the Des Moines river, near what is known as the "High Bridge" of the Chicago & Northwestern Railway, and on the 4th day of July, 1901, was carrying passengers over the said line for hire. The west or river end of this railway ran for some distance parallel to, and immediately north of, the right of way of the Chicago & Northwestern Railroad Company, and the rights of way of the two companies were separated by a wire fence. Just prior to the 4th day of July, 1901, one Spraker who owned some land south of the steam railway right of way, which he used as pleasure ground, constructed a stile over this wire fence, which was made by placing two ladders, each 8 or 10 feet in length, and 14 or 16 inches in width, in such a position as that two ends met over and above the fence, while the other ends were set in the earth on either side thereof. Boards running parallel with the sides of the ladders were nailed thereon, and strips or cleats at short intervals were fastened to these boards. There were no railings or hand-rails, and no lateral supports. Plaintiff took one of defendant's trains in the city of Boone, rode out to the western terminal at or near the Des Moines river, alighted from the car, and, seeing this stile, which was near where the train stopped, attempted to pass over it, and, as he started to descend from the top, caught his foot in such a way as that he was thrown to the ground, and received the injuries of which he complains. He said on the witness stand that as he took the second step down, and placed the weight on his foot, something broke or turned with him causing him to lose his balance and to fall to the ground; that his foot was caught and held, so that his head and shoulders struck the ground. The alleged grounds of negligence are that "the said stile was without railing or means of lateral support, and that the defendant, its

agents or servants, so carelessly and negligently constructed, appropriated, maintained, and used said unsafe and dangerous ladder and stile, and so negligently and carelessly failed, refused, and neglected to assist plaintiff at any time or in any manner in getting over said ladders or stile or barbed-wire fence, in departing from the defendant's said grounds, and so failed, refused, and neglected to provide safe means of egress and ingress from or to said grounds, as to cause each and all of the damages set out in the petition; that said stile or ladder was so defectively constructed of light and defective timber as to break and give way, and thus throw plaintiff to the ground and break his leg, causing the injury complained of." Defendant denied any negligence on its part, and pleaded contributory negligence on the part of the plaintiff. Many points are relied upon for a reversal, the more important of which we shall consider in the order presented by appellant's counsel in their brief.

The first proposition made by them is that, as defendant did not erect the stile, had not assumed control thereof, and had no right to enter upon the land of the steam railway, either to inspect or to repair it, it owed plaintiff no duty with respect thereto, and cannot be charged with negligence either in the construction or maintenance of this device. The trial court gave the following, among other instructions: "You are instructed that, after completing its road, defendant was under no obligations to build or erect a stile or stairs over the fence from the right of way leading over and into the right of way of the Chicago & Northwestern Railway; but, if you find from the evidence that said stile in question was constructed partly on defendant's grounds and partly on the grounds of the Chicago & Northwestern Railway Company, and that the same was used by the passengers from defendant's cars as the usual means of egress from said grounds, and such fact was known to defendant, and defendant permitted the same, and there was no other reasonable or safe way of egress from said grounds, then the fact that said stile was partially upon the grounds of the Chicago & Northwestern Railway Company would not relieve defendant of the obligation to exercise ordinary care in keeping said stile in a reasonably safe condition, if it allowed the same to remain and be used as the only reasonable means of egress from its grounds." From the statement already made, it will be observed that the accident occurred on that part of the stile which was over and upon the right of way of the Chicago & Northwestern Railroad, and it is contended that defendant's responsibility

ceased when the passenger passed upon the grounds of another carrier; that, at most, it was under no other duty to the plaintiff than to warn him of danger of which it had notice or knowledge, and that its liability is no greater than if the stile had been erected jointly by the steam railway company and the defendant. The defendant did not erect the stile, and there is no evidence that the Chicago & Northwestern Railroad Company had anything to do with it. Little need be said in support of the proposition that this stile was a dangerous contrivance. The jury so found, and we have no doubt of the correctness of its finding. But defendant strenuously insists that, as it had no right to enter upon the grounds of the other company to repair the device, it cannot be held liable for any injury that may have resulted from the use thereof. Ordinarily this proposition is true, but it must be remembered that this contrivance, while partly on or over the land of the Chicago & Northwestern Railroad Company, was a single, complete device, and formed a continuous passageway over the fence; and, if defendant invited its passengers to use it, either expressly or by implication, it was bound to at least ordinary care in seeing that it was fit for the purpose intended. That it had no right to go upon the grounds of the Chicago & Northwestern Railroad Company to make inspection or repairs is not controlling. Its passengers were not bound to ascertain at their peril what part of this stile was on the premises owned by another company, and what right defendant had to use it. Defendant undoubtedly had the right to make arrangements with this other company for the construction of a stile, and for permission to its passengers to cross its right of way; and, having invited the traveling public to use the device, it will not be permitted to say that it had no right to erect part of the contrivance upon grounds of another company. It will not do to say that the traveling public must inquire in such cases as to the right the carrier had to pass upon the grounds of another company to make repairs. This contrivance was used by defendant's passengers alone. It was not built to accommodate the steam railway or its passengers. The use made of the railway right of way was permissive only. That company had no interest in the device, did not profit therefrom in any way, and was not using it for the benefit of its patrons. It did not owe the plaintiff or the defendant company any duty whatever with reference to this stile, and the plaintiff was not going upon its grounds for the purpose of taking its trains, or for any other purpose than simply to cross them. In so

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doing, he was nothing more than a licensee, and the steam railway company was under no obligation to look after his safety in coming upon its premises. The use made of the stile was for the joint benefit of the defendant company and the owner of the pleasure grounds. The jury was justified in finding that the defendant company knew that it was being used by its passengers, and that it was in a dangerous condition. It was also justified in finding, on account of its position and the manner in which the defendant stopped its trains and operated its road, that there was an implied invitation to its passengers to use the device in going to the High Bridge and to the picnic grounds of Spraker, the man who constructed the stile. Had the contrivance been constructed by the defendant and the Chicago & Northwestern Railroad Company jointly for the use of the passengers of either line, both would undoubtedly have been liable for an injury received by a passenger. The rule seems to be "that the depot and connected grounds, visited by coming and going passengers, should be fitted up with a careful regard to their comfort and safety. The approaches, the tracks around, the platforms and places for entering and leaving the cars, the passages to the cars, every spot likely to be visited by passengers seeking the depot, waiting at it for trains or departing, should be made safe, and kept so." Bishop, *Noncontract Law*, § 1086. See also *Lucas v. Pennsylvania Co.* 120 Ind. 205, 16 Am. St. Rep. 323, 21 N. E. 972, and cases cited. Here there was no liability on the part of the steam railway company, but the situation was such as to make it natural for a person alighting from defendant's train as plaintiff did, intending to go to the bridge or to the pleasure grounds, to use the stile in passing over the fence. Defendant was bound to know that persons alighting from its trains would likely use this device in passing to their destination, and it was its duty to use at least ordinary care in seeing that it was properly constructed and in good repair. The following cases lend support to our conclusions on this point: *Cross v. Lake Shore & M. S. R. Co.* 69 Mich. 363, 13 Am. St. Rep. 399, 37 N. W. 361; *Collins v. Toledo, A. A. & N. M. R. Co.* 80 Mich. 390, 45 N. W. 178; *East Tennessee, V. & G. R. Co. v. Watson*, 94 Ala. 634, 10 So. 228; *Delaware, L. & W. R. Co. v. Trautwein*, 52 N. J. L. 169, 7 L. R. A. 435, 19 Am. St. Rep. 442, 19 Atl. 178.

2. The defendant asked an instruction to the effect that, if the jury found the injury was due to a defective step or board in the stile, it would not be liable, unless it knew, or in the exercise of ordinary care should

have known, of this defective condition. This thought was embodied in one of the instructions given by the trial court, and defendant has no cause of complaint.

3. Instruction 10, which reads as follows, is complained of: "If you find from the evidence that the stile in question was constructed partly upon the ground of defendant company, and that the same was ordinarily and generally used by those who were passengers on defendant company's cars as a means of egress from said grounds, where the railway of defendant terminated, and that there was no other reasonable means of egress from said grounds, and that said defendant company knew that said stile was so used by passengers upon its cars in leaving said grounds, and that it permitted them to do so; and you further find that said stile, by reason of its narrowness, or by reason of the fact that there was no railing thereon or by reason of the fact that said stile was constructed of light and defective lumber, if such you find the fact to be, was not such means of egress from said grounds as an ordinary person would provide under similar circumstances,—you will be justified in finding the defendant guilty of negligence, as charged. If, however, you find that the said stile was such as an ordinary person would employ under similar circumstances as a means of egress from said grounds, then there would be no negligence upon the part of defendant." The criticism is that there was no evidence upon which to base it. Suffice it to say that we find in the record ample testimony to justify the instruction.

4. Instruction 19, relating to the measure of damages, is also challenged. It reads as follows: "If you find him entitled to recover, he should be allowed a fair and reasonable compensation for his injuries. In estimating his damage, no precise rule can be given for the amount to be allowed, as they are not in their nature susceptible of exact money valuation. You are to use your own sense and judgment, and be guided by the evidence, in allowing him such sum as will reasonably compensate him. In making up this amount, you should award, as may appear from the evidence, the reasonable value of the time lost because of the injury, the amount he has paid for medical attendance and nursing, and fair compensation for the bodily pain and suffering caused by the said injury; and if you further find that plaintiff's injuries are permanent, and will, to some extent, disable him in the future, and cause him pain and suffering hereafter, you should also allow him such further sum as, paid now in advance, will reasonably

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compensate him for such future disability, pain, and suffering as the evidence shows it is reasonably probable will result to him in the future from such injuries." The first point made with reference to this is that there is no testimony on which to base an allowance for future disability. The evidence clearly shows that plaintiff was suffering from his injuries at the time of trial, and the experts testified that his injury would probably be permanent. Plaintiff testified that he was earning \$50 per month before the injury, and had not been able to earn more than \$10 since. This was sufficient to take the case to the jury. *Smith v. Sioux City*, 119 Iowa, 50, 93 N. W. 81; *Winter v. Central Iowa R. Co.* 80 Iowa, 443, 45 N. W. 737; *Ashley v. Sioux City (Iowa)* 93 N. W. 303. Next it is argued that the instruction runs counter to the rules announced in *Fry v. Dubuque & S. W. R. Co.* 45 Iowa, 416, and *Laird v. Chicago, R. I. & P. R. Co.* 100 Iowa, 336, 69 N. W. 414. A reading of these cases will sufficiently demonstrate the incorrectness of this proposition. Abstractly considered, the instruction has support in *Bailey v. Centerville*, 108 Iowa, 20, 78 N. W. 831; *Miller v. Boone County*, 95 Iowa, 5, 63 N. W. 352; *Smith v. Sioux City*, 119 Iowa, 50, 93 N. W. 81.

5. Lastly it is argued that the verdict is contrary to the instructions. The principal contention here is that there was another means of egress from the defendant's grounds, whereby plaintiff could have reached his destination with safety. There was testimony to the effect that there was an opening in a barbed-wire fence 40 rods away, but it was not a place which afforded a reasonable means of egress from defendants terminal. Another opening in the fence, 400 or 500 feet away, was spoken of by one witness, but it was not in sight, and the witness said that it may have been closed on the day of the accident. It was clearly a question for the jury to say whether or not there was another reasonably safe, and accessible place of exit from the grounds where the railway terminated, and as to whether or not plaintiff was negligent in not taking it.

In conclusion, we may say that the case was submitted to the jury on two theories: One, that the stile, by reason of its narrowness, or for want of railings, or because it was constructed of light or defective materials, was not such means of egress as an ordinarily prudent person would provide, in which event defendant might be found guilty of negligence; and the other, that the injury was due to a defective board in said stile, in which event defendant would not be guilty of negligence, unless it

knew, or in the exercise of reasonable care should have known, of its defective condition. The latter theory, was bottomed on the thought that the stile itself was not dangerous, save as it had a defective board. What we have said in the first division of this opinion has reference to this last contention. On the other proposition, defendant was liable for the defective condition of the stile, although it was erected by a stranger. Defendant had full knowledge of the construction of the stile, and impliedly invited its passengers to use it. Under such circumstances, its liability is the same as if it had itself set up and maintained the device. See cases hitherto cited and *McDonald v. Chicago & N. W. R. Co.* 26 Iowa, 124, 95 Am. Dec. 114; *Beard v. Connecticut & P. Rivers R. Co.* 48 Vt. 101; *Gilmore v. Philadelphia & R. R. Co.* 154 Pa. 375, 25 Atl. 774; *Watson v. Ozanna Land Co.* 92 Ala. 320, 8 So. 770. This rule is bottomed on the proposition that the duty of a carrier of passengers does not end when the passenger has alighted from its cars. It must also provide reasonably safe means of access in and from its stations or terminals for the use of its passengers, and the passengers have a right to assume that the means of egress provided are reasonably safe. This duty it cannot delegate to another so as to relieve itself from respon-

sibility. See cases hitherto cited. Defendant's contention that it is not liable because the stile was erected by a stranger is unsound in principle, and not sustained by authority. When it invited its passengers to use this stile, it, in effect, represented that it was reasonably safe for the purposes intended; and, when injury occurred by reason of its unsafe or faulty construction, it should not be allowed to shield itself behind another, and to say that it did not know of its defective construction. *Gulf, C. & S. F. R. Co. v. Glenk*, 9 Tex. Civ. App. 599, 30 S. W. 278, and cases cited.

The instructions were even more favorable to the defendant than it was entitled to. We are not to be understood as approving all of them. Suffice it to say that defendant was in no manner prejudiced either by those given, or by the refusal of the court to give those asked by it. Our observations in the second paragraph of this opinion must be construed with reference to these suggestions.

There is no prejudicial error in the record, and the judgment must be, and is, affirmed.

Bishop, J., took no part.

Petition for rehearing overruled.

TEXAS SUPREME COURT.

**James W. SWAYNE et al., Plffs. in Err.,
v.
LONE ACRE OIL COMPANY.**

(.....Tex.....)

1. The life estates created by statute, giving a surviving husband or wife one-third interest for life in the real estate of the other, are subject to the incidents of common-law life estates, although they are not the same as the common-law estates; and the life tenant is therefore impeachable for waste.
2. One entitled to an undivided life estate under a statute giving a surviving husband or wife a one-third interest in the real estate of the other cannot demand absolutely any part of the production of oil wells subsequently opened upon the property by the remainder-men, but is entitled only to the income upon one third of the oil produced.

(April 27, 1905.)

NOTE.—As to right of dower in mines, see, in this series, *Seager v. McCabe*, 16 L. R. A. 247, and note.

As to rights of life tenants generally in oil in place, see, in this series, *Koen v. Bartlett*, 69 L. R. A.

ERROR to the Court of Civil Appeals for the First Supreme Judicial District to review a judgment modifying a judgment of the District Court for Jefferson County in plaintiffs' favor in an action brought to establish an interest in petroleum produced from land in which plaintiffs claimed an undivided interest. *Affirmed*.

The facts are stated in the opinion.

Messrs. Amos L. Beaty, W. D. Gordon, and E. C. McLean, for plaintiffs in error:

The widow's estate is not confined to the surface of the land, but includes the minerals beneath; and the case must be adjudged accordingly.

Tex. Rev. Stat. art. 1689; *Benavides v. Hunt*, 79 Tex. 383, 15 S. W. 396; *Koen v. Bartlett*, 41 W. Va. 559, 31 L. R. A. 128, 56 Am. St. Rep. 884, 23 S. E. 664; *Seager v. McCabe*, 92 Mich. 186, 16 L. R. A. 247, 52 N. W. 299; *Blakley v. Marshall*, 174 Pa.

31 L. R. A. 128; *Williamson v. Jones*, 25 L. R. A. 222, with note as to nature of property in mineral oil and gas, also 38 L. R. A. 694; *Marshall v. Mellon*, 35 L. R. A. 816, and *Wilson v. Hughes*, 39 L. R. A. 292.

425, 34 Atl. 564; *Wilson v. Youst* (*Wilson v. Hughes*) 43 W. Va. 826, 39 L. R. A. 292, 28 S. E. 781; *MacSwinney*, Mines, 32; *Tiedeman*, Real Prop. 2; Co. Litt. 4a; 1 Washb. Real Prop. 3; 2 Bl. Com. 16-18, 144; *Lewis v. Branthwaite*, 2 Barn & Ad. 437.

Since the life estate comes by inheritance, and vests solely by operation of law, the widow, though having only a life estate, might drill for oil without being guilty of waste, and is consequently entitled to her proportion of the oil produced, less the expenses of producing and marketing.

Tex. Rev. Stat. art. 1689; *Higgins Oil & Fuel Co. v. Snow*, 51 C. C. A. 267, 113 Fed. 439; *Seager v. McCabe*, 92 Mich. 186, 16 L. R. A. 247, 52 N. W. 299; *Branbridge*, Mining, 55; 4 Wait, Act. & Def. 424.

The remainder-man having drilled wells and devoted the land to mining purposes, the widow is entitled to her proportion of the proceeds of the oil, after deducting the expenses of producing and marketing, regardless of whether she would have been allowed to sink wells and extract oil.

Higgins Oil & Fuel Co. v. Snow, 51 C. C. A. 267, 113 Fed. 439; *Koen v. Bartlett*, 41 W. Va. 559, 31 L. R. A. 128, 56 Am. St. Rep. 884, 23 S. E. 664; *Gillum v. St. Louis, A. & T. R. Co.* 5 Tex. Civ. App. 338, 23 S. W. 717; *Lenfers v. Henke*, 73 Ill. 405, 24 Am. Rep. 263; *Priddy v. Griffith*, 150 Ill. 560, 41 Am. St. Rep. 397, 37 N. E. 999; *Allen v. McCoy*, 8 Ohio, 418.

The life estate cast by the Texas statute does not carry the inherent restrictions as to use that hedge about conventional life estates or dower and curtesy, and is not impeachable for waste.

In conventional life estates, if the grantor did not prohibit the grantee, or life tenant, the latter was not punishable for waste prior to the statutes of Marlbridge and Gloucester.

28 Am. & Eng. Enc. Law, p. 891; 2 Bl. Com. 123.

It is in every instance a conventional "life estate" to which the doctrine of waste has been applied.

Blakley v. Marshall, 174 Pa. 425, 34 Atl. 564; *Wilson v. Youst* (*Wilson v. Hughes*) 43 W. Va. 826, 39 L. R. A. 292, 28 S. E. 781; *Marshall v. Mellon*, 179 Pa. 371, 35 L. R. A. 816, 57 Am. St. Rep. 601, 36 Atl. 201.

There was at common law "a life estate of the legal kind, as contradistinguished from conventional."

2 Bl. Com. p. 125.

A tenant for life without impeachment for waste, and a tenant in tail after possibility of issue extinct, seem to stand upon 69 L. R. A.

precisely the same footing in regard to all questions of waste.

Atty. Gen. ex rel. Churchill v. Marlborough, 3 Madd. 539; *Smythe v. Smythe*, 2 Swanst. 251; *Bridges v. Stephens*, 2 Swanst. 157, note; *Coffin v. Coffin*, Jac. 72; 4 Kent, Com. 12th ed. 78, note b.

The legal life estate in question under our statute—a freehold estate of inheritance,—does not "necessarily" imply impeachment for waste.

The congress of Texas did not adopt the common law of England as a rule of property. The common law was adopted only as a rule of decision.

Considering that the Republic up to that time had been under the civil law, where an estate of this character was under no restrictions as to use, but where the usufructuary had a right to seek for and open every kind of mine (1 Domat, Civil Law, 843; 2 Domat, Civil Law, 945, 968), is it not reasonable that congress intended to fix the time or duration in which the estate could be enjoyed, rather than to hedge about with limitations the use thereof inherent in certain estates of this character at common law?

Cartwright v. Hollis, 5 Tex. 164; *Thompson v. Duncan*, 1 Tex. 489; *Bradley v. McCrabb*, Dallam (Tex.) 508; *Campbell v. Everts*, 47 Tex. 102; *Klein v. Gehrung*, 25 Tex. Supp. 238, 78 Am. Dec. 565; 3 Kent, Com. 448; 2 Bl. Com. p. 403; *Howard v. North*, 5 Tex. 298, 51 Am. Dec. 769.

The widow's estate is equal to the children's in all of its uses.

McGowan v. Bailey, 179 Pa. 470, 36 Atl. 325; *Marshall v. Mellon*, 179 Pa. 371, 35 L. R. A. 816, 57 Am. St. Rep. 601, 36 Atl. 201; *Blakley v. Marshall*, 174 Pa. 425, 34 Atl. 564; *Wilson v. Youst* (*Wilson v. Hughes*) 43 W. Va. 826, 39 L. R. A. 292, 28 S. E. 781; *Lunn v. Oslin*, 96 Tenn. 28, 33 S. W. 561; *Owen v. Hyde*, 6 Yerg. 334, 27 Am. Dec. 467; *Gaines v. Green Pond Iron Min. Co.* 33 N. J. Eq. 612; *Sayers v. Hoskinson*, 110 Pa. 473, 1 Atl. 308; *Snyder*, Mines, § 941.

When the remainder-man, as such and as cotenant, entered upon the land before partition and without the joinder of the life tenant, and drilled oil wells, and devoted the hitherto unused land to mining purposes, thereby destroying all other possible uses, mining thereby became a lawful mode of use, and the proceeds, when severed and sold, became a product of the land, and the accounting is due on a basis of profit, and not corpus.

Gillum v. St. Louis, A. & T. R. Co. 5 Tex. Civ. App. 338, 23 S. W. 717; *Koen v. Bartlett*, 41 W. Va. 559, 31 L. R. A. 128, 56 Am. St. Rep. 884, 23 S. E. 664; *Seager v. Mc*

Cabe, 92 Mich. 186, 16 L. R. A. 247, 52 N. W. 299; *Donahue*, Petroleum & Gas, chap. 4, § 3.

Messrs. Smith, Crawford, & Sonfield, for defendant in error:

The common law was adopted as the rule of property in Texas in 1840, and has been in force ever since, and was in force in 1848, when the statute casting an estate for life on the surviving husband or wife was enacted. Therefore, the estate conferred by the statute not being further defined than "an estate for life," the character of the estate was such as had been fixed and construed by the common law.

Hartley's Digest, art. 127; *Black, Constr. & Interpretation of Laws* p. 130; *McCool v. Smith*, 1 Black, 467, 17 L. ed. 220 *United States v. Jones*, 3 Wash. C. C. 209, Fed. Cas. No. 15,494; *United States v. Trans-Missouri Freight Asso.* 24 L. R. A. 73, 4 Inters. Com. Rep. 443, 7 C. C. A. 58, 19 U. S. App. 36, 58 Fed. 58; *Kircher v. Murray*, 8 C. C. A. 448, 23 U. S. App. 214, 60 Fed. 50; *Boone v. Hulsey*, 71 Tex. 189, 9 S. W. 531; *Babb v. Carroll*, 21 Tex. 771.

Where the statute confers upon the surviving wife "an estate for life in one third of the lands of her deceased husband," such estate is no greater than that of a life tenant at common law.

Carroll v. Carroll, 20 Tex. 744; *Hendrix v. McBeth*, 61 Ind. 473, 28 Am. Rep. 680; *Tiedeman*, Real Prop. § 72; 1 Washb. Real Prop. 4th ed. p. 139.

A tenant for life has only the right to full enjoyment and use of the land and all its temporary profits during his estate therein. He is entitled to none but temporary profits, and is prohibited from doing anything with the land which would constitute waste.

2 Bl. Com. p. 122; *Tiedeman*, Real Prop. § 72; *Ft. Worth & N. O. R. Co. v. Pearce*, 75 Tex. 281, 12 S. W. 864; *Cook v. Caswell*, 81 Tex. 678, 17 S. W. 385; *Barnsdall v. Boley*, 119 Fed. 195.

Waste is an unlawful act or omission of duty which results in permanent injury to the inheritance, and any act which does damage to the reversioner, and is not one of the ordinary uses to which the land is put, is waste.

Tiedeman, Real Prop. §§ 72, 73.

Oil is a mineral; oil *in situ* is a part of the land,—the inheritance.

Bryan, Petroleum & Natural Gas, p. 21; *Brown v. Spilman*, 155 U. S. 669, 39 L. ed. 305, 15 Sup. Ct. Rep. 245; *Gerkins v. Kentucky Salt Co.* 100 Ky. 734, 66 Am. St. Rep. 370, 39 S. W. 444; *People's Gas Co. v. Tyner*, 131 Ind. 277, 16 L. R. A. 443, 31 Am. St. Rep. 436, 31 N. E. 59; *Williamson v. Jones*, 43 W. Va. 562, 38 L. R. A. 694, 64 69 L. R. A.

Am. St. Rep. 891, 27 S. E. 410; *Marshall v. Mellon*, 179 Pa. 371, 35 L. R. A. 816, 57 Am. St. Rep. 601, 36 Atl. 201; *Wilson v. Youst (Wilson v. Hughes)* 43 W. Va. 826, 39 L. R. A. 292, 28 S. E. 781.

A tenant for life has no ownership or interest in minerals underlying the land, unless at the time that the life estate is cast, or prior thereto, mines have been opened on the land.

Marshall v. Mellon, 179 Pa. 371, 35 L. R. A. 816, 57 Am. St. Rep. 601, 36 Atl. 201; *Blakley v. Marshall*, 174 Pa. 425, 34 Atl. 564; *Stoughton v. Leigh*, 1 Taunt. 402; *Coates v. Cheever*, 1 Cow. 460; *Williamson v. Jones*, 43 W. Va. 562, 38 L. R. A. 694, 64 Am. St. Rep. 891, 27 S. E. 410; *Westmoreland Coal Co.'s Appeal*, 85 Pa. 344; *Gaines v. Green Pond Iron Min. Co.* 33 N. J. Eq. 603; *Reed v. Reed*, 16 N. J. Eq. 248; *Hendrix v. McBeth*, 61 Ind. 473, 28 Am. Rep. 680; *Billings v. Taylor*, 10 Pick. 460, 20 Am. Dec. 533; *Gerkins v. Kentucky Salt Co.* 100 Ky. 734, 66 Am. St. Rep. 370, 39 S. W. 444; *Tiedeman*, Real Prop. §§ 73-75; *Donahue*, Petroleum & Gas, p. 41, § 1; *Higgins Oil & Fuel Co. v. Snow*, 51 C. C. A. 267, 113 Fed. 438; *Barnsdall v. Boley*, 119 Fed. 195; *Bond v. Godsey*, 99 Va. 564, 39 S. E. 215; *Maher v. Maher*, 73 Vt. 243, 50 Atl. 1063; *Neel v. Neel*, 19 Pa. 323; *Franklin Coal Co. v. McMillan*, 49 Md. 549, 33 Am. Rep. 280; *Moore v. Rollins*, 45 Me. 493; *Griffin v. Fellows*, 81* Pa. 114; 4 Kent, Com. p. 41.

The life tenant's possession and right where no mines have been opened when the life estate is cast are only in the surface.

Benavides v. Hunt, 79 Tex. 390, 15 S. W. 396; *Ames v. Ames*, 160 Ill. 599, 43 N. E. 592; *Caldwell v. Fulton*, 31 Pa. 475, 72 Am. Dec. 760; *Caldwell v. Copeland*, 37 Pa. 427, 78 Am. Dec. 436.

If plaintiffs, holders of the life estate of Mrs. Snow, are entitled to any share in the oil or other minerals, such right is limited to interest on the investment of the net proceeds of one eighteenth of the oil produced.

Blakley v. Marshall, 174 Pa. 425, 34 Atl. 564; *Lenfers v. Henke*, 73 Ill. 405, 24 Am. Rep. 266; *Dickin v. Hamer*, 1 Drew. & S. 284; *Wilson v. Youst (Wilson v. Hughes)* 43 W. Va. 826, 39 L. R. A. 292, 28 S. E. 781.

Messrs. Greer, Greer, Nall, & Parker and Crane, Greer, & Wharton also for defendant in error:

Where a statute is enacted, using a well-understood, common-law, technical phrase, the statute will be construed as using the phrase in its technical sense, and with the same meaning it had at common law.

Cayce v. Curtis, Dallam (Tex.) 404;

Williams v. State, 12 Tex. App. 395; *Monroe v. State*, 23 Tex. 210; *Powell v. State*, 17 Tex. App. 351; Black, *Constr. & Interpretation of Laws*, p. 130; *Laird v. Briggs*, L. R. 19 Ch. Div. 22; *Adams v. Turrentine*, 30 N. C. (8 Ired. L.) 147; *McCool v. Smith*, 1 Black, 467, 17 L. ed. 220; *United States v. Jones*, 3 Wash. C. C. 209, Fed. Cas. No. 15,494; *United States v. Trans-Missouri Freight Asso.* 24 L. R. A. 73, 4 Inters. Com. Rep. 443, 7 C. C. A. 58, 19 U. S. App. 36, 58 Fed. 58; *State v. Phelps*, 24 La. Ann. 493; *State v. Whitener*, 93 N. C. 590.

Gaines, Ch. J., delivered the opinion of the court:

This is an action of trespass to try title, and was brought by the plaintiffs in error to recover of the defendant in error an estate for the life of Annie E. Snow in an undivided one eighteenth interest in a small parcel of the John A. Veatch survey, and also to recover a like proportion of the net value of certain petroleum which had been extracted from the land. The plaintiffs recovered in the trial court to the full extent of their claim. Upon appeal the court of civil appeals affirmed the judgment as to the land, but reversed and modified it as to the recovery for the oil. The case was tried by the court upon an agreed statement of facts, together with a written stipulation, signed by the attorneys for both parties, as to the judgment to be rendered, according to the determination of certain questions of law affecting the respective rights of the plaintiffs and the defendant.

We will state the facts necessary to a decision of the case: and this as briefly as practicable. It appears from the agreed statement that one Andrew A. Veatch inherited from his father a sixth undivided interest in the Veatch survey of 3,400 acres in Jefferson county, of which his father was the original grantee; that upon the death of Andrew, in 1871, his interest descended to his surviving widow, Annie E., and their two children,—that is to say, one third to each of the children in fee, and a life estate in the other third to the widow, with remainder to the children; that she subsequently intermarried with Henry A. Snow; and that by purchase the plaintiffs are the owners of her interest. It also appears that the defendant is the owner of the entire tract in controversy save the life estate which descended to Mrs. Veatch, the widow of Andrew A. Veatch. The entire Veatch survey was unoccupied and unclosed at the death of Andrew Veatch, but was adapted to agricultural and pastoral purposes. No oil wells had been or were being bored upon it at that time. Oil, however, was discovered upon it in 1891, 60 L. R. A.

and the part in controversy is now very valuable for the oil which it is producing.

The stipulation of the parties as to the judgment to be rendered is as follows:

"(1) Upon the foregoing statement of facts judgments shall be rendered by the court on the issue of title as to the land described in plaintiffs' petition. (2) In case it is held by the court that the plaintiffs have no interest in the land, then, of course, judgment shall be rendered that the plaintiffs take nothing by their suit, and pay the costs thereof. (3) In case it shall be held by the court that they are entitled to an estate for the life of said Annie E. Snow in one eighteenth of the land in controversy without any interest in the oil or its proceeds, then the plaintiffs must get their quantum of land from the Gladys City Oil, Gas, & Manufacturing Company, and judgment shall be rendered that the plaintiffs take nothing by their suit, and pay the costs thereof. Likewise, if it shall be held that the plaintiffs must take their quantum of the land out of the land owned now by the Gladys City Oil, Gas, & Manufacturing Company, or out of that sold by it subsequent to the sale to the defendant. (4) If it shall be held by the court that they are entitled to an estate for the life of said Annie E. Snow in one eighteenth of the land in controversy, and in substance or effect that they are entitled to have one eighteenth of the net proceeds of the oil that has been extracted and marketed after deducting all expenses of producing and marketing invested or put at interest, and to receive only the interest thereon during her life, the corpus of the fund at her death to belong to the remainder-men, then judgment shall be rendered for the plaintiffs against the defendant for such life estate, and for the value of their interest in the proceeds of oil taken and marketed, to wit, \$300. (5) If it shall be held by the court that they are entitled to an estate for the life of the said Annie E. Snow in one eighteenth of the land in controversy, and also to one eighteenth of the net proceeds of the oil extracted and marketed, after deducting all expenses of producing and marketing, judgment shall in that event be rendered for the plaintiffs against the defendant for such life estate and for their one eighteenth of the net proceeds of the oil marketed, amounting to \$500."

The trial court and the court of civil appeals both held that the plaintiffs in error were entitled to a third interest for life in the land in controversy, and that holding is not questioned by either party. The real question in the case is, What are the rights of the plaintiffs in error as life tenants in the oil under the land? The trial

court held that the plaintiffs in error were entitled not only to a one-eighteenth interest for life in the land, but "also to one eighteenth of the net proceeds of the oil extracted and marketed, after deducting expenses of producing and marketing," and gave judgment as under the fifth paragraph of the stipulation. The court of civil appeals, however, affirmed the hypothesis contained in the fourth paragraph, and gave judgment under the stipulation in accordance therewith, namely, for one-eighteenth interest in the land for the life of Mrs. Snow, and for \$300.

Our statute of descent and distribution declares that, "where any person having title to any estate of inheritance, real, personal, or mixed, shall die intestate as to such estate, and shall have a surviving husband or wife, the estate of such intestate shall descend and pass as follows: 1. If the deceased have a child or children, or their descendants, the surviving husband or wife shall take one third of the personal estate, and the balance of such personal estate shall go to the child or children of the deceased and their descendants. The surviving husband or wife shall also be entitled to an estate for life, in one third of the land of the intestate, with remainder to the child or children of the intestate and their descendants." Rev. Stat. 1895, art. 1689. The question is, What under this provision, are the rights of the life tenant in the oil underlying the land when no attempt had been made to extract it at the time of the descent cast? It is strenuously insisted on behalf of plaintiffs in error that the common-law rules as to the incidents of life estates do not apply to this statute. But we do not concur in the proposition. The statute of January 20, 1840, entitled "An Act to Adopt the Common Law," etc., reads as follows: "The common law of England (so far as it is not inconsistent with the Constitution and laws of this state) shall, together with such Constitution and laws, be the rule of decision, and shall continue in force until altered or repealed by the legislature." Rev. Stat. 1895, art. 3258. Since the passage of that act, which has ever since remained the law, and is now incorporated in our Revised Statutes as article 3258, probably few cases have been decided in this court in which the rules of the common law have not been expressly or impliedly applied in the determination of one or more of the questions involved. In some instances it may be that the law as announced by the English courts has not been followed; not for the reason, however, that this court felt at liberty to depart from the rule of the common law, but because the decision or decisions were not re-

garded of such authority as to fix the rule. So in other instances rules established in England were not regarded as of controlling authority in this state, for the reason that it was thought that the conditions here were so different from those existing in England that, if the conditions in that country had been the same as in this, the ruling there would have been different. At all events, since the adoption of the common law the courts of this state have adhered to the decisions of the English courts with as much strictness as the courts of the other states who have the common law, not by adoption, but by inheritance, so to speak. In order to illustrate the strictness in which we have adhered to the common law, we need refer only to the "rule in *Shelley's Case*,"—a rule which has been expressly repealed by a majority of the states of this Union in which the common law prevails, perhaps in every one in which the matter has been of sufficient importance to call the attention of its legislature to it; a rule founded upon the peculiar policy of the real-estate laws of England, and one by reason of its extreme technicality well calculated to thwart the clear intention of devisors and grantors of real estate. Yet our courts, ever since the decision in *Hancock v. Butler*, 21 Tex. 804, have followed the rule without question, because it was a rule of the common law; the only question discussed being whether the rule was applicable to the case in hand. We conclude, therefore, that we may safely assume that since the adoption of the act of January 20, 1840, the common law is as much the rule of decision in this state as in those states in which it was the law from the beginning of their political existence.

But it is also insisted that, since there was no such life estate created by the operation of the common law as the life estate provided for under our statute of descent and distribution, the common-law rule does not apply to the estate in question. It is true that the life estates which were devolved upon the husband and the wife respectively under the common law were the tenancy by the curtesy on part of the husband and in dower on part of the wife. The husband, when he became a tenant by the curtesy, had a life estate in all the land of the wife. The dower had to be assigned by the heir before the estate of the widow became fixed to her third. But it does not follow that because the life estate provided by our statute has no exact exemplar in the common law the quality and incidents of life estates at common law do not appertain to it. At common law there were two classes of life estates: First, conventional life estates or those which were created by

contract; and, second, those which came into existence by operation of law. The former were not impeachable for waste unless expressly made so by the conveyance. The reason assigned for this rule is that it is presumed that, if the grantor intended to limit the enjoyment of the estate, he would have expressed his intention in the deed. As to the second class of life estates, on the other hand, they are, as a general rule, impeachable for waste; that is to say, the tenant for life cannot use the property for any purpose which would result in an injury to the inheritance, save those only to which it had been devoted at the time the life estate came into existence. The rights of a tenant of an estate tail after possibility of issue extinct may be an exception to the general rule. As is said by Mr. Cruise: "He is punishable for waste, because he continues in by virtue of the livery upon the estate tail; and, having once had the power of committing waste, he shall not be deprived of it by the act of God." 1 Greenleaf's Cruise, Real Prop. p. 143. On the other hand, speaking of waste Mr. Washburn says: "This restriction existed at common law in respect to estates in possession of tenants in dower and curtesy, because, as these were created by the law itself, it was thought that the law was bound to protect the reversioner or remainder-man from being thereby injured. But where the estate of the tenant was created by act of the parties it was held, that, if the grantor or lessor failed to protect the estate by stipulations in his deed or lease, the law was not bound to supply the omission." 1 Washb. Real Prop. p. 146. The reason for excepting the tenant in tail after possibility of issue extinct from the general rule applicable to life tenants whose estates have been created by operation of law seems rather technical, and does not apply to the life estates provided for in our statutes. On the other hand, the reason for holding the tenant by the curtesy or in dower impeachable for waste does so apply. and with equal force. We conclude, therefore, that it was the intention of the legislature, in enacting the statute in question, to make the estate therein provided for subject to impeachment for waste.

It is too well settled to require a citation of authority that, while it is not waste for a tenant by the curtesy or a tenant in dower to work an open mine, it is waste to open a new mine; in other words, the tenant of a life estate punishable for waste has no right to remove the minerals, when the land had not been devoted to mining purposes before the creation of his estate. Oil, before its extraction, is a mineral, and is a part of the land, and, in so far as the ques-

tion under discussion is concerned, is to be considered like iron, coal, lead, or other solid mineral substances. Such authorities as we have been able to find sustain our view of the effect of our statute. In reference to the descent of real estate where the husband or wife dies, leaving children, the statute of Pennsylvania is the same as that of Texas; that is to say, the surviving spouse takes a third interest for life in the land or lands of the deceased. In the case of the *Westmoreland Coal Co.'s Appeal*, 85 Pa. 344, the coal company, who claimed under a woman who had inherited a third interest for life in the land from a deceased husband, was guilty of waste in opening mines upon a parcel of land upon which none had been opened at the death of the husband. In the case of *Franklin Coal Co. v. McMillan*, 49 Md. 549, 33 Am. Rep. 280, a life estate in the land had been devised to a Mrs. McMillan, with the remainder to her children. She conveyed her right in the land to the coal company. Prior to the death of the testator the coal had been mined for domestic uses, but had never been mined for market. In the suit by the children against the coal company for damages for waste in mining the coal it was held they were entitled to recover. A like rule was made in the case of *Gaines v. Green Pond Iron Min. Co.* 32 N. J. Eq. 86. There it was ruled that the mining company who held the title of a life tenant was liable for waste in mining the land. Presumably the life tenant acquired her estate by operation of law, but that matter does not clearly appear from a report of the case. That case upon appeal was reversed by the court of errors and appeals of New Jersey, but upon another point. 33 N. J. Eq. 603. The ruling of the chancellor upon the question whether the life tenant was impeachable for waste was neither questioned nor decided. In the case of *Seager v. McCabe*, 92 Mich. 186, 16 L. R. A. 247, 52 N. W. 299, are found expressions not in accordance with our views. But it seems to us that they were not called for in the decision of that case. The statute of Michigan gives to the wife the "use during her natural life of one third of the lands whereof her husband was seised" during marriage. The opinion in the case cited shows that the land in controversy was valueless for agricultural or lumbering purposes. It contained a bed of iron ore, and that was practically the only use of which it was susceptible. It seems to us that under the Michigan statute it was not difficult to reach the conclusion that the widow, under the circumstances, was entitled to mine the ore, without reference to any rule of the common law. But in no aspect of this case do we think that

the plaintiffs in error have cause of complaint of the judgment of the court of civil appeals. The right of the life tenant is to the use, and not to the corpus, of the estate; and where his title is in an undivided interest, and not in the whole of the land, and a sale is ordered for partition, his right in the proceeds is not a part proportionate to the undivided interest in which he has the life estate, but to the interest on that part as long as the life estate may continue to exist. In speaking on this subject in reference to the remainder-men, Chief Justice Marshall, in *Herbert v. Wren*, 7 Cranch, 380, 3 L. ed. 378, says: "They have a right to insist that, instead of a sum in gross, one third of the purchase money shall be set apart, and the interest thereof paid annually to the tenant in dower during her life." The rule thus stated is followed in North Carolina. *Ex parte Winstead*, 92 N. C. 703. The same principle is announced in Alabama. *McQueen v. Turner*, 91 Ala. 273, 8 So. 863; *Kelly v. Deegan*, 111 Ala. 152, 20 So. 378. As to securing the life tenant in the use of the part of the proceeds in which he has an interest the North Carolina court follows the rule indicated by the remarks of Chief Justice Marshall above quoted. The Alabama court, however, permits that part to be paid to him upon his executing a properly secured refunding bond conditioned to pay

the principal to the remainder-man upon the termination of his estate. In the case of *Clift v. Clift*, 72 Tex. 144, 10 S. W. 338. Mrs. Clift had a one-sixth interest for her life in a town lot, and this court adjudged that the property should be sold, and that from the proceeds "there should be paid to Mrs. Clift a sum equal to a one-sixth interest for life in the proceeds of the land proper." Since the proceeds of the sale must be money, and the value of the use of the money is determined by the interest upon it, it follows that this recognizes the same right in the life tenant which was announced in the cases before cited, but lays down a different rule for securing that right. As to this last matter the rule announced by this court may be questionable, but, so far as we can now see, and so far as the writer of this opinion can recollect, that point was not mooted in that case.

Since we hold that the plaintiffs were not entitled absolutely to any part of the oil—that is to say, to the corpus of one-eighteenth interest—it follows that under the stipulation as to the judgment to be rendered *the judgment of the Court of Civil Appeals should be affirmed*, and it is accordingly so ordered.

Petition for rehearing overruled June 22, 1905.

END OF CASES IN BOOK 69.

RÉSUMÉ OF THE DECISIONS PUBLISHED IN THIS BOOK.

SHOWING the Changes, Progress, and Development of the Law during the First Quarter of the Judicial Year Beginning with October 1, 1905. Classified as Follows:

- I. PUBLIC, OFFICIAL, AND STATUTORY MATTERS.
- II. CONTRACTUAL AND COMMERCIAL RELATIONS.
- III. CORPORATIONS AND ASSOCIATIONS.
- IV. DOMESTIC RELATIONS.
- V. TRUST RELATIONS.
- VI. TORTS; NEGLIGENCE; INJURIES.
- VII. PROPERTY RIGHTS; DEEDS; FIXTURES; WILLS.
- VIII. CIVIL REMEDIES; RULES AND PRINCIPLES.
- IX. CRIMINAL LAW AND PRACTICE.

I. PUBLIC, OFFICIAL, AND STATUTORY MATTERS.

Eminent domain.

See also *Parks*.

The right of a municipality to compensation for the value of sewer and water pipes owned by it, and laid under streets which are taken by the Federal government, under its power of eminent domain, for an entirely different use, is sustained. (C. C. A. 1st C.) 723.

The power to separate the right to fish in an inland lake, in New Jersey, from the ownership of the lake, and take it under the power of eminent domain for the benefit of the public, is denied. (N. J. Err. & App.) 768.

A farmer who supports his family from the products of the farm, and for many years has sold his surplus in a neighboring town, is held to have an established business within the meaning of a statute authorizing the construction of a water-supply reservoir upon the site of the town, and providing compensation for any established business thereby destroyed, although he has no regular route or customers, or anything in the nature of good will. (Mass.) 599.

Bankruptcy.

A claim for unaccrued rents is held not to be a fixed liability, which may be proved in bankruptcy proceedings. (C. C. A. 8th C.) 719.

That a full discharge of individual liability of one partner on a firm debt may be had in bankruptcy proceedings concerning that partner only, is decided. (Minn.) 771.

Internal improvements.

Appropriations to aid counties in the construction of public roads are held not to be forbidden by a constitutional provision that the general assembly shall not have power to involve the state in the construction of public works. (Ill.) 69 L. R. A.

tion of works of internal improvement, nor to grant any aid thereto which shall involve the faith or credit of the state, nor make any appropriation therefor. (Md.) 914.

Taxes.

A statute making all the property of corporations engaged in maritime commerce or navigation taxable only at the place designated in their charters as their general office for business is held to violate a constitutional provision requiring a uniform rate of taxation. (Mich.) 431.

The right of the legislature to provide for the valuation and assessment of the property of railway companies by one assessing body, and for ascertaining the value of the whole of such property of any one railway corporation subject to taxation in the state as a unit, or as an entirety, and to distribute the value as thus found over the main line or track of such railway company, and to the different taxing districts, municipalities, etc., on a mileage basis, is sustained. (Neb.) 447.

Schools.

Offering a prayer at the beginning of school each day, which does not represent any peculiar view or dogma of any sect or denomination, is held not to bring a public school within a provision of the Constitution that no portion of any fund or tax raised for educational purposes shall be used in aid of any sectarian or denominational school. (Ky.) 592.

Receivers.

A receiver of a Federal court in charge of a railroad company, who, by statute, is required to manage and operate the property according to the requirements of the valid laws of the state in which it is situated, in the same manner as the owner

thereof would be bound to do, is held to be subject to any rule prescribed by the state, imposing on railroad corporations a liability for the negligence of employees having superior authority over other employees. (C. C. A. 6th C.) 705.

Attorneys.

A license to practise law is held to be properly revoked, where it is secured by fraudulent concealment of the fact that the plaintiff has recently been convicted of embezzling funds from a client in another state, although he has been pardoned for the crime. (Ill.) 701.

Expelling member of legislature.

The power of the court to supervise the exercise, by the legislature, of its constitutional power to expel a member, is denied. (Cal.) 556.

Parks.

The power of the legislature to authorize a municipal corporation to condemn, for park purposes and boulevards, land near to, but outside of, its corporate limits, is sustained. (Tenn.) 750.

Forbidding the use of land near a park or park way for advertising purposes is held to amount to a taking of it for public use, for which compensation must be made. (Mass.) 817.

Public improvements; assessments.

A statute providing for the cleaning of drainage ditches, and the assessment of the costs thereof according to benefits upon the parties along its line who were assessed for the cost of its original construction, is held not to take private property for public use without compensation. (Ohio) 805.

Vested right to damages.

The statutory right to have damages for land, the fee of which is taken for a public use, assessed and paid in money, is held to be a substantial right which, after the proceedings have progressed so far that the fee has passed, cannot be impaired by the passage of a statute authorizing the abandonment of the land, and directing that the fee shall revert in the former owner, and that fact be considered in reduction of the damages. (Mass.) 314.

Wrongful arrest; officer's liability.

The mayor and chief of police of a city are held to be liable in damages in case they arrest motormen of street cars to abate a nuisance caused by the operation of the cars, when the trolley wire is in such poor condition as to be liable to fall, when the object can be effected by merely cutting the wires, or removing the controllers from the cars. (Mich.) 350.

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Requiring license of doctor.

An ophthalmologist, who prefixes to his name the letters "Dr." on his sign, and on notices in which he undertakes to correct certain diseased conditions by the fitting of glasses to the eyes, is held to come within the terms of a statute providing that, when a person shall append the title "Dr.," in a medical sense, to his name, he shall be regarded as practising medicine, within the meaning of a statute which requires a license as a condition precedent to doing so. (S. D.) 504.

Storage of oils.

An ordinance prohibiting the storage of refined and other explosive oils within the corporate limits is held not to be unreasonable. (La.) 276.

Numbering automobiles.

Power to require the registering and numbering of automobiles is held to be conferred upon a city council by charter authority to control, prescribe, and regulate the manner in which the streets shall be used and enjoyed. (Mich.) 345.

Use of voting machines.

A statute permitting the use of a voting machine is held not to contravene a constitutional requirement that all votes at elections shall be given by ballot. (Mich.) 184.

Employers' liability act.

The employers' liability act, changing the law as to the defense in case of negligence of fellow servants of corporations, is held to be constitutional. (Ind.) 875.

A corporation operating a "logging railroad," not as a common carrier, but exclusively for its own private business, is held to be subject to the provisions of a statute making railroad corporations liable for injuries to servants caused by the negligence of fellow servants. (Minn.) 887.

Building and loan associations; usury.

A statute giving building and loan associations the right to assess and collect from members and depositors such dues, fines, interest, and premium on loans made, or other assessments, as may be provided for in the Constitution and by-laws; and which provides that such dues, fines, etc., shall not be deemed usury, although in excess of the legal rate of interest,—is held to be valid. (Ohio) 415.

Surety bonds.

A statute requiring all bonds given for the faithful performance of official or fiduciary duties, or the faithful keeping, applying, or accounting for funds or property, to

be executed by a surety company, is held to be unconstitutional. (Ohio) 427.

Destroying county.

The power of the legislature to destroy

or abolish counties recognized by the Constitution as organized and existing at the date of its adoption is denied. (Idaho) 220.

II. CONTRACTUAL AND COMMERCIAL RELATIONS.

A covenant by a purchaser of the business and effects of a corporation, the sale of which is intended to terminate its existence, to indemnify it from and against the contracts and engagements to which the vendor appears to be now liable, and also all claims and demands on account of the same contracts and engagements, is held not to cover a claim by the president-manager of the corporation to salary for the time subsequently accruing, where it was founded merely on the fact that he had been elected president, and there was no contract that the services and salary should continue for any specified time. (Mass.) 821.

Upon the termination, by the insolvency of a corporation, of an executory contract with it, necessitating, in its execution, work, labor, and the expenditure of money for materials, machinery, etc., it is held that the contractor is entitled to compensation for services rendered by him in pursuance of the contract until the date of its termination, and to reimbursement for his actual and necessary outlay and expenses, subject to a deduction of all sums paid him by the corporation, and of the value of materials, machinery, etc., on hand. (W. Va.) 124.

Banks.

Payment, by a savings bank, of a forged check bearing a signature similar to that of the depositor, to one who presents the depositor's pass book, there being nothing to arouse the suspicion of the teller, or to put him upon inquiry, as to the genuineness of the check, is held not to make the bank liable in a suit by the depositor to recover the money so paid, where a rule of the bank provides that payment to a person presenting a pass book shall be good and valid, unless the pass book has been lost and notice in writing given to the bank before such payment is made. (Ga.) 341.

A depositor in a savings bank is held not to be estopped to hold the bank responsible in case it negligently pays the deposit to an unauthorized person, by the fact that he, also, is negligent in the care which he takes of his bank book. (Conn.) 329.

Failure of the officers of a savings bank to make a physical comparison of the signature on a draft presented with the depositor's bank book with his signature on file is held to render it liable for paying out
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money on a forged draft, in the absence of some unusual and pertinent excuse which will justify such failure. (N. Y.) 317.

Bills and notes.

See also *Limitation of Actions*, *infra*, VIII.

That a note for the payment of which a married woman becomes surety is made payable in a state where such contract is invalid, is held not to defeat her liability, although the suit is brought in that state, if the contract was valid at her domicile, where it was executed. (Ind.) 870.

A sound reason, inhering in the same transaction from which a promissory note springs, why the holder ought not, in equity and good conscience, to recover its face value, is held to be a good, equitable defense to it, although the defense constitutes neither an offset, a counterclaim, nor an affirmative cause of action against the holder of the note. (C. C. A. 8th C.) 232.

Carriers.

The checking of baggage to destination upon a through ticket to transport the passenger over roads of initial and connecting carriers is held to render the initial carrier liable for its loss on a connecting line. (Ark.) 65.

A carrier who negligently delays a shipment is held to be liable for the damages, where, because of such delay, the goods are overtaken in transit and damaged by an act of God, even though the act of God could not reasonably have been anticipated. (Minn.) 509.

A rule of the state railroad commission that carriers shall afford to all persons equal facilities in the transportation and delivery of freight is held not to prohibit discrimination against commodities, but simply discrimination against shippers. (Ga.) 119.

A railroad company which expressly, or by implication, invites its passengers to use a stile over a wire fence in leaving its grounds, is held to be bound to use at least ordinary care in seeing that it is fit for the purpose intended, although the stile was not erected by it, and the defective part is not on its property, but on property where it has no right to go to make inspection or repairs. (Iowa) 982.

The right of a steamship company to a limitation of its liability for loss of passengers and baggage through the sinking of its

RÉSUMÉ OF DECISIONS.
(CORPORATIONS AND ASSOCIATIONS.)

vessel is denied where the crew could not understand the language of its officers, and were not drilled in the launching of the boats, because of which the loss occurred. (C. C. A. 9th C.) 71.

That livery-stable keepers are not within the rule that common carriers of passengers are bound to exercise extraordinary care for the safety of their passengers is decided. (Conn.) 561.

Insurance.

An open mortgage clause attached to a policy of fire insurance, which merely provides that loss, if any, shall be paid to the mortgagee as his interest may appear, is held not to create any contract relations between the mortgagee and insurer, or to give the mortgagee a right to participate in arbitration proceedings to fix the amount of loss; and that, therefore, he will be bound by the award, although he was given no opportunity to be heard. (Conn.) 924.

A niece of a former wife of a man is held not to be a relative of his child by a subsequent one, within the meaning of a statute permitting certificates of mutual benefit societies to be taken in favor of relatives. (Iowa) 174.

A provision of a life insurance policy that suit shall be brought on it within a period less than that fixed by the statute of limitations is held to be void as against public policy. (Ky.) 264.

An agent authorized to issue policies is held to bind the company by all waivers, representations, or other acts within the scope or requirements of his business, unless the insured has notice of the limitation of his power. (La.) 278.

Landlord and tenant.

That a tenant cannot be relieved from forfeiture of his term because of breach of his covenant to pay taxes after the premises

have been sold because of his default, is held, since he can no longer perform his covenant, or make compensation for the breach, so as to entitle him to equitable relief. (Mass.) 867.

Vendor and purchaser.

The right to enforce payment of the money under a contract to purchase real estate, which stipulates that the property shall be clear of all encumbrances, is denied where the title has not been accepted, and there is an existing right on the part of the municipality to open a platted street over the property, which will destroy the buildings without making compensation for them. (Tenn.) 790.

Factors.

A commission merchant to whom grain is consigned to be sold on commission, who purchases such grain after close of business hours at the highest price of the day upon the board of trade, and subsequently resells it at an advance, is held to be bound to account to the consignor for the profit thus made. (Minn.) 667.

Sale; implied warranty.

That no implied warranty of fitness of an article for a particular purpose arises out of a contract to make or supply a described and definite article, is declared, although the vendor knows that the vendee is purchasing it to accomplish a specific purpose, because the essence of this contract is the delivery of the specific article, and not the accomplishment of the purpose. (C. C. A. 8th C.) 973.

Liability of bidder at judicial sale.

A court order annulling a judicial sale, and directing a resale of the property, without accepting the bid, or directing any proceedings against the bidder, or any confirmation of the sale, is held to relieve him from all liability upon his bid. (Ky.) 33.

III. CORPORATIONS AND ASSOCIATIONS.

Corporations.

See also *supra*, II.

The power of a corporation to make valid contracts for the repurchase of its own stock in the absence of charter restrictions, is sustained in a recent Iowa case. (Iowa) 968.

Benevolent societies.

An election to treat the original contract as still in force, upon notification of reduction in the amounts of certificates in a 69 L. R. A.

mutual benefit society, adhered to for two years and five months, is held not to be subject to change, so as to permit a certificate holder to treat the contract as rescinded, and sue for assessments paid. (C. C. A. 3d C.) 803.

Religious societies.

A creditor of a religious corporation is held to have no right of action against the individual members of it as such. (Iowa) 255.

IV. DOMESTIC RELATIONS.

As to contracts of married woman, see also *supra*, II., *Bills and Notes*.

Marriage.

The marriage of a ward, valid where made, in a sister state, is held necessarily to be regarded as valid at his domicile, although it would not have been so had it been solemnized there, because of statutory limitation of his right to contract. (R. I.) 493.

Liability for support of insane wife.

The liability of a husband for the support of his wife at an asylum for the insane, to which she has been removed by due process of law, is denied in the absence of a statute expressly imposing such liability. (Wis.) 829.

Partnership between husband and wife.

A woman whose husband is carrying on a partnership business with her money under an agreement that she shall receive all of his share of the profits of the business is held to be liable to account to him for the amount for which he rendered himself liable on account of the purchase of a machine by him and his partner for use in the business, although she had given him special instructions not to purchase the ma-

chine, if it was in fact necessary or proper for the conduct of the business. (Ga.) 87.

Conveyance by husband to wife.

A conveyance of land from husband to wife in the usual form, for a valuable consideration, though without words disclosing an intent to do so, is held to vest in her a separate estate which she may transfer without his joinder or consent. (Tenn.) 353.

A man is deprived of his curtesy interest in land by conveying it to his wife to her sole, separate, and exclusive use, free and discharged from all his control and liabilities. (Tenn.) 370.

Estoppel of married woman.

A married woman who, with her husband, enters into an oral contract for the sale of their homestead, under which the purchaser takes possession, and pays the purchase price, and makes valuable improvements, all of which is done with the full knowledge and consent of the wife, is held to be estopped to set up the invalidity of the contract in defense of an action to compel specific performance thereof. (Idaho) 584.

V. TRUST RELATIONS.

Removal of trustee.

The removal of the widow as trustee of a fund provided for the benefit of testator's daughter is held proper where she elected to take her dower rights in opposition to the will, thereby depleting the trust estate and destroying a very important part of

the scheme of the testator, remarried within a short time, became estranged from the *cestui que trust* and her cotrustees, so that no intercourse could subsist between them, and kept the estate in needless litigation. (Md.) 920.

VI. TORTS; NEGLIGENCE; INJURIES.

Imputed negligence.

The owner of a wagon, seated beside the driver, whom he employs, is held to be chargeable with the driver's negligence in attempting to cross a street-car track in front of an approaching car, which is in plain view. (Mo.) 389.

Negligence of a locomotive engineer, which results in a collision, is held not to be imputable to the conductor in charge of his train, so as to prevent a recovery for injuries thereby caused to the latter, where the conductor could not have controlled the action of the engineer at the time of the accident, or have prevented its occurrence. (Ark.) 217.

Last clear chance.

The doctrine of last clear chance is held

not to be applicable in an admiralty case. (C. C. A. 1st C.) 293.

Nuisance.

The characteristic noises and odors issuing from a chicken house and yard, which are maintained in a cleanly manner, and cared for so as not injuriously to affect the health of any normal person in the neighborhood, are held not to be a nuisance, although they may make neighboring property uncomfortable as a residence for invalids. (Mass.) 820.

A fair occupying 75 or 80 feet in width and 4 blocks in length of an important business street in a city, and consisting of numerous tents inclosing shows and exhibitions, in front of which are stationed men blowing horns and talking through mega-

phones, together with various other stands, booths, Ferris wheels, merry-go-rounds, etc., which is permitted by the authorities to be maintained on the street for a week, is held to be a public nuisance. (Ga.) 564.

Injury to servant.

The failure to box, or otherwise protect, a rapidly revolving upright shaft coming up through the floor in an alley or passageway where an inexperienced girl is required to sweep, who is not warned of the danger, is held to be properly found by the jury to constitute negligence which will render the employer liable for injuries to her when her clothing is caught and wound upon the shaft. (Md.) 909.

The liability of a master to a servant for injuries caused by negligence of a foreman in directing work is denied where the master has otherwise performed his duty. (Ind.) 163.

A railroad engineer who obeys, although reluctantly, an order to take his train through a mountainous region on its regular trip, at a time of heavy rains, when land slides are anticipated, is held to assume the risk of such slides, and to have no right to hold the company responsible in case his train is carried from the track by a slide which comes upon it so suddenly that there is no time to escape, and the danger of which was not observed by a track inspector who had passed the spot just before the train reached there. (C. C. A. 8th C.) 757.

That the conductor of a passenger train cannot be regarded as in a separate department of service from a brakeman of a freight train so as to render the railroad company liable for injury to the latter by his negligence, is decided. (Tenn.) 746.

Mere knowledge of an employee of a contractor for the setting of the stone work of a building, of a custom that the scaffolding shall be furnished by the brick contractors, is held not to amount to a waiver of his right to hold his employer responsible for the safety of a scaffold furnished for him to work upon. (Ill.) 697.

The proximate cause of the injury of a servant by the fall of a derrick because of the breaking of a spliced rope is held not to be the failure to insert thimbles into the loops of the splice, but the failure to inspect the rope for the purpose of determining its condition, and to repair it after it has become chafed and worn by use, where there is nothing to show that the splice is not sufficiently strong, without the thimbles, to do the work required of it, and it fails because of the wear due to continued use. (Conn.) 936.

The liability of an employer to an em-
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ployee for injuries caused by negligence in the handling of a boiler upon the premises by a coemployee, an engineer who is conceded to have been competent, is denied. (Pa.) 792.

Injury to guest at inn.

That an innkeeper is not liable for an injury inflicted upon a guest in his hotel, by a servant who was not at the time of the injury acting within the apparent or actual scope of his employment, is declared. (C. C. A. 8th C.) 653.

A trespass committed upon a guest in a hotel by a servant of the proprietor, whether actively engaged in the discharge of his duties at the time or not, is held to be a breach of the implied undertaking that the guest shall be treated with due consideration for his comfort and safety, for which the proprietor is liable in damages. (Neb.) 642.

Blocking stairway.

The occupant of the lower floors of a building, who blocks the stairway leading from the upper floor to the ground, so that a tenant of such floor, in seeking to escape a fire, is compelled to drop a considerable distance to reach the ground, is held to be liable for the injury resulting to him therefrom. (Pa.) 800.

Runaway team.

The proximate cause of the runaway of a team harnessed to a wagon loaded with about a ton's weight, which a farmer had left standing in the street hitched to a hitching rail in front of a store while he was engaged in unloading his wagon, and which became frightened because a boy in turning over the hitching rail, struck the nose of one of them with his foot, causing them to break the halter and run away, is held to be the striking of the horse by the boy. (Kan.) 246.

Injury to traveler on sidewalk.

The liability of a municipal corporation for injuries to a traveler upon a sidewalk through the fall of a billboard insecurely placed by an abutting owner upon his own property near the edge of the street is denied. (Mich.) 618.

A horse block or stepping stone of ordinary size, placed at the edge of the sidewalk to facilitate access to and egress from carriages in the street, is held not to be an obstruction of the walk, so as to render the municipality liable for injuries caused by a traveler falling over it. (App. D. C.) 83.

Owners of property in possession of tenants are held not to be bound to keep watch to see that ice dangerous to travel does not form on the walks in front of it, which are properly constructed and in proper repair,

where their negligent construction of their buildings does not contribute to its formation. (Pa.) 488.

Injury to person on street railway track.

Failure to anticipate the presence of a man on his hands and knees on the track in front of an electric car on a dark night, and to run the car so as to provide for that contingency, is held not to be negligence on the part of the motorman. (R. I.) 188.

Failure to look and listen at railroad crossing.

Failure to look and listen before crossing a street-car track at a public crossing is held not to be negligence *per se*, as matter of law. (Me.) 300.

Failure to sound warning at trestle.

The duty to sound warnings when trains approach a trestle over a highway is held to depend upon the dangerous character of the place, which is a question for the determination of the jury. (Tenn.) 662.

Failure to care for person injured.

Failure of the employees operating a car and engine by which a trespasser on the railway track is struck and injured without fault of the employees, to take charge of the wounded man and give him care and attention, is held not to be a violation of a

legal duty for which the company is liable. (Kan.) 513.

Violation of right of privacy.

The publication of the picture of a person without his consent, as part of an advertisement, for the purpose of exploiting the publisher's business, is held to be a violation of the right of privacy of the person whose picture is reproduced, and to entitle him to recover without proof of special damages. (Ga.) 101.

Conspiracy.

A combination of two or more persons to injure one in his trade by inducing his employees to break their contract with him, or to decline longer to continue in his employment, is held to be actionable if it results in damage. (Ga.) 90.

Duty to connect property with drain.

The owners of improved property located adjacent to an adequate sewer or drainage system in a city are held to be bound to connect therewith the water gutters and spouts upon their buildings, and not to permit the rain water to collect and discharge at a point in a public alley, where, by reason of the volume and force thus attained, it enters adjoining premises, provided such connection with the drainage system can be reasonably made. (Minn.) 621.

VII. PROPERTY RIGHTS; DEEDS; FIXTURES; WILLS.

Shelley's Case.

A fee simple is vested in the first taker, under the rule in *Shelley's Case*, by a conveyance to one "during his natural life, and then to his heirs." (Iowa) 953.

Price quotations.

A property right in price quotations gathered by a board of trade is held not to be destroyed by the fact that a large percentage of the business done under its auspices consists of gambling transactions or that the news is susceptible of bad as well as good uses. (C. C. A. 7th C.) 59.

Mines; surface support.

The leaving of surface supports is held not to be within a provision in a sale by the owner of coal in place of the vein, which is held subject to the duty of supporting the surface, by which he undertakes to indemnify the purchaser for any damage which may result to the surface "by reason of the skilful and careful mining and taking away of the coal;" the words being held to refer solely to the manner of working the vein. (Pa.) 637.

Easement or license.

Permission to use a stairway erected on the outside of a building for ingress and

egress to and from the second story of another building, in consideration that the owners of the latter building will permit the owner of the other one to erect a porch on a 5-foot strip of a vacant lot adjoining the back end of his building, is held not to amount to the grant of an easement, but to constitute a license only, revocable by the licensor. (Idaho) 568.

Life tenants' interest in oil wells.

One entitled to an undivided life estate under a statute giving a surviving husband or wife a one-third interest in real estate of the other is held to have no right to demand absolutely any part of the production of oil wells subsequently opened upon the property by the remainder-men, but to be entitled only to the income upon one third of the oil produced. (Tex.) 986.

Life tenants' right to dividends.

Cash dividends upon corporate stock are held to belong to the life tenants, notwithstanding they were derived from the sale of permanent property in which profits had been invested. (Conn.) 76.

Waters.

The wharfage and reclamation rights of the owner of land on a cove leading off from

a river are held not to be destroyed or impaired by the construction of an embankment across the mouth of the cove. (Conn.) 929.

The owner of property bordering on a mill pond is held to have no right to enjoin the owner of the dam and water privilege from drawing the water down to its natural level, when it becomes necessary for the utilization of the power, although a portion of the bottom of the pond is thereby uncovered and exposed to the sun, rendering it unhealthful and injurious to the abutting owner. (Conn.) 933.

Surface waters which, by natural drainage, collect in a natural basin and depression upon the premises of a dominant tenement, and escape therefrom only by percolation or evaporation, forming thereby a lake or pond, permanent in its character, are held to lose the character of surface waters when so collected, so that they may not, by artificial means, other than that incident to the cultivation of the soil, be drained to the damage of a servient tenement without liability for such acts. (Okla.) 460.

Trees.

The right to recover punitive damages for the cutting of trees upon a sidewalk for the accommodation of electric-light wires, in entire disregard of the rights of the abutting owner, and against his protest, is sustained. (N. C.) 631.

Deeds.

A deed without power of revocation, from a parent who is incapacitated physically and weak mentally, to his daughter who has for some time had the care of him, made without the benefit of competent and independent advice, is held to be properly set aside by equity. (N. J. Err. & App.) 393.

It is held that a deed absolute on its face cannot be delivered to the grantee therein named to be held by him in escrow; and that such a delivery will operate as abso-

lute and freed from all parol conditions, vesting the title at once. (Idaho) 572.

Fixtures.

The mere finishing material, such as doors, mantels, casings, etc., which have been purchased for an unfinished building and placed therein, but not affixed thereto is held not to pass by a sale of the real property under a mortgage foreclosure, where it is not mentioned or deemed a part of the sale. (Tenn.) 892.

A mortgage of a lot on which stands a partially completed building is held to pass cut stone and structural iron prepared for the building and located on the lot mortgaged and that adjoining, if the intention of the parties is that the building shall be speedily completed with the material at hand. (Mich.) 900.

Wills.

The granting of an absolute divorce is held not to revoke, by implication, a legacy in the will of the husband in favor of the wife. (Pa.) 940.

Where the body of a will is written on horizontal lines on several pages of foolscap paper, so that all its items and provisions are in consecutive order to the end of the last page, under which the testator's signature appears, but there is also written in the margin of the last page, to the left of, and separated from, the body of the instrument, a dispositive clause extending lengthwise of the page from near the bottom to near the top, and in no manner connected with the body of the instrument by any words or marks to indicate where the marginal matter is to be read in relation to the other provisions; and it is established by testimony that the marginal matter was written after all the other provisions, at the request of the testator, and before he attached his signature under the body of the will,—it is held that the will is not signed at its end, as required by statute, and is invalid for that reason. (Ohio) 422.

VIII. CIVIL REMEDIES; RULES AND PRINCIPLES.

A subcontractor is held to be entitled to pursue simultaneously a proceeding to enforce his mechanic's lien against the property and an action against the contractor for the amount due him, in which he attaches funds due the contractor from the property owner. (R. I.) 497.

Bill of review; limitations.

The right to file a bill of review after the lapse of the statutory period for an appeal is denied, except in case of new, or 69 L. R. A.

newly discovered, matter. (N. J. Err. & App.) 397.

Limitation of actions.

Giving a note for interest upon a larger note already barred by the statute of limitations, which does not in any way refer to the earlier note, is held not to revive it under a statute providing that causes of action founded on contract are revived by an admission in writing, signed by the party to be charged, that the debt is unpaid, or

by a like new promise to pay the same. (Iowa.) 260.

Under a mortgage securing a series of notes due at intervals of one year, and providing that nonpayment of any one of them, together with nonpayment of taxes, should mature the entire debt, it is held that the statute of limitations commences to run at the date of default upon the first note and taxes. (Kan.) 250.

Specific performance.

That the statute of frauds is satisfied, and specific performance of a contract may be decreed, is held where a signed, but undelivered, lease, taken in connection with a previously signed memorandum in writing of an oral agreement for a lease, shows a complete agreement on the terms of the lease. (N. J. Err. & App.) 394.

Replevin.

That replevin lies for growing strawberry plants, although they are attached to the soil, is declared since they are fruits of industry, and must be treated as chattels. (Ark.) 827.

The rule that one is adverse possession, under color of title, of a tract of land, is entitled to maintain replevin for logs cut thereon by one claiming to be the true owner, regardless of the true location of the ultimate title to the land, is held to apply where the spot from which the logs were cut is annexed to the actual possession of a portion of the tract because within the boundaries of the paper title. (Tenn.) 732.

A plaintiff in replevin is held to have no right to claim salvage for rescuing the replevied property after it had sunk while in his possession, since it was his legal duty to care for and preserve it. (C. C. A. 6th C.) 283.

Accord and satisfaction.

The payment of less than is due is held to discharge the debt, when an agreement to that effect is fully executed, and the discharge is evidenced by a written receipt for the lesser sum in full satisfaction of the greater one. (Ark.) 823.

Judgment.

That no interest in real estate located in another state can be vested in a complainant in a divorce proceeding by a decree which purports to deal directly with the title to the estate, is decided. (Ill.) 673.

Res judicata.

A decree denying the right of a corporation to have bonds secured by mortgage on its property surrendered by a pledgee who was seeking to foreclose its lien on the bonds against the pledgeor, on the ground that the bonds had been wrong-
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fully put upon the market, and had never been rightfully negotiated, is held to be no bar to a subsequent suit against the corporation to foreclose the mortgage by which they are secured, since the latter question could not have been determined in the former action. (Or.) 480.

That a party pleading a judgment as an estoppel must sustain the plea by showing that the particular matter in controversy was actually determined in the former litigation, in accordance with his contention, is declared where it appears from the record introduced in support of the plea that several issues were involved in such litigation, and the verdict and judgment do not clearly show that this particular issue was then decided. (Ga.) 483.

A decree of a probate court having jurisdiction, assigning the residue of the estate of a deceased person, is held to be conclusive upon all persons interested in the estate, whether then in being or not. (Minn.) 785.

Exemptions.

The exemption from execution of the proceeds of insurance policies is held not to be limited to claims against the insured but to extend to those against the beneficiary, under a statute providing that all moneys, benefits, privileges, or immunities growing out of life insurance are exempt from execution. (Cal.) 67.

Set-off.

In an action against the maker and indorser of a promissory note, joined in the same suit, it is held that the indorser may set off an individual claim against plaintiff growing out of the transaction which gave rise to the execution of the note. (Ga.) 97.

Injunction.

A judgment of a justice of the peace, rendered within less than the time prescribed by statute after service of summons, is held not to be so far void that its execution can be enjoined. (S. D.) 499.

Equity.

That equity will not prevent a forfeiture of an estate for breach of a condition subsequent is held where the performance of the condition was made of the very essence of the contract, and the damages for the breach cannot be measured in money, while the failure to perform was not caused by mistake, nor the result of mere negligence. (Wis.) 833.

Pleading.

Where a complaint is indefinite and uncertain because the pleader has confused the element of ordinary negligence with

gross negligence, and the attention of the trial court is called thereto, it is held that the court should compel the plaintiff to proceed upon one theory or the other, or to give such permissible construction to the pleadings as to confine plaintiff's claim to one species of wrongdoing. (Wis.) 601.

Evidence.

If the memoranda of inspection of engines prepared by the men in charge of that work, and filed in the office of the railroad company, have been lost, and the facts with regard to the inspection forgotten by them, it is held that such facts may be proved by the introduction in evidence of a transcript of such memoranda, entered by the proper clerk in a book kept for that purpose, accompanied by his testimony, and that of the inspectors, showing that inspections were made and properly entered in the book. (Or.) 475.

Parol evidence to show that one who signed a memorandum for the sale of goods necessary to satisfy the statute of frauds acted as agent for the one who is seeking to enforce the contract, so as to permit him to maintain the action, is held to be admissible. (N. H.) 629.

Damages.

The measure of damages for false and fraudulent representations by which a party had been induced to exchange real property for stock in a corporation, but who had affirmed the contract after discovering the deceit, is held to be, in the absence of a claim for special or exemplary damages, the

difference in the value between what was received or parted with, as the case may be, and what would have been received or parted with had the representations been true. (N. D.) 409.

Mere disappointment and regret are held not to be included in the rule allowing damages for mental anguish upon failure of a telegraph company promptly to deliver a death message. (N. C.) 403.

The rental value of the premises during the possession of the vendee is held to be properly deducted from his recovery for breach of a covenant of seisin, which is made by an outstanding contingent remainder, where his deed gave him at least a life estate, and the life tenancy has continued so as to preclude the remainder-men from demanding rents for any part of the time. (Tenn.) 760.

In an action on a contract to convey unimproved land with warranty of title, to recover damages for failure to convey, the vendor's title proving defective, it is held that the value of buildings placed on the land by the vendee without the request of the vendor, before the time fixed for the conveyance has arrived, cannot be recovered by the vendee. (N. J. Err. & App.) 764.

Right of plaintiff in contempt to proceed with trial.

A plaintiff in an equity case, who is in contempt of court for refusing to obey an order which can be enforced by mandamus, is held to have no absolute right to proceed with the trial. (Mass.) 311.

IX. CRIMINAL LAW AND PRACTICE.

The arrest at their own instigation, for the purpose of preventing a trial elsewhere, of persons accused of crime, in the county where the commission of the crime is commenced, and binding them over to await the action of the grand jury, are held not to prevent proceedings against them in the county where the crime is consummated, under a statute providing that, if the jurisdiction of any offense be in two counties, the accused shall be tried in the county in which he is first arrested. (Ky.) 270.

Homicide by officer.

A police officer who kills a person whom he is attempting to arrest is held to be guilty of a criminal offense if he uses more force than is reasonably necessary to effect his purpose. (Mo.) 381.

Burglary.

The fact that the owner of a building, to whom a detective disclosed that it was probably about to be burglarized by a person 60 L. R. A.

named, with the feigned assistance of the detective, for the purpose of securing evidence of the intended burglary and other crimes, did not take steps to prevent the burglary, but passively allowed it to go on, is held not to be a consent to the burglary that will be a defense in a prosecution therefor. (N. D.) 405.

Soliciting bribe.

The solicitation of a bribe is held not to constitute an attempt to accept or receive a bribe. (Kan.) 176.

Betting.

Playing pool under an agreement that the one losing the game shall pay for the use of the table is held to be betting at a pool table, within the meaning of a statute making such betting a misdemeanor. (Ga.) 117.

Lottery.

The fact that each member is entitled

to trade out the amount he has paid in whenever he chooses to withdraw from the club is held not to prevent a suit club, which is a scheme by which a certain number of persons pay a small sum per week and choose by lot each week one of the number who shall receive a suit of clothes worth much more than such weekly payment, upon receipt of which he ceases to be a member of the club, from being a lottery. (Mich.) 505.

Indictment or information.

Indictment by a grand jury is held not
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to be necessary to due process of law, so as to preclude the institution of a criminal prosecution by information. (Or.) 466.

Instruction to jury.

A plea of guilty of theft, to commit which a burglary is alleged to have been committed, is held not to relieve the court of the necessity of instructing the jury as to the law governing convictions on circumstantial evidence, where the fact of the burglary itself depends on circumstantial evidence. (Tex. Crim. App.) 193.

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1. Failure to set out instructions to 69 L. R. A.

which objection is made, as required by rule of court, will waive the objection. *Garrigue v. Keller* (Ind.) 870

2. That there is evidence in the record that a tenant permitted the premises to be sold for taxes in violation of his covenant through mistake does not require a reversal of a judgment dismissing his bill for equitable relief from a forfeiture claimed on the ground, where there is no statement of facts found, or of rulings made; since it cannot be held to have been error to refuse to give credence to such evidence. *Gordon v. Richardson* (Mass.) 867

3. Sundays cannot be excluded in computing the time for signing of bills of exception under Code Pub. Loc. Laws, art. 4, § 170, allowing it to be done "at any time within thirty days" after verdict or finding of fact. *American Tobacco Co. v. Strickling* (Md.) 909

Assignments of error.

4. An assignment that the court erred "in charging the jury as certified to in the printed record," without pointing out the error complained of, raises no question which the appellate court is bound to review. *Chase v. Waterbury Sav. Bank* (Conn.) 329

5. On appeal from an order overruling a motion for new trial, appellant is entitled to have the assignment and specification of errors contained in his statement used on the hearing of such motion examined and considered by the appellate court, although such order was not assigned as error on appeal, since Id. Rev. Stat. 1887, § 4427, allows an aggrieved party an exception, as a matter of law, to an order denying his motion for a new trial. *Whitney v. Dewey* (Id.) 572

6. Where a motion for a new trial has been made, and the statement used on such motion contains an assignment and specification of errors, and an appeal is taken from the order denying the motion, and the original brief of appellant contains no enumeration of errors relied on, but refers to the transcript and discusses such errors, and prior to the argument in the appellate court a supplemental brief is filed by appellant, making a specific enumeration of such errors, the same will be regarded as a substantial compliance with the rules of court requiring an assignment of errors: and the case will be examined on the merits. Id.

Necessity of exceptions.

7. In the absence of exception to the conduct of the prosecuting attorney in reading the verdict of a coroner's jury in propounding a question to a witness, the supreme court will not set aside a verdict of guilty

in a murder case merely because the coroner's verdict stated that the homicide for which accused was on trial was unjustified. *State v. Coleman* (Mo.) 381

Questions reviewable.

8. The exercise by the trial court of its discretion as to the setting aside of a verdict as being contrary to the clear weight of the evidence will not ordinarily be reviewed on appeal. *Hancock v. Western U. Telegr. Co.* (N. C.) 403

9. The question of the invalidity of an information may be raised for the first time in the appellate court. *State v. Coleman* (Mo.) 381

10. Refusal to grant leave to amend the complaint so as to set up a new issue, after the introduction of the evidence, is not reviewable on appeal. *Allen v. North Des Moines M. E. Church* (Iowa) 255

11. Failure of the clerk to indorse the word "Filed" upon an affidavit is a mere irregularity which may be amended at any time before or during trial, and objection to it cannot be made for the first time on appeal. *State v. Coleman* (Mo.) 381

Review of facts.

12. On an appeal to the Louisiana supreme court solely under the grant of jurisdiction to that court over suits involving the constitutionality or legality of a fine or penalty imposed by a municipal corporation, the question whether the facts were sufficient to justify the conviction of the appellant cannot be considered. *Crowley v. Ellsworth* (La.) 276

13. A verdict in favor of plaintiff in an action to recover for injury to a railroad brakeman while coupling cars through the alleged negligence of the engineer in failing to stop his engine as soon as the cars came together, and hold it stationary until signaled to move it again, will not be disturbed where the evidence is conflicting, but plaintiff's evidence that the engine was not stopped is corroborated by undisputed evidence tending to show that fact. *Schus v. Powers-Simpson Co.* (Minn.) 887

14. A finding that there is no such disparity or difference between signatures on drafts presented to a savings bank and that of the depositor on file as to create a doubt or misgiving concerning the genuineness of the signatures in the mind of a competent and reasonably careful bank officer when presented by a person unknown to him, and that, therefore, the bank is not guilty of negligence in failing to make a comparison, is a conclusion of law reviewable by the appellate court, and not a finding of fact. *Kelley v. Buffalo Sav. Bank* (N. Y.) 317

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Grounds for reversal generally.

15. A judgment will not be reversed because the sufficiency of an answer was tested by what was called a motion to strike, instead of by demurrer, although the practice is improper, where the motion has been treated by the parties as in effect a demurrer. *Wisconsin Lumber Co. v. Greene & W. Teleph. Co.* (Iowa) 968

16. The admission of evidence of a conversation between the maker and payee of a note as to the law by which it shall be governed, which took place in the absence of the surety, is not reversible error upon complaint of the surety, where the conversation merely corroborated the effect of the contract itself, and there was no evidence to the contrary. *Garrigue v. Keller* (Ind.) 870

17. The excusing of a competent juror on motion of the court itself is not ground of error, if a fair and impartial jury was obtained. *Pittsburgh, C. C. & St. L. R. Co. v. Montgomery* (Ind.) 875

18. A verdict for damages will not be disturbed on writ of error on the ground that they were excessive, when the trial court did not disturb it. *Peirce v. Van Dusen* (C. C. App. 8th C.) 705

19. Failure to credit overdue premium notes on a life insurance policy in entering judgment thereon, as provided in the contract, is cause for reversal. *Union C. L. Ins. Co. v. Spinks* (Ky.) 264

Remarks or conduct of court or counsel.

See also *supra*, 2, 7.

20. The jury in a murder case cannot infer that a verdict was rendered by a coroner's jury, merely because the prosecuting attorney asked a witness whether or not he, as a member of such jury, did not render such verdict, which question the witness was not permitted to answer, so as to make the conduct of the prosecuting attorney ground for reversal. *State v. Coleman* (Mo.) 381

21. A remark by the trial judge to counsel in the presence of the jury in a criminal case, indicating that in his opinion the case is not one depending on circumstantial evidence, and that he gives instructions on that subject only in deference to the opinion of the higher court, is reversible error. *Beason v. State* (Tex. Crim. App.) 193

22. It is reversible error for the trial judge to permit, without rebuke, the prosecuting attorney to state to the jury, in a prosecution for burglary, that, if they do not convict, we might as well tear down the court houses; that, if defendant is not guilty, there are too many courts for the

case to go through to permit his conviction; that the state has proved that defendant stole the property by his plea of guilty, which the judge would not have entered if it was not true; so that the case is one of direct, and not circumstantial, evidence, although a 2x4 appellate court had held that it was the latter. Id.

Instructions.

23. Charging the jury as to the effect of verbal statements of accused, when there is no evidence that he made any, is not reversible error, where the facts disclosed by the record show that accused was not prejudiced thereby. *State v. Coleman* (Mo.)

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24. An instruction in an action for false imprisonment permitting the damages to be fixed by what the average man would suffer under the circumstances is not reversible error, where there is nothing to show that plaintiff suffered less than would the average man, although the measure of damages should actually have been what plaintiff suffered. *Mumford v. Starmont* (Mich.)

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25. A manifest clerical mistake in copying an instruction is not prejudicial error. *Pittsburgh, C. C. & St. L. R. Co. v. Montgomery* (Ind.)

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26. Failure to give an instruction which is not requested upon a matter to which the attention of the court is not called is not reversible error. *State v. Coleman* (Mo.)

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27. The appellate court may correct a judgment which erroneously imposes imprisonment in addition to a fine for a statutory misdemeanor, by striking out the erroneous portion and affirming the judgment as modified. *Pressly v. State* (Tenn.)

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1. The pardoning of a lawyer who has been convicted of embezzling funds from his client does not efface the moral turpitude and want of professional honesty involved in the crime, nor obliterate the stain upon his moral character. *People ex rel. Deneen v. Gilmore* (Ill.) 701

2. A license to practise law will be revoked which is secured by a fraudulent concealment of the fact that the plaintiff has recently been convicted of embezzling funds from a client in another state,—especially if, since its issuance, the plaintiff has been guilty of professional misconduct evincing such lack of personal integrity and professional honor as to establish that he is unworthy to be allowed to hold it. *Id.*

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1. Requiring an automobile to carry a number does not violate the constitutional provision against unreasonable searches, or compel the owner to testify against himself, or deprive him of property without due process of law. *People v. Schneider* (Mich.) 345

2. Power to require the registering and numbering of automobiles is conferred upon the city council by charter authority to control, prescribe, and regulate the manner in which the streets shall be used and enjoyed. *Id.*

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1. A debt is properly scheduled in bankruptcy proceedings, so as to give notice to the creditor or his assignor, where in the schedule the name of the original creditor and the nature and the amount of the debt
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are correctly stated. *Loomis v. Wallblom* (Minn.) 771

2. A trustee in bankruptcy has the option to assume or to renounce the leases and other executory contracts of the bankrupt, as he may deem for the best interest of the estate. *Watson v. Merrill* (C. C. App. 8th C.) 719

Provable claims.

3. Rents which a bankrupt had agreed to pay at times subsequent to the filing of the petition in bankruptcy do not constitute a provable claim under the bankruptcy law of 1898, because they are not a "fixed liability . . . absolutely owing at the time of the filing of the petition against him," and because they do not constitute an existing demand. *Id.*

4. Damages for the breach of a contract of the bankrupt to pay rents at times subsequent to the filing of the petition in bankruptcy are not a fixed liability, absolutely owing, which may be proved in bankruptcy proceedings under the law of 1898. *Id.*

Effect of adjudication.

5. An adjudication of bankruptcy absolves the bankrupt from no agreement, terminates no contract, and discharges no liability. *Id.*

6. An adjudication of bankruptcy in a case in which there was no rent due at the time of the filing of the petition in bankruptcy does not constitute a breach at that time of the covenants of the bankrupt in his lease to pay rents accruing thereafter. *Id.*

Discharge and its effect.

7. A full discharge of the individual liability of one partner on a firm debt may be had in bankruptcy proceedings concerning that partner only. *Loomis v. Wallblom* (Minn.) 771

8. A discharge of individual liability on a firm debt in bankruptcy proceedings concerning one partner only is a good defense in an action brought against both partners to renew a judgment on a partnership debt, the process in which action was served only on the partner who had been duly discharged in bankruptcy proceedings, where it appears that, many years before, the parties dissolved the firm, and the firm, to the actual knowledge of the judgment creditor, made an assignment of all unexempt firm and individual property under a state insolvency law, and that the claim was properly scheduled, and notice thereof duly given; and it does not affirmatively appear that any firm assets now exist. *Id.*

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1. A depositor in a savings bank is bound by the reasonable rules of the bank, to which he assents by an agreement in writing. *Langdale v. Citizens' Bank* (Ga.) 341

2. A depositor in a savings bank, by accepting and using a deposit book, assents to and is bound by the rules printed therein regulating the method of withdrawing money. *Chase v. Waterbury Sav. Bank* (Conn.) 329

Bank's liability on payment to wrong person.

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3. A rule of a bank that payment made to a person presenting a pass book shall be good and valid on account of the owner, unless the pass book has been lost and notice in writing given to the bank before such payment is made, is reasonable and binding upon depositors. *Langdale v. Citizens' Bank* (Ga.) 341

4. Under a rule of a bank that payment to a person presenting a pass book shall

be good on account of the owner, unless the book has been lost and notice in writing given to the bank, where a pass book is presented by a person other than the depositor to whom it belongs, together with a forged check bearing a signature similar to that of the depositor, and there is nothing to arouse the suspicion of the teller, or put him upon inquiry, as a reasonably prudent man, as to the genuineness of the check, and the bank in good faith pays the check, believing the person presenting it to be the depositor, it is not liable in a suit by the depositor to recover the money so paid, notwithstanding another rule of the bank, that depositors must always present their pass books when depositing or withdrawing money, and that, "if not present personally, an order properly signed and witnessed must accompany the presentation of the book in case of withdrawal." Id.

5. Failure of the officers of a savings bank to make a physical comparison of the signature on a draft presented with a depositor's bank book with his signature on file will render it liable for paying out money on a forged draft, in the absence of some unusual and pertinent excuse which will justify such failure. *Kelley v. Buffalo Sav. Bank* (N. Y.) 317

6. Ordinary care, under the circumstances of each particular case, is the measure of the duty of a savings bank in paying money out of a depositor's account after his death, upon production of the bank book and the presentation of a draft purporting to bear his signature, when the bank has no actual notice of the depositor's death, and nothing has transpired to charge it with knowledge of that fact. Id.

7. A regulation printed in the deposit books of a savings bank relieving the bank from liability for any fraud that may be practised on its officers in withdrawing money by means of forged certificates, does not relieve the bank from its duty to exercise ordinary care to prevent payment to the wrong person. *Chase v. Waterbury Sav. Bank* (Conn.) 329

Effect of depositor's negligence.

8. A depositor in a savings bank is not estopped to hold the bank responsible in case it negligently pays the deposit to an unauthorized person by the fact that he also is negligent in the care which he takes of his bank book. Id.

9. Negligence of a depositor in a savings bank in failing to keep his deposit book where it will not fall into the hands of persons who will fraudulently withdraw the deposit does not relieve the bank from liability in case it is guilty of negligence in

paying out a deposit to one not authorized to receive it. Id.

NOTES AND BRIEFS.

Banks; liability of savings banks for payments to fraudulent claimants:—(I.) General rule requiring reasonable care by the bank; (II.) the application of the rule of reasonable care as affected by the bank's by-laws: (a) in general; (b) by-law providing for payment to the depositor's representative after his death; (III.) the binding effect of the by-laws upon the depositor: (a) assent by the depositor; (b) what is a reasonable by-law; (IV.) limits of the application of the rule requiring reasonable care: (a) in general; (b) payment upon fraudulent claim of identity merely; (c) payment upon impersonation of the depositor, combined with forgery; (d) payment upon forged orders alone; (e) payment without either impersonation or forgery; (f) payment after the death of the depositor; (g) the obligation to compare the signatures; (V.) contributory negligence of the depositor: (a) in general; (b) failure to give notice to the bank; (c) failure to keep pass book safely; (VI.) matters of evidence. 317

Duty to take notice of depositor's death; payment of deposit to impostor; right to recover back money paid to person presenting pass book of dead depositor; where bank has no knowledge of death; care required of bank in paying deposit. 321

Payment of deposit on presentation of pass book; liability where payment made to impostor; regulation relieving bank from liability for fraud in withdrawing money; effect of negligence of depositor in care of pass book; presumption that bankers know signatures of depositors; measure of care required of bank in paying deposit; duty to keep signatures of depositors on file for comparison. 329

Rule that, if depositor does not present book personally, order properly signed and witnessed must accompany book; liability for payment contrary to rule; by-law relieving bank from liability for wrong payment when depositor has failed to give notice of loss of pass book; what vigilance required of bank in detecting fraud; rule that payment to person presenting book shall be binding on depositor; negligence of bank in making payment question for jury. 342

BENEVOLENT SOCIETIES.

1. An election to treat the original contract as still in force, upon notification of reduction in the amounts of certificates 49 L. R. A.

in a mutual benefit society, adhered to for two years and five months, is not subject to change, so as to permit a certificate holder to treat the contract as rescinded, and sue for assessments paid. Supreme Council A. L. of H. v. Lippincott (C. C. App. 3d C.) 803

2. Breach of the contract of a mutual benefit society by arbitrary reduction of the amounts of outstanding certificates is not a continuing one, so as to entitle a certificate holder to elect to treat the contract as rescinded at any time before the time set for performance. Id.

BETTING.

Playing Pool as, see GAMING.

BIBLE.

Reading of, in School, see SCHOOLS, 3.

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Bicycle as a vehicle. 346

BILL BOARD.

Placed Near Edge of Street; Municipal Liability for Injury by Fall of, see MUNICIPAL CORPORATIONS, 7.

BILL OF ATTAINDER.

See ATTAINDER.

BILL OF REVIEW.

See also REVIEW.

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Bill of review; limitation of time for filing. 397

BILLS AND NOTES.

Enforcing Note for Principal and for Interest in Same Action, see ACTION OR SUIT, 2.

Law Governing Married Woman's Liability on, see CONFLICT OF LAWS, 5, 6.

For Purchase Money, Stay of Action on, see INJUNCTION, 5.

Right of Set-Off in Action on, see SET-OFF AND COUNTERCLAIM.

1. The execution of a renewal note in consideration of the surrender of one upon which the signer was liable as surety will bind him as principal, as between himself and the payee. Garrigue v. Keller (Ind.) 870

Defenses.

Laches, *as*, see **LIMITATION OF ACTIONS**, 2.

Availability of Defense of Recoupment though Affirmative Action Barred, see **LIMITATION OF ACTIONS**, 3.

Removal of Bar of Limitations, see **LIMITATION OF ACTIONS**, 6.

2. One who purchases for value, of a creditor, the obligation of his debtor and obtains the latter's promissory note, payable to himself, as evidence of his obligation, with full knowledge of the consideration thereof, and of the facts which condition the inception of the original obligation, takes the note subject to all the defenses which existed against it in the hands of the original creditor. *Williams v. Neely* (C. C. App. 8th C.) 232

3. A partial failure of consideration, which results from a defect of title, is a good defense *pro tanto* to an action by the vendor upon, a promissory note given for the purchase price of land which he has conveyed with covenants of warranty and against encumbrances. *Id.*

4. A sound reason, inhering in the same transaction from which a promissory note springs, why the holder ought not, in equity and good conscience, to recover its face value, is a good equitable defense to it, although this defense constitutes neither an offset nor a counterclaim, nor an affirmative cause of action against the holder of the note. *Id.*

NOTES AND BRIEFS.

Bills and notes; who considered innocent purchaser of; note given for purchase price of land; breach of covenants in deed as defense to action on note; right of action on bond given by equitable owner of note as defense to action on note. 234

Effect of giving note to secure interest accrued on note previously given as acknowledgment of indebtedness upon latter; effect of mortgage given to secure original note as security for second note given for interest on first one. 261

What law governs where parties have fixed place for performance different from domicile; married woman's contract of suretyship; effect of admissions of maker of note on liability of surety. 871

BOARD OF TRADE.

Right to Enjoin Wrongful Dissemination of Quotation of Prices, see **INJUNCTION**, 4.

Effect of Carrying on Gambling Transactions on Property Right in Price Quotations, see **PROPERTY**.

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BOILER.

Master's Liability for Injury to Servant by Explosion of, see **MASTER AND SERVANT**, 3-5.

BONDS.

Estoppel of Corporation to Claim Payment of, see **ESTOPPEL**, 6.

Of Corporation, Conclusiveness against Corporation of Judgment as to, see **JUDGMENT**, 4.

A statute requiring that all bonds for the faithful performance of official or fiduciary duties, or the faithful keeping, applying, or accounting for funds or property, with certain exceptions, must be executed by a surety company or companies, is invalid as an invasion of the liberty to contract guaranteed by the Constitution. *State ex rel. McKell v. Robins* (Ohio) 427

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Bonds; when equity will go above penal sum of. 234

Action on; impossibility of performance of condition as defense; where impossibility arises through act of obligor. 285

Statute requiring all surety bonds to be signed by surety company. 428

BOULEVARD.

Condemnation of Land for, see **EMINENT DOMAIN**, 4, 5.

Sufficiency of Title of Statute as to, see **STATUTES**, 4.

BREACH.

Of Contract; Malicious Procurement of, see **CASE**.

BRIBERY.

Power of Legislature to Expel Member for, before Conviction, see **LEGISLATURE**, 4.

1. The solicitation of a bribe does not constitute an attempt to accept or receive a bribe. *State v. Bowles* (Kan.) 176

2. The solicitation of a bribe is not punishable as a crime by the laws of Kansas. *Id.*

BUILDING AND LOAN ASSOCIATIONS.

1. A statute which confers power on building and loan associations "to assess and collect from members and depositors such dues, fines, interest, and premium on loans made, or other assessments, as may be provided for in the constitution and by-laws;" and which further provides that "such dues, fines, premiums, or other assessments shall not be deemed usury, although in excess of the legal

rate of interest,"—is not in conflict with Ohio Const. art. 2, § 26, requiring all laws to have a uniform operation, or art. 1, § 2, forbidding the grant of special privileges or immunities. *Cramer v. Southern Ohio L. & T. Co.* (Ohio) 415

Premiums.

2. The premium for a loan, if reasonable in amount, need not be ascertained by competitive bidding for precedence in obtaining the loan, but it may be fixed at the uniform rate by the constitution and by-laws of the association, under a statute empowering building and loan associations to impose such premiums or assessments as may be provided for in the constitution and by-laws, and exempting such associations from the operation of the usury laws. *Id.*

NOTES AND BRIEFS.

Building and loan associations; validity of statute exempting from operation of usury laws; mutuality as essential principle of building association. 417

BUILDINGS.

License to Use Stairway on Outside of, see **LICENSE**, 3.

BURDEN OF PROOF.

See **EVIDENCE**, 4-7.

BURGLARY.

By One Apparently Assisted by Detective, see **CRIMINAL LAW**, 1-3.

NOTES AND BRIEFS.

Burglary; criminal liability when instigated by private detective with approval of proprietor of place burglarized. 406

Necessity of instruction as to law on circumstantial evidence on prosecution for 197, 207

BUSINESS.

NOTES AND BRIEFS.

Business; what constitutes. 599

CARRIERS.

Duty and Liability as to passengers.

Questions for Jury as to Safety of Exit, see **TRIAL**, 7.

1. Livery-stable keepers are not within the rule that common carriers of passengers are bound to exercise extraordinary care for the safety of their passengers. *Stanley v. Steele* (Conn.) 561

2. Whether or not a livery-stable keeper is liable to a patron for an injury due to a defect in the neck yoke of the carriage furnished by him depends upon whether it was discoverable by the exercise of such care as is usually exercised by persons of ordinary prudence in the conduct of such business. *Id.*

3. A carrier cannot delegate to another the duty of seeing that the means of egress from its terminal grounds are reasonably safe. *Cotant v. Boone Suburban R. Co.* (Iowa) 982

4. A railway company which expressly or by implication invites its passengers to use a stile over a wire fence in leaving its grounds is bound to use at least ordinary care in seeing that it is fit for the purpose intended, although the stile was not erected by it, and the defective part is not on its property, but where it has no right to go to make inspection or repairs. *Id.*

Contributory negligence of passenger.

Question for Jury as to, see **TRIAL**, 7.

5. Passengers have a right to assume that means of egress from the carrier's terminal grounds are reasonably safe. *Id.*

Liability as to baggage.

6. The checking of baggage to destination upon a through ticket to transport the passenger over roads of initial and connecting carriers will render the initial carrier liable for its loss on a connecting line. *Kansas City, Ft. S. & M. R. Co. v. Washington* (Ark.) 65

7. A steamship company is not entitled to a limitation of its liability for loss of passengers and baggage through the sinking of its vessel, where its crew could not understand the language of its officers, and were not drilled in the launching of the boats, so that after the accident but one boat was successfully launched, although there was time enough to launch them all had proper orders been given and obeyed, and the statute provides that no steamer carrying passengers shall depart from any port unless she shall have in her service a full complement of licensed officers, and a full crew sufficient at all times to manage the vessel. *Re Pacific Mail S. S. Co.* (C. C. App. 9th C.) 71

Duty and Liability as to freight.

Proximate Cause of Loss, see **PROXIMATE CAUSE**, 1.

8. It is the duty of a common carrier to whom goods are delivered for transportation, to forward them promptly, and without unreasonable delay, to their destination. *Bibb Broom Corn Co. v. Atchison, T. & S. F. R. Co.* (Minn.) 509

9. A carrier who negligently and carelessly delays a shipment is liable for the loss, where the goods are overtaken in transit and damaged by an act of God which would not have caused the damage had there been no delay,

even though the act of God could not reasonably be anticipated; and this is true whether the goods are in their nature perishable or nonperishable. *Id.*

Governmental control; discrimination.

10. A carrier may at any time change its policy as to furnishing shippers of a certain commodity privileges which, under the law, it is not bound to extend to them. *Central of Ga. R. Co. v. Augusta Brokerage Co. (Ga.)* 119

11. That a discrimination by a carrier against a particular commodity is dictated by the business interests of the carrier, and really affects but a single shipper, does not make it unlawful. *Id.*

12. Discrimination against shippers only, and not against commodities, is forbidden by the rule promulgated by the railroad commission of Georgia that carriers, "in the conduct of their intrastate business, shall afford to all persons equal facilities in the transportation and delivery of freight." *Id.*

13. Unjust discrimination against shippers engaged in interstate commerce, as to the matter of issuing through bills of lading or furnishing reshipping facilities at terminal points within the state of Georgia, does not constitute a violation of rule 36 of the Georgia railroad commission that carriers in their intrastate business shall afford to all persons equal facilities in the transportation and delivery of freight. *Id.*

14. A discrimination by a carrier against cotton seed, by refusing to issue through bills of lading or to furnish its cars to connecting carriers in order that shipments may be carried to ultimate destination without reloading at terminal points, is not unlawful, provided all shippers of that commodity are treated alike. *Id.*

NOTES AND BRIEFS.

Carriers; liability of initial carrier for loss; where through ticket is issued. 65

Limitation by steamship company of its liability for loss; when justified; statute requiring crew sufficient at all times to manage vessel. 71

Duty to ship beyond terminus of its own line; right to discriminate against certain commodity. 120

Liability of, for loss of goods which, because of delay in forwarding, are overtaken and destroyed by act of God. 509

Duty to furnish medical care and treatment to injured passenger. 513

Liability for injury to passenger; by misconduct of servant; sleeping car companies. 643

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Duty to keep stile used as exit from ground safe; where carrier did not erect stile, and it is on land of other party; care of passenger in using exit. 983

CASE.

See also CONSPIRACY.

The malicious procurement of a breach of contract of employment, resulting in damage where the procurement was during the subsistence of the contract, is an actionable wrong. *Employing Printers Club v. Dr. Blosser Co. (Ga.)* 90

CASH DIVIDENDS.

Right of Life Tenant as to, see LIFE TENANTS, 3-6.

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As Nuisance, see NUISANCES.

CHOSE IN ACTION.

Rights of Assignee of, see ASSIGNMENT.

CIRCUMSTANTIAL EVIDENCE.

Necessity of Instruction as to, see TRIAL, 12.

CLOUD ON TITLE.

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Cloud on title; jurisdiction of equity of suit to remove cloud on title to land in other state or country. 682

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Duty of One Mining to Leave Surface Support, see MINES.

COMBINATIONS.

Injunction against, see INJUNCTION, 2.
See also CONSPIRACY.

NOTES AND BRIEFS.

Combinations; illegal combination to control prices and restrict competition; attempt to injure person by inducing employees to break their contracts with him; right of party to protection where he was a former member of the combination; right to enforce illegal rules and regulations against former member. 91

COMMERCE.

See also CARRIERS, 13.

1. A statute requiring merchants licensed to sell grain on commission to render a true statement to the consignor within twenty-four hours of making a sale, showing the grain sold, price received, name and address of purchaser, and the date, hour, and minute when sold, with vouchers for charges, and expenses, is not unconstitutional.

tional as an interference with interstate commerce, though applying to shipments from beyond as well as from within the state. *State v. Edwards* (Minn.) 667

2. Railroad companies engaged in interstate commerce are subject to a state statute making railroad companies liable for injuries to employees on account of the negligence of others having control or direction of them, so long as Congress does not deal with that subject. *Peirce v. Van Dusen* (C. C. App. 6th C.) 705

NOTES AND BRIEFS.

Commerce; interstate; statute regulating sales of grain by commission merchants as interference with; what constitutes interstate commerce; right to require license for conducting in state business originating outside of. 668

COMMISSION MERCHANTS.

See FACTORS.

COMMON LAW.

Rule in *Shelley's Case* as Part of, see REAL PROPERTY, 1.

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Common law; implied change of, by statute. 354

COMPLAINT.

See PLEADING, 3-5.

CONDITIONS SUBSEQUENT.

See REAL PROPERTY, 3-8.

CONDONATION.

Of Adultery as Justification for Filing Bill to Review Divorce Decree, see REVIEW, 3.

CONFESSION.

See EVIDENCE, 16.

CONFLICT OF LAWS.

1. The validity and interpretation of the contract, as well as the rule measuring the damages arising upon its breach and the company's liability therefor, are to be determined by the laws of the state where a telegram is filed for transmission in case the points of inception and termination are in different states. *Hancock v. Western U. Telegr. Co.* (N. C.) 403

2. Delivery of notes into the mail, to be forwarded to another state in accordance with the understanding between maker and payee, completes the delivery so as to make the contract one to be governed by the laws of the state where the postoffice is located. *Garrigue v. Keller* (Ind.) 870
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As to marriage.

3. The marriage of a ward, solemnized in a sister state where it is valid, is not void because no license was procured with the consent of the guardian, as required by the laws of his domicile, nor because such laws render void all his contracts. *Ex parte Chace* (R. I.) 493

4. The marriage of a ward, valid where made in a sister state, must be regarded as valid at his domicile, although it would not have been so had it been solemnized there because of statutory limitation of his right to contract. Id.

As to married woman's liability.

5. That a note for the payment of which a married woman becomes surety is made payable in a state where such contract is invalid will not, although the suit is brought in that state, defeat her liability if the contract was valid at her domicile, where it was executed. *Garrigue v. Keller* (Ind.) 870

6. A contract of suretyship against a married woman, which is valid in the state where made, is not unenforceable in another state, as violative of its public policy, merely because its statutes forbid her to bind herself by such a contract. Id.

NOTES AND BRIEFS.

Conflict of laws; as to damages for negligence in sending telegram; controlling effect of law of state in which contract made. 403

As to negotiable paper; as to contracts of married women. 870

CONNECTING CARRIERS.

Liability of, see CARRIERS, 6.

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To Burglary by Owner of Building, see CRIMINAL LAW, 3.

To Sale of Liquor to Minor, see INTOXICATING LIQUORS.

CONSIDERATION.

Marriage as, see CONTRACTS, 2.

CONSPIRACY.

1. A combination of two or more persons to injure one in his trade by inducing his employees to break their contract with him, or to decline to continue longer in his employment, is, if it results in damage, actionable. *Employing Printers' Club v. Dr. Blosser Co.* (Ga.) 90

2. A former member of an illegal combination, whose connection with it was severed before the filing of the suit, will not be denied the protection of a court of equity against an illegal act of such

combination because of his previous connection therewith. Id.

NOTES AND BRIEFS.

Conspiracy; to injure person's business by inducing employees to break their contracts; injunction to restrain; where party injured was formerly a member of the illegal combination. 91

CONSTITUTIONAL LAW.

Power of Legislature to Create and Destroy Counties, see COUNTIES.

Relation of Court to Legislative Department, see COURTS, 4, 5.

Validity of Statute for Cleaning and Repair of Drainage Ditches, see DRAINS AND SEWERS; EMINENT DOMAIN, 8.

Authorizing Abandonment of Condemnation Proceeding as Impairing Substantial Right, see EMINENT DOMAIN, 10.

Power of Legislature to Expel Member, see LEGISLATURE.

Who may Question Constitutionality of Statute, see STATUTES, 1.

Special Legislation, see STATUTES, 7.

Constitutionality of Tax Measures, see TAXES.

Constitutionality of Statute Permitting Use of Voting Machine, see VOTERS AND ELECTIONS.

1. Acts inconsistent with the spirit of the Constitution are as much prohibited by its terms as are acts specifically enumerated and forbidden therein. McDonald v. Doust (Id.) 220

Personal liberty and security.

2. Personal liberty includes not only freedom from physical restraint, but also the right "to be let alone;" to determine one's mode of life,—whether it shall be a life of publicity or of privacy; and to order one's life and manage one's affairs in a manner that may be most agreeable to him, so long as he does not violate the rights of others or of the public. Pavesich v. New England L. Ins. Co. (Ga.) 101

3. Personal security includes the right to exist, and the right to the enjoyment of life, while existing, and is invaded not only by a deprivation of life, but also by a deprivation of those things which are necessary to the enjoyment of life according to the nature, temperament, and lawful desires of the individual. Id.

Equal protection or privileges.

Special Privileges to Loan Association, see BUILDING AND LOAN ASSOCIATIONS, 1.

4. Railroad corporations are persons 69 L. R. A.

within the constitutional provisions as to equal privileges and immunities of citizens and the equal protection of persons. Pittsburgh, C. C. & St. L. R. Co. v. Montgomery (Ind.) 875

5. The exemption of municipal corporations from a statute making other corporations liable to a servant for negligence of a fellow servant does not make the statute invalid. Id.

6. A constitutional provision requiring all laws of a general nature to have a uniform operation throughout the state is not violated by Ohio act April 2, 1890, relating to the liability of railroad companies for injuries to employees, since it applies to all railroad corporations operating railroads within the state, and to all of a common class of railroad employees. Peirce v. Van Dusen (C. C. App. 6th C.) 705

7. No unconstitutional discrimination between resident and nonresident owner of land along the line of a ditch is made by a statute permitting any resident owner, when the ditch needs cleaning, to petition therefor under a section which simply requires a sworn statement of such necessity to be made to the county auditor, while nonresident owners can only petition for such improvement under a section which requires application to be made to the county commissioners, and the giving of a bond for the payment of costs if the application is not granted. Taylor v. Crawford (Ohio) 805

Due process of law.

Requiring Automobile to Carry Number as Violation of Provision as to, see AUTOMOBILES, 1.

Necessity of Indictment by Grand Jury, see CRIMINAL LAW, 4.

8. Property is not taken without due process of law by Neb. Comp. Stat. 1901, chap. 77, art. 1, §§ 39, 40, requiring railroad property to be valued and assessed by one assessing body, and the aggregate value distributed, on a mileage basis, to the various counties, cities, towns, etc., through which the road runs. State ex rel. Morton v. Back (Neb.) 447

9. A person upon whose property an assessment for cleaning out a drainage ditch is laid is not deprived of his property without due process of law, where the assessment is fixed by the county surveyor after examining the sewer to ascertain whether the work is necessary, and estimating the cost, and a report of his examination and estimate must be returned to the county auditor, who appoints a day for hearing the report, of which due notice is given to all interested parties, and the

auditor may make such changes in the assessment as he deems just, while any person aggrieved has a remedy under Ohio Rev. Stat. 1892, § 5848, providing for an injunction to restrain the illegal levy or collection of taxes and assessments. *Taylor v. Crawford* (Ohio) 805

10. Though an ordinance prohibiting the storage of explosive oils in large quantities within the corporate limits happens to have the effect of putting an end to a business, and of rendering valueless certain structures used in connection with the business, its enforcement will not constitute a depriving of property without due process of law, when the circumstances justify its adoption as a police regulation. *Crowley v. Ellsworth* (La.) 276

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Constitutional law; weight to be given to contemporaneous construction of Constitution. 184

Construing Constitution; power of legislature limited only by express provisions; what justifies courts in setting aside enactment of legislature; powers and duties of local authorities as to public roads and levy of taxes; held solely by delegation from general assembly. 915

Right of legislature to abolish county in existence at time state is admitted to Union; right to change county seat; refusal of court to consider extent of infringement of Constitution; any infringement, however slight, fatal. 221

Validity of statute providing that, if jurisdiction of offense be in two counties, accused shall be tried in county where first arrested. 271

What constitutes due process; denial of due process because party is in contempt of court. 312

Validity of retrospective laws not impairing obligation of contracts or of the nature of *ex post facto* laws; right to change form of remedy; where cause of action has already arisen; vested right of party to damages for land taken for public use; where damages have not been established in mode pointed out by law; statutory right to lien as vested right; vested right to costs. 314

Scope of police power; right to pursue lawful calling; what constitutes property; power of legislature to delegate to municipalities regulation of street traffic. 346

Police power; right to prohibit injurious or hazardous business. 350

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surety bonds to be signed by surety companies; constitutional right to make and enforce contracts; right to receive property not absolute. 428

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What constitutes a "taking" of property, for which compensation must be made; forbidding use of land near parkway for advertising purposes; no vested right to be exempt from police regulations. 817

Statute making all corporations, except municipal, liable for injury to employee by fellow servant; making void contract by corporation for release from liability, for negligence of fellow servant; what classification of business constitutional; act invalid as to some persons embraced in provisions invalid as to all; necessity of uniformity and equal privileges; depriving owner of property of one of its attributes as depriving him of his property; interference with right to contract. 876

CONSTRUCTIVE POSSESSION.

See ADVERSE POSSESSION. ..

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Enforcing Order for Support of Insane Person by Proceedings for, see INCOMPETENT PERSONS, 2.

A plaintiff in an equity case has no absolute right to proceed with the trial while he is in contempt of court for refusal to obey an order which can be enforced by mandamus. *Campbell v. Justices of Superior Court* (Mass.) 311

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Contempt; refusal to permit plaintiff to proceed with trial while in contempt of court for refusal to obey orders; as denial of due process of law. 312

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Outstanding, Recovery for Improvements on Breach of Covenant of Seisin by, see IMPROVEMENTS.

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Impairing Obligation of, see EMINENT DOMAIN, 10.

- Showing Completed Agreement Satisfying Statute of Frauds, see EVIDENCE, 8.
- Parol Evidence of Signing Memorandum of Contract as Agent for Purchaser, see EVIDENCE, 15.
- Effect of Permitting Gambling Transactions on Right of Board of Trade to Protection of Price Quotations, see INJUNCTION, 4.
- Invalidity of Limitation as to Time for Suit on Policy, see INSURANCE, 8.
- Validity of Parol License, see LICENSE.
- Validity of Statute Avoiding Contract for Relief from Liability for Fellow Servant's Negligence, see MASTER AND SERVANT, 23, 24.
- Property Right in Price Quotations by Board of Trade Carrying on Gambling Transactions, see PROPERTY.
- Specific Performance of Oral Contracts, see SPECIFIC PERFORMANCE, 2.
- For Sale of Land, see VENDOR AND PURCHASER.
1. A covenant by a purchaser of the business and effects of a corporation, the sale of which is intended to terminate its existence, to indemnify it from and against the contracts and engagements to which the said vendor appears to be now liable, and also all claims and demands on account of the same contracts and engagements, does not cover a claim by the president-manager of the corporation to salary for the time subsequently accruing, where it was founded merely on the fact that he had been elected president, and there was no contract that the services and salary should continue for any specified time. *Busell Trimmer Co. v. Coburn* (Mass.) 821
- Consideration.**
2. Marriage is a valuable consideration sufficient to support a conveyance from husband to wife. *Barnum v. Le Master* (Tenn.) 353
- Partial performance.**
3. On the termination, by the insolvency and dissolution of a corporation, of an executory contract with it necessitating, in its execution, work, labor, and the expenditure of money for materials, machinery, etc., and the construction of roads and other improvements, as well as in carrying on the work, the contractor is entitled to compensation for services rendered by him in pursuance of the contract until the date of its termination, and to reimbursement for his actual and necessary outlay and expenses, subject to a deduction of all sums paid to him by the corporation, and of the value of such materials, machinery, and other property on hand. *Griffith v. Blackwater Boom & L. Co.* (W. Va.) 124
- Rescission.**
- Of Mutual Benefit Certificate, see BENEVOLENT SOCIETIES.
4. A deed without power of revocation, from a parent who is incapacitated physically, and weak mentally, to his daughter, who has for some time had the care of him, made without the benefit of competent and independent advice, will be set aside by equity. *Slack v. Rees* (N. J. Err. & App.) 393
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Powers of, and contracts by.

Effect of Failure to Keep Tender Good on Right to Compel Repurchase of Stock, see **TENDER**.

See also **CONTRACTS**, 3.

1. A corporation has power to make valid contracts for the repurchase of its own stock in the absence of charter restrictions. *Wisconsin Lumber Co. v. Greene & W. Telegraph Co. (Iowa)* 968

2. A corporation cannot refuse to perform its contract to allow subscribers to stock free passes, or to repurchase the stock at the price paid, on the ground that it is contrary to public policy. *Id.*

3. A corporation cannot accept stock subscriptions secured by its officers, and repudiate the promise to take back the stock under certain circumstances. *Id.*

4. A corporation cannot refuse to carry out its contract to repurchase the stock of certain subscribers upon certain contingencies on the ground that other stockholders were not given the same right to return their stock; at least where there is no showing of any other prejudice to the other stockholders. *Id.*

5. The fact that a person entering into an executory contract with a corporation, necessitating in its execution the expenditure of money and labor, is a director of the corporation, does not affect his right, upon the termination of the contract by the insolvency and dissolution of the corporation, to compensation for services rendered, and to reimbursement for expenses incurred, under the contract, where the contract was entered into openly, without fraud, and the other directors and the stockholders were fully informed of its terms, and permitted it to be partly executed without disapproval. *Griffith v. Blackwater Boom & L. Co. (W. Va.)* 124

6. A contractor who, under an executory contract with a corporation, terminated by its insolvency and dissolution, has made large expenditures in the construction and repair of river dams, bridges, and roads belonging to the corporation, for the driving and hauling of timber, and upon timber partially prepared for delivery under the contract, is entitled, upon a sale of the

corporate property free and discharged from the contract, under a decree of the court directing it to be offered for sale both subject to and free from the contract, to compensation and reimbursement for his services and expenditures out of the assets of the company, although he afterwards purchases the corporate property and obtains the benefit of such improvements. *Id.*

Compensation of officers.

7. Electing one president of a corporation, and appointing him manager, do not entitle him to a salary for any specified time. *Busell Trimmer Co. v. Coburn (Mass.)* 821

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COUNTIES.

Action to Enforce Order for Support in Insane Asylum in Name of, see **INCOMPETENT PERSONS**, 1-2.

See also **CONSTITUTIONAL LAW**, **NOTES AND BRIEFS**.

1. The power to create new counties, conferred on the legislature by the Constitution, does not include power to reorganize under a new name an old county existing

at the time of the adoption of the Constitution. *McDonald v. Doust* (Id.) 220

2. The legislature has no power to destroy the counties recognized by the Constitution as organized and existing at its adoption as legal subdivisions of the state. *Id.*

3. A statute abolishing an existing county, and creating two new counties out of the same territory, and establishing a new county seat for each, is void under the Idaho Constitution, which recognizes the counties existing at the time of its adoption as legal subdivisions of the state, and forbids the removal of a county seat or the cutting off of territory without a vote of the people, and prohibits the reduction of the territory of a county below 400 square miles. *Id.*

4. A county organization is not a special privilege or immunity within the meaning of a constitutional provision that no special privilege or immunity shall ever be granted that may not be altered or revoked by the legislature. *Id.*

COURTS.

Judicial Notice by, see EVIDENCE, 1.

Territorial limitations.

1. A constitutional right to trial by jury of the vicinage does not prevent the trial taking place in either county, in case a crime is begun in one and consummated in another. *Hargis v. Parker* (Ky.) 270

2. An accessory before the fact to a murder in which the wound is inflicted in one county and the injured person dies in another may be tried in either county, although his acts are committed only in the former, under statutes providing that accessories shall be liable to the same punishment as principals, and may be prosecuted jointly with them, and, in case of a crime committed jointly in two counties the prosecution may be in either. *Id.*

3. No interest in real estate located in another state can be vested in a complainant in a divorce proceeding by a decree which purports to deal directly with the title to the estate. *Proctor v. Proctor* (Ill.) 673

Relation to legislative department.

4. The court cannot supervise the exercise by the legislature of its constitutional power to expel a member. *French v. Senate* (Cal.) 556

5. The question whether a general law can be made applicable to a particular case is for the legislature, and not for the court, to determine. *Pittsburgh, C. C. & St. L. R. Co. v. Montgomery* (Ind.) 875

Superintending control.

6. The supreme court may exercise its 69 L. R. A.

constitutional power to prevent an inferior court from exceeding its jurisdiction, before the question of jurisdiction has been presented to such court, where the situation disclosed is such that to take the ordinary course would be of itself to subject the complaining party to irremediable loss. *Hargis v. Parker* (Ky.) 270

7. The supreme court has jurisdiction to intervene by a writ of prohibition to stay an inferior court from proceeding out of its jurisdiction, under a constitutional provision empowering it to issue such writs as may be necessary to give it a general control of inferior jurisdictions. *Id.*

Conflict of authority.

8. The court which first acquires jurisdiction of specific property by the issue and service of process in a suit to enforce a lien upon it, in which it may be necessary to take possession or control of it, retains jurisdiction until the end, free from the interference of any court of co-ordinate jurisdiction. *Williams v. Neely* (C. C. App. 8th C.) 232

9. A subsequent suit involving rights in the same property, in a court of co-ordinate jurisdiction, should not be dismissed, but, before a seizure of the property under it, should be stayed until the proceedings in the earlier suit are terminated, or ample time for their termination has elapsed. *Id.*

10. The arrest at their own instigation, for the purpose of preventing a trial elsewhere, of persons accused of crime, by a magistrate of the county where the commission of the crime is commenced, and binding them over to await the action of the grand jury, will not prevent proceedings against them in the county where the crime is consummated, under a statute providing that, if the jurisdiction of any offense be in two counties, the accused shall be tried in the county in which he is first arrested. *Hargis v. Parker* (Ky.) 270

Federal courts following state decisions.

11. The Federal court is not bound to follow a decision of the courts of the state in which it is sitting, declaring that a plaintiff in replevin is not bound to return the property replevied if prevented by act of law, which is based not upon a statute, but upon general principles. *Three States Lumber Co. v. Blanks* (C. C. App. 6th C.) 283

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By Tenant; Forfeiture for Breach of, see LANDLORD AND TENANT, 2.

Restoration of possession is an indispensable ingredient of a decree in equity in favor of a vendee for breach of a covenant of seisin made by an outstanding contingent remainder, where his deed gave him at least a life estate, and he has had the benefit of possession. *Brannon v. Curtis* (Tenn.) 760

CRIMINAL LAW.

Place of Trial of Crime Committed in Two Counties, see COURTS, 1, 2.

Effect of Arrest in Court of One County for Purpose of Preventing Trial Elsewhere, see COURTS, 10.

For Indictment, Generally, see INDICTMENT AND INFORMATION.

Power of Legislature to Expel Member for Bribery before Conviction, see LEGISLATURE, 4.

See also APPEAL AND ERROR, 27.

Criminal liability; apparent co-operation of detective.

1. Upon the trial of one charged with burglary, the mere fact that one who was present with an assisted him in the burglary was a detective is not a defense, if the detective did not instigate the crime, and it was committed, as to every ingredient of it, by the criminal. *State v. Currie* (N. D.) 405

2. The acts of a detective who apparently assists in a burglary for the purpose of securing evidence of the same and other offenses are not to be imputed to the crim-

inal, as they are not acting in a common purpose. Nevertheless, if the offense is committed by the person charged, as to every element thereof, he may be found guilty, notwithstanding the complicity of the detective. Id.

3. The fact that the owner of a building to whom a detective disclosed that it was probably about to be burglarized by a person named, with the feigned assistance of himself, acting for the purpose of securing evidence of the intended burglary and other crimes, did not take steps to prevent the burglary, but passively allowed it to go on, is not a consent to the burglary that will be a defense to the burglar. Id.

Necessity of Indictment.

4. Indictment by a grand jury is not necessary to due process of law, so as to preclude the institution of a criminal prosecution by information. *State v. Guglielmo* (Or.) 466

5. Under a constitutional provision for the constitution of a grand jury, which empowers the legislature to modify or abolish it, provision may be made for the institution of criminal proceedings by information without the entire abolition of the grand jury. Id.

Extent of punishment.

6. Where a statute prescribes a fine as the punishment for giving liquor to minors, the court has no authority to impose imprisonment therefor. *Pressly v. State* (Tenn.) 291

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See also TRIAL.

Criminal law; proceedings before grand jury as part of prosecution; what constitutes an attempt to commit crime; solicitation as attempt; offer by public officer to receive bribe as criminal offense. 176

Statute providing that, if jurisdiction of offense be in two counties, accused shall be tried in county where first arrested. 271

Criminal liability where crime is instigated by detective and consented to by party injured. 406

Criminal liability for violation of statute without wrongful intent. 669

Right to institute criminal prosecution by information; right of one to preliminary examination before prosecution for crime; necessity that prosecution be instituted by district attorney; necessity that indictment be signed by district attorney; power of attorney general at common law to file criminal information *ex officio* in case of felony; necessity that information be verified by affidavit; sufficiency of signing of name of district attorney by his deputy. 467

CURTESY.

1. A fee-simple estate is vested in a woman by a deed to her and her body heirs, in which her husband is entitled to curtesy, although the grant is expressly made free from his debts and liabilities. *Bingham v. Weller* (Tenn.) 370

2. A man is deprived of his curtesy interest in land by conveying it to his wife to her sole, separate, and exclusive use, free and discharged from all his control and liabilities. *Id.*

CUSTOM.

To Search Prisoners, Exclusion of Evidence as to, see **EVIDENCE**, 24.

Of Commission Merchants, see **FAC-TORS**, 2.

As to who Shall Furnish Scaffolding; Effect of Servant's Knowledge of, see **MASTER AND SERVANT**, 7.

DAMAGES.

Reversal for Excessiveness, see **AP-PEAL AND ERROR**, 18.

Conflict of Laws as to, see **CONFLICT OF LAWS**, 1.

Burden of Proof as to, see **EVIDENCE**, 7.

Duty to keep down damages.

1. It is the duty of the injured party, when a contract is broken, to minimize the loss and injury, when it is practicable to do so by a reasonable outlay of money; but such outlay is to be allowed him as a part of his damages. *Griffith v. Blackwater Boom & L. Co.* (W. Va.) 124

Nominal damages.

2. In an action on contract for breach of covenant to convey real estate with warranty of title, where the vendor's title is defective, only nominal damages can be recovered. *Gerbert v. Congregation of the Sons of Abraham* (N. J. Err. & App.) 764

On contracts.

Recovery for Improvements on Breach of Covenant, see **IMPROVEMENTS**.

3. When a contractor, by reason of the termination of a partly executed contract, is entitled to compensation for services and outlay, part of which have been made in effecting permanent improvements, the service and expenditures relating to such improvements are not apportioned between the executed and unexecuted parts of the contract. *Griffith v. Blackwater Boom & L. Co.* (W. Va.) 124

4. A contractor who, in the prosecution of work under his contract for cutting logs and hauling and driving them to a mill by means of a railroad, tramroads, and booms and dams in a river, constructed by him for the purpose, puts in timber to the same 69 L. R. A.

mill, by means of the same improvements, for others, not keeping separate accounts of the expenditures, may be allowed, upon an inquiry as to the amount necessary to compensate him for his services and outlay, when he has been prevented from completing his contract, to charge up his entire outlay on all the work done, and credit all sums received on account thereof, when it is shown that all the work was profitable so far as executed, and that the accounts cannot be separated. *Id.*

5. To entitle an employee to damages against his employer for breach of the contract by disposing of all his property so that no more services could be rendered, he must show that he has not been able to earn an equal amount elsewhere. *Busell Trimmer Co. v. Coburn* (Mass.) 821

6. The rental value of the premises during the possession of the vendee must be deducted from his recovery for breach of a covenant of seisin, which is made by an outstanding contingent remainder, where his deed gave him at least a life estate, and the life tenancy has continued so as to preclude the remainder-men from demanding rents for any part of the time. *Brannon v. Curtis* (Tenn.) 760

7. In an action on a contract to convey unimproved land with warranty of title, to recover damages for failure to convey, the vendor's title proving defective, the value of buildings placed on the land by the vendee, without the request of the vendor, before the time fixed for conveyance has arrived, cannot be recovered by the vendee. *Gerbert v. Congregation of the Sons of Abraham* (N. J. Err. & App.) 764

In admiralty; division of damages.

8. Negligently sitting within the bight of a hawser which is subject to strain will bring one within the admiralty rule of apportionment of damages in case both parties are in fault, where, by reason of the negligence of the vessel, the strain is put upon the line in such a way that the bitt around which it runs gives way and he is thrown overboard by the sweeping forward of the line. *Steam Dredge No. 1* (C. C. App. 1st C.) 293

For personal injuries.

See also *supra*, 8; *infra*, 13.

9. Damages for future suffering because of a negligent injury may be allowed where plaintiff is still suffering at the time of trial, and experts testify that the injury will probably be permanent. *Cotant v. Boone Suburban R. Co.* (Iowa) 982

For deceit.

10. In an action to recover damages for fraudulent representations by which the

plaintiff was induced to exchange real property for stock in a corporation, the measure of recovery, in the absence of a claim for special or exemplary damages, is the difference in value between what was received or parted with, as the case may be, and what would have been received or parted with, had the representations been true, where he affirmed the contract after discovering the deceit. *Beare v. Wright* (N. D.) 409

In condemnation proceedings.

11. A state statute acquiescing in an attempt by the Federal government to acquire land within the state for the use of such government does not entitle the government to employ the local rule of damages as the measure of its liability for property taken. *Nahant v. United States* (C. C. App. 1st C.) 723

Mental anguish.

12. Mere disappointment and regret are not included in the rule allowing damages for mental anguish upon failure of a telegraph company promptly to deliver a death message. *Hancock v. Western U. Teleg. Co.* (N. C.) 403

13. Physical and mental suffering arising out of a personal injury may be taken into consideration in establishing damages. *Pittsburgh, C. C. & St. L. R. Co. v. Montgomery* (Ind.) 875

Punitive damages.

Necessity of Allegations as to, see PLEADING, 5.

14. Punitive damages may be allowed for the cutting of trees upon the sidewalk for the accommodation of electric-light wires, in entire disregard of the rights of the abutting owner, and against his protest. *Brown v. Asheville Electric Co.* (N. C.) 631

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DECEIT.

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Interest Passing by Deed to Woman and Her Bodily Heirs, see CURTESY, 1.

Delivery.

Parol Evidence of, see EVIDENCE, 12, 13.
See also ESCROW.

1. Even though a valid delivery of a deed had not been made at the time of its execution, still the grantor may, after he has acquired complete knowledge of the facts of the transaction, ratify the wrongful taking of the deed by the grantee, and thereby perfect the title. *Whitney v. Dewey* (Id.) 572

2. The delivery to the grantee of a warranty deed executed free from any conditions or qualifications as to the vesting of title is absolute, and title vests at once, although the delivery is accompanied by a contemporaneous parol agreement to the effect that the grantee shall form a corporation and deed the property to such corporation, and thereupon pay the grantor \$1,000 cash and deliver to him \$5,000 worth of first-mortgage bonds of the corporation secured on the property so deeded, and the deed is placed in the hands of the grantee to facilitate such transaction. Id.

3. A grantor cannot, by warranty deed absolute on its face, and free from conditions or restrictions, convey such a title to his grantee as will enable the grantee to pass a good title to a specific corporation, and at the same time attach such parol conditions to the deed upon its delivery as to preclude the grantee from transferring an equally good title to any other person or corporation. Id.

Description of property.

4. A tract of land is sufficiently described in a deed by referring to it by the number of its government patent, in which it is definitely described. *Wheeler v. Clark* (Tenn.) 732

NOTES AND BRIEFS.

Deed; how question whether deed passes title determined; delivery of deed to grantee as an escrow; right to show that deed absolute on its face was delivered in

escrow: what constitutes complete delivery; no delivery without acceptance; presumption of acceptance by grantee. 573

Conditions in; condition subsequent; reversion of title for breach of; necessity of re-entry or some equivalent act to revest title; effect of acceptance of deed and possession of land to bind grantee to conditions; necessity of demand of performance of condition; waiver of condition; effect of breach followed by re-entry on intermediate rights acquired by third parties; strict construction of condition; grantor only entitled to take advantage of breach; effect of conveyance to third party before re-entry; waiver of condition subsequent; by silent acquiescence in grantee's failure to perform. 840

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Apparent Co-operation by, in Burglary, see **CRIMINAL LAW**, 1-3.

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Judicial Notice of Appointment of Deputy, see **EVIDENCE**, 3.

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Oath to Information by, see **INDICTMENT AND INFORMATION**, 7.

DIVIDENDS.

Rights of Life Tenant as to, see **LIFE TENANTS**, 3-6.

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Power of Courts over Land in Other State, in Action for, see **COURTS**, 3.

Condonation of Adultery as Justification for Filing Bill to Review Decree for, see **REVIEW**, 3.

As Revocation or Lapse of Legacy to Wife, see **WILLS**, 3, 4.

Sufficiency of Service on Defendant in Suit for, see **WRIT AND PROCESS**.

See also **HUSBAND AND WIFE**, **NOTES AND BRIEFS**.

DOCUMENTARY EVIDENCE.

See **EVIDENCE**, 8-11.

DOMICIL.

The temporary absence from the state of one domiciled there will not be held a change of residence, unless to the *factum* of residence elsewhere be added the *animus manendi*; for a domicile, having once been acquired, continues until a new one is actually acquired *animo et facto*. *Watkinson v. Watkinson* (N. J. Err. & App.) 397

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Discrimination against Nonresidents as to, see CONSTITUTIONAL LAW, 7.

Due Process in Assessment for Cleaning out Drainage Ditch, see CONSTITUTIONAL LAW, 9.

Statute for Cleaning Drains as Taking of Private Property for Public Use, see EMINENT DOMAIN, 8.

Requiring Connection of Gutters and Water Spouts on Buildings with Drainage System, see WATERS, 2.

1. The legislature may constitutionally confer upon county auditors and surveyors power to receive petitions for the cleaning of drainage ditches, and, upon receipt of such a petition, to examine the ditch and pass upon the necessity of cleaning it, estimate the expense and apportion the cost thereof according to benefits among the landowners along the line of the ditch who were assessed for the original construction thereof, and appoint a day for a hearing of the matter, and give notice thereof to all parties affected by the assessment, after which the auditor shall enter upon a journal the assessments, as approved by him, and place such assessment upon the duplicate against the land upon which they are assessed. *Taylor v. Crawford (Ohio)* 805

2. That no discretion to determine whether the improvement is for the public health, convenience, or welfare is vested in any officer or tribunal by a statute providing for the cleaning and repair of drainage ditches, and the assessment of the cost thereof upon the parties who were assessed for the original construction of each ditch, does not render it unconstitutional, since all questions as to the public health, convenience, and welfare must have been settled by the original proceedings for the establishment of the ditch. *Id.*

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NOTES AND BRIEFS.

Embezzlement; what constitutes. 701

EMINENT DOMAIN.

Railroad Company's Right to Continue to Enjoy Property after Forfeiture for Breach of Condition Subsequent, see REAL PROPERTY, 8.

1. The doctrine that, if a railroad company takes possession of land for a public way, the owner thereof not objecting, the latter will be presumed to have consented thereto, and impliedly agreed to accept a just compensation therefor, and consented to rely upon the statutory method of obtaining the same, has no application to a case where the rights of the parties are defined by a written instrument. *Maginnis v. Knickerbocker Ice Co. (Wis.)* 833

What may be taken.

2. The right to fish in an inland lake in New Jersey cannot be separated from the ownership of the lake, and taken under the power of eminent domain. *Albright v. Sussex County L. & P. Com. (N. J. Err. & App.)* 768

For what purpose.

Question for Jury as to, see TRIAL, 3.

3. The establishment of a railroad as a purely private enterprise cannot be legitimately aided by the power of eminent domain. *Maginnis v. Knickerbocker Ice Co. (Wis.)* 833

4. The legislature may authorize a mu-

municipal corporation to condemn for park purposes and boulevard land near to, but outside of, its corporate limits. *Memphis v. Hastings* (Tenn.) 750

5. The condemnation of land for a boulevard connecting public parks is not unlawful on the ground that it is for mere convenience or pleasure, not for necessity. *Id.* **What constitutes a taking.**

6. Forbidding the use of land near a park or park way for advertising purposes amounts to a taking of it for public use, for which compensation must be made. *Com. v. Boston Advertising Co.* (Mass.) 817

7. The wharfage and reclamation rights of the owner of land on a cove leading off from a river are not destroyed or impaired by the construction of an embankment across the mouth of the cove. *Richards v. New York, N. H. & H. R. Co.* (Conn.) 929

8. A statute providing for the cleaning of drainage ditches and the assessment of the cost thereof, according to benefits, upon the parties along its line who were assessed for the cost of its original construction, does not take private property for public use without compensation, since the property occupied by the ditch was taken by its original construction, when the parties along its line whose lands were taken had ample opportunity to obtain compensation. *Taylor v. Crawford* (Ohio) 805

Right to compensation.

Applying Local Rule of Damages in Federal Court, see DAMAGES, 11.

9. An amendment to a city charter authorizing the condemnation of land outside the city limits for park purposes is not invalid for not providing compensation to the owner of the land taken, where it provides that the proceedings for the exercise of the power of condemnation shall be the same as that now provided by law for the taking of private property for public use, and the charter of the city incorporates within itself the general condemnation statutes of the state. *Memphis v. Hastings* (Tenn.) 750

10. The statutory right to have damages for land the fee of which is taken for public use assessed and paid in money is a substantial right which, after the proceedings have progressed so far that the fee has passed, cannot be impaired by the passage of a statute authorizing the abandonment of the land, and directing that the fee shall revert in the former owner, and the fact thereof be considered in reduction of the damages to be awarded. *Hellen v. Medford* (Mass.) 314

11. Waiver of the right to have the

whole damages for land the fee of which is taken for public use assessed and paid in money will be effected by the agreement of the former owner of the land that, if the proceedings are abandoned for his benefit, and the title reverted in him, his damages will be very light, if any. *Id.*

12. No recovery can be had by the owner of land on a cove leading off from a river for interference with his right of access from his land to the river by the construction of a railroad track across the mouth of the cove, where the access is not entirely cut off, and, because of the limited extent of the cove, and the shallowness of its waters, the right is not essentially impaired. *Richards v. New York, N. H. & H. R. Co.* (Conn.) 929

13. A farmer who supports his family from the products of the farm, and for many years has sold his surplus in a neighboring town, has an established business within the meaning of a statute authorizing the construction of a water-supply reservoir upon the site of the town, and providing compensation for any established business thereby destroyed, although he has no regular route or customers, or anything in the nature of good will. *Allen v. Com.* (Mass.) 599

14. The value of sewer and water pipes owned by a municipal corporation, and laid under streets which are taken by the Federal government under its power of eminent domain for an entirely different use, must be paid to the municipality. *Nahant v. United States* (C. C. App. 1st C.) 723

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Eminent domain; vested right of party to have damages for land taken for public use paid in money; validity of statute authorizing abandonment, and directing fee to revert in former owner; right to obtain market value of land taken. 314

Statute providing compensation for injury to established business; what constitutes "business." 599

Power of, inherent in United States; taking city property by; right of city to compensation for; easement as property for which compensation may be claimed; recovery of value of sewer and water pipes in city street taken by Federal government. 723

Power of municipalities to take property by; right to compensation therefor; condemning land for parks and park ways. 750

Right to take land under, for private railroad. 844

EMPLOYERS' LIABILITY ACT.

See MASTER AND SERVANT, 19-24.

ENCUMBRANCE.

Right to Open Highways over Property as, see VENDOR AND PURCHASER, 4.

EQUAL PROTECTION OF THE LAWS.

See CONSTITUTIONAL LAW, 4-7.

EQUITY.

1. The adequate remedy at law which will deprive a court of equity of jurisdiction must be a remedy as certain, complete, prompt, and efficient to attain the ends of justice as the remedy in equity. *Williams v. Neely* (C. C. App. 8th C.) 232

2. If a person conveys property to another, coupled with a condition the breach of which will, if taken advantage of, cause the title to revert to him, the condition being to secure the payment of money, or the performance of an obligation the breach of which can be fairly measured in money by some established rule, the particular thing to be done, or the particular time of the doing thereof, not being made essential and of the very essence of the contract, under some circumstances a court of equity, by an arbitrary rule of construction peculiar to that jurisdiction, may say the parties did not intend the full effect of their language, but purposed to have the condition stand as security for the performance of the obligation or the payment of an equivalent in money. *Magginnis v. Knickerbocker Ice Co.* (Wis.) 833

NOTES AND BRIEFS.

Equity; doctrine of clean hands; jurisdiction to protect property right in stock quotations; where illegal transactions are permitted to be conducted in exchange hall. 63

Refusal to aid either party to illegal transaction. 91

Jurisdiction of equity over suits affecting real property in another state or country:— (I.) In general; jurisdiction limited to suits in *personam*; (II.) conditions of jurisdiction: (a) necessity of proper case for equitable intervention; (b) ability to grant effective relief by a decree in *personam* the criterion of jurisdiction; (c) nonresidence of defendant as affecting jurisdiction; (d) discretion as to exercising jurisdiction; (III.) particular subjects of jurisdiction: 69 L. R. A.

(a) creation and enforcement of trusts; substitution of trustees; (b) suit for specific performance; (c) suit to remove cloud upon title; to cancel void mortgage; (d) foreclosure of mortgage or other lien; (e) suit to redeem; (f) suit to reform deed; or to have deed declared a mortgage; (g) relief from fraud: (1) as between parties or privies; (2) as between one party and creditors of the other; (h) injunction; (i) accounting and incidental relief by requisition of conveyance; (j) partition; (k) appointment of receiver; (l) miscellaneous; (IV.) form of relief; effect and enforcement of decree; (V.) summary. 673

Equitable relief against forfeiture of estate:—(I.) General rules; (II.) conditions precedent; (III.) forfeiture will be relieved when compensation can be made: (a) in general; (b) forfeiture to secure payment of money: (1) general rule; (2) grant or devise on condition of support; (3) grant or devise on condition of payment of money; (4) nonpayment of rent; (5) nonrenewal of lease; (6) nonpayment of taxes; (7) failure to remove encumbrance; (IV.) fraud, accident, mistake; (V.) effect of conduct of obligee; (VI.) collateral covenants: (a) in general; (b) failure to improve or repair; (c) failure to insure; (d) copyholds; (f) mining leases; (VII.) conditions against marriage; (VIII.) after forfeiture declared; (IX.) statutory forfeiture; (X.) statutory jurisdiction. 833

Jurisdiction of action to enforce forfeiture of estate; of action to remove cloud on title by canceling conveyance after condition broken. 840

Jurisdiction to relieve from forfeiture of estate. 868

Refusal to take charge of and administer trust when properly administered by trustee. 921

ESCROW.

Parol Evidence as to, see EVIDENCE, 13.

A deed absolute on its face cannot be delivered to the grantee therein named, to be by him held in escrow; and a delivery which purports to be such will operate as absolute and freed from all parol conditions, and title will vest at once. *Whitney v. Dewey* (Id.) 572

NOTES AND BRIEFS.

Escrow; delivery of deed to grantee as an escrow. 573

ESTABLISHED BUSINESS.

What Constitutes, see EMINENT DOMAIN, 13.

ESTOPPEL.

Of Depositor to Hold Bank Liable after Payment to Unauthorized Person, see **BANKS**, 8.

Of Corporation, see **CORPORATIONS**, 3.

By Judgment; Burden of Proof as to, see **EVIDENCE**, 4, 5.

By Prior Judgment; Admissibility of Evidence in Opposition to Plea of, see **EVIDENCE**, 22.

Of Insurance Company, see **INSURANCE**, 6.

Of Beneficiary of Condition in Conveyance of Land, see **REAL PROPERTY**, 3.

As Basis of Waiver, see **WAIVER**.

1. One who consigns grain to a commission merchant for sale on commission is not estopped to repudiate a purchase of the grain by the consignee himself unless he acquiesces therein and ratifies it after being fully informed of the entire transaction, including a subsequent sale at a profit. *State v. Edwards* (Minn.) 667

Of married woman.

2. A married woman is estopped to set up the invalidity of a contract by herself and her husband for the sale of their homestead because of failure to comply with certain statutory provisions, as a defense to a suit for specific performance, where the purchaser has taken possession, and paid the purchase price, and made valuable improvements, with the full knowledge and consent of the wife. *Grice v. Woodworth* (Id.) 584

By legal proceedings.

3. A plaintiff in replevin who obtains actual possession of property seized under the writ is estopped from claiming that the writ was wrongfully executed, upon a proceeding to assess damages against him for seizure of property upon which he had no rightful claim. *Three States Lumber Co. v. Blanks* (C. C. App. 8th C.) 283

4. A plaintiff in replevin who took into his possession, under the writ, lumber to which he was not entitled, cannot plead, in defense of his liability to return the property, that he had caused it to be sold to satisfy his own claim for salvage in recovering and preserving the property, after the vessel on which it was stored, while in his possession, had sunk. *Id.*

5. One filing a bill for relief from a forfeiture, at law, of a lease, will not be heard to contend that the entry of the landlord was invalid because there was no forfeiture. *Gordon v. Richardson* (Mass.) 867

6. A decree for defendant in an action to compel the surrender of corporate bonds to a corporation which had succeeded to the rights of the one which issued them, on 69 L. R. A.

the ground that they had been wrongfully transferred by one in whose hands they had been placed for negotiation for the benefit of the corporation, will estop the corporation plaintiff, in a subsequent suit to foreclose the mortgage by which the bonds are secured, from setting up that they had been paid, or that the present plaintiff's grantor was present when the corporation that issued the bonds transferred its property to the present defendant, and knew that the latter understood that it was acquiring the property free from the lien of the mortgage, since these were matters which should have been tried in the former suit. *Ruckman v. Union Ry.* (Or.) 480

7. One who purchases mortgaged premises subject to the mortgage, but without assuming the debt, after limitations have begun to run against foreclosure by force of a stipulation in the mortgage that failure to pay at maturity any one of a series of notes secured thereby, together with nonpayment of taxes due, shall mature the entire debt, does not, by payment of such overdue taxes, estop himself from pleading the statute of limitations as a defense to an action to foreclose the mortgage. *Snyder v. Miller* (Kan.) 250

NOTES AND BRIEFS.

Estoppel; of insurance company to claim forfeiture of policy for nonpayment of premium by retaining and attempting to collect overdue premium note. 264

Of one advising another to purchase property without mentioning lien, to assert lien. 481

To assert secret equities. 575

To dispute validity of sale after accepting benefits; of married woman by fraudulent acts. 585

To claim ownership of material; as mixed question of law and fact. 900

EVIDENCE.

Of Title of Plaintiff in Replevin, see **REPLEVIN**, 1, 2.

Judicial notice.

Of Proceedings by Legislature for Expulsion of Member, see **LEGISLATURE**, 5.

1. The court will take judicial notice of the fact that many automobiles may be driven at a speed of at least 40 miles per hour. *People v. Schneider* (Mich.) 345

2. The district court of any county is obliged to take judicial notice of an executive order upon the attorney general to appear and prosecute criminal proceedings there; and such authority need not be ex-

pressed on the face of an indictment which he signs. *State v. Bowles* (Kan.) 176

3. Proof of the appointment of a deputy district attorney who signed an information is not necessary to render it valid, since the court is presumed to be cognizant of such appointment and of the powers of the appointee. *State v. Guglielmo* (Or.) 466

Burden of proof.

4. The burden of proof is upon a party pleading a judgment as an estoppel to sustain the plea by showing that the particular matter in controversy was necessarily or actually determined in the former litigation. *Draper v. Medlock* (Ga.) 483

5. One who pleads a judgment as an estoppel must prove that the particular matter in controversy was actually decided in the former litigation in accordance with his contention, where it appears from the record that several issues were involved in the former litigation, and the verdict and judgment do not clearly show that this particular issue was then decided. *Id.*

6. One charging that water rates imposed upon his property are unreasonable has the burden of establishing that fact. *Souther v. Gloucester* (Mass.) 309

7. One claiming damages for delay in the preparations for interment of his relative because of failure promptly to deliver a telegram has the burden of showing that the preparations would have been made had the telegram been promptly delivered, and such fact will not be presumed. *Hancock v. Western U. Teleg. Co.* (N. C.) 403

Documentary evidence.

8. A signed but undelivered lease may be given in evidence to show an agreement upon the details of a lease pursuant to the terms of a previously signed memorandum in writing of an oral agreement for a lease, in order thereby to establish that the two writings, taken together, show a completed agreement upon the terms of the lease so as to satisfy the statute of frauds. *Charlton v. Columbia Real Estate Co.* (N. J. Err. & App.) 394

9. After a memorandum book has been introduced in evidence without objection no objection will lie to its use as evidence, or to a witness using it as a basis for the facts to which he testifies, on the ground that he did not make the entries. *Manchester Assur. Co. v. Oregon R. & Nav. Co.* (Ore.) 475

10. If the memoranda of inspection of engines prepared by the men in charge of that work and filed in the office of the railroad company have been lost, and the facts with regard to the inspection forgotten by them, such facts may be proved by the introduction in evidence of a transcript of such

memoranda, entered by the proper clerk in a book kept for that purpose, accompanied by his testimony and that of the inspectors, showing that inspections were made and properly entered in the book. *Id.*

11. The record of a prior conviction of theft, based upon a plea of guilty, is admissible in a prosecution for burglary, where the taking alleged in both cases is the same. *Beason v. State* (Tex. Crim. App.) 193

Parol evidence.

12. Parol evidence is admissible to show delivery of a deed. *Whitney v. Dewey* (Id.) 572

13. Parol evidence is inadmissible to show that a deed delivered to the grantee and absolute on its face shall take effect only upon the performance of some condition or the happening of some contingency unexpressed therein. *Id.*

14. Parol evidence cannot be introduced to prove a warranty that a machine will do particular work as rapidly or economically as some other specified machine, where the written contract of sale is silent on the subject. *Davis Calyx Drill Co. v. Mallory* (C. C. App. 8th C.) 973

15. Parol evidence is admissible to show that the one who signed a memorandum for the sale of goods necessary to satisfy the statute of frauds acted as agent for the one who is seeking to enforce the contract, so as to permit him to maintain the action. *Usher v. Daniels* (N. H.) 629

Confessions.

16. That accused was not admonished does not destroy the effect of a judicial confession in the nature of a plea of guilty in a prosecution for a misdemeanor. *Beason v. State* (Tex. Crim. App.) 193

Res gestæ.

17. Admissions by a servant who has committed a trespass, made a day after the trespass and only remotely connected therewith, are not admissible in evidence as a part of the *res gestæ*. *Clancy v. Barker* (Neb.) 642

18. Evidence of expressions of pain and suffering, made by an injured person at the time of or shortly after the injury is admissible as part of the *res gestæ*. *Rideout v. Winnebago Traction Co.* (Wis.) 601

19. Declarations of a train conductor tending to show that his negligence caused an injury to an employee whose hand was caught between cars is admissible as part of the *res gestæ* when made as he met the injured man with his hand still bleeding, immediately after he had come from between the cars, and had walked only six or seven car lengths toward the engine. *Peirce v. Van Dusen* (C. C. App. 6th C.) 705

Declarations; threats.

20. That threats made by one on trial for murder to kill his victim were made a year or eighteen months before the homicide does not render evidence of them inadmissible. *State v. Coleman* (Mo.) 381

Relevancy and materiality.

See also *NEW TRIAL*, 2.

21. Upon trial of an action for false imprisonment plaintiff may testify that he felt humiliated by the arrest. *Mumford v. Star-mont* (Mich.) 350

22. Evidence offered in opposition to a plea of estoppel by a prior judgment, which shows that in the former litigation the parties alleged to be estopped by the judgment therein sought so to amend their pleading as to have the question in controversy in the subsequent litigation determined, and that the court disallowed such amendment, is admissible. *Draper v. Medlock* (Ga.) 483

23. It is not error to exclude evidence, in an action by a motorman for false imprisonment for attempting to run cars against the orders of the municipal authorities, to the effect that plaintiff was subsequently complimented by his employer for his effort to do so. *Mumford v. Star-mont* (Mich.) 350

24. The exclusion of evidence as to a custom to search prisoners is not error in an action for wrongful arrest, where plaintiff was not searched. *Id.*

NOTES AND BRIEFS.

Evidence; burden of proof on owners of vessel to show that loss of life or sinking of ship did not arise from insufficiency of crew. 72

Burden of proof to establish waiver of forfeiture of insurance policy. 279

Action in admiralty for alleged negligent injuries; burden of proof as to negligence and freedom from contributory negligence. 293

Presumption of due care on part of person injured. 189

Burden of proving that employee acted within scope of employment in committing injury. 645

In action by injured employee; burden of proof to show insufficiency of inspection of appliances. 798

Presumption that grantor used words with intent to give them meaning which law has attached thereto. 954

Circumstantial; necessity of instruction as to. 193

Parol; to vary terms of written contract; to establish trust; admissibility of declaration. 69 L. R. A.

tions of party against his title under deed; presumption of acceptance of deed. 573

Parol; to establish identity of sum embodied in note given for interest with interest due upon pre-existing debt, and that it was given for that debt. 261

Admissibility of record of former conviction; where state fails to show defendant had been properly admonished before pleading guilty. 194

Of verdict of coroner's jury in homicide case; effect, on competency of evidence of threats, of remoteness. 382

Admissibility of admissions of maker of note who is not making defense against surety; when not made in her hearing. 871

Of confession obtained by direct or implied promise. 406

Right of witness to use memoranda to refresh memory; admissibility of book in which memoranda have been entered; evidence of other fires set by engines other than that causing fire in question. 476

Admissibility of admissions and declarations made at time of accident; as part of *res gestæ*. 707

Admissibility of testimony *res inter alios* on measure of damages. 822

Of custom to guard shafting; admissibility in action for injury to servant. 910

EXCEPTIONS.

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EXECUTION.

Property Exempt from, see *LEVY AND SEIZURE*, 1, 2.

EXECUTORS AND ADMINISTRATORS.

Conclusiveness of Decree of Probate Court, see *JUDGMENT*, 2.

NOTES AND BRIEFS.

Executors and administrators; right of court to reject executor appointed by will. 921

EXEMPLARY DAMAGES.

See *DAMAGES*, 14.

EXEMPTIONS.

What Property Exempt from Levy, see *LEVY AND SEIZURE*.

From Taxation, see *TAXES*, 1.

EXPLOSION.

Of Boiler, Master's Liability for Injury to Servant by, see *MASTER AND SERVANT*, 3-5.

EXPLOSIVES.

Prohibiting Extensive Storage of, within Limits of City, see CONSTITUTIONAL LAW, 10.

Ordinance Regulating Storage of, see MUNICIPAL CORPORATIONS, 4.

FACTORS.

Estoppel of, see ESTOPPEL, 1.
See also COMMERCE, 1.

1. Commission merchants to whom grain has been consigned for sale on commission have no right to purchase it themselves after business hours, at the highest price of the day on the board of trade; and if they do so, and subsequently resell it at an advance, the profit thus made inures to the benefit of the consignor. *State v. Edwards* (Minn.)

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2. That a commission merchant who has failed to make to his principal such a report of a sale of grain consigned to him as is required by statute acted in good faith and in accordance with the custom of commission merchants in that locality is no defense to a prosecution under the statute, since, the statute having made the sending of the report a positive duty, his intent in failing to do so is immaterial.

Id.

3. A commission merchant who himself purchases a carload of grain consigned to him for sale on commission, after close of business hours, at the highest price of the day on the board of trade, and who subsequently resells the grain at an advance, is bound to report to his principal the latter sale, under a statute requiring commission merchants to render a true statement to the consignor within twenty-four hours of making a sale, showing the grain sold, price received, name and address of purchaser, etc.; and a report by the consignee of the sale to himself is not a compliance with the statute.

Id.

NOTES AND BRIEFS.

Factors; statute regulating sales of grain by commission merchant; interference with interstate commerce; right of factor to buy grain consigned to him, and resell it at advance; ratification by principal; criminal liability for violation of statute without wrongful intent.

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FAIR.

Permitting Use of Streets for, see HIGHWAYS, 3. 4.

FALSE IMPRISONMENT.

Evidence of Humiliation by, see EVIDENCE, 21.

1. The arrest of a motorman to abate a nuisance caused by the running of cars when

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the trolley wire is in such poor condition that it is liable to come down to the injury of travelers upon the street is not justified when the result can be obtained by cutting the feed wires or removing the controllers from the cars. *Mumford v. Starmont* (Mich.)

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2. The mayor and chief of police of a city are liable in damages in case they arrest motormen of street cars to abate a nuisance caused by the operation of cars when the trolley wire is in such poor condition as to be liable to fall, when the object can be effected by merely cutting the wires or removing the controllers from the cars.

Id.

FELLOW SERVANTS.

See MASTER AND SERVANT, 14-24.

FIRE.

Question for Jury as to Cause of, see TRIAL, 6.

FISHERIES.

Taking Right to Fish under Power of Eminent Domain, see EMINENT DOMAIN, 2.

FIXED LIABILITY.

See BANKRUPTCY, 3.

FIXTURES.

1. Commercial finishing material, such as doors, mantels, casings, etc., which have been purchased for an unfurnished building and placed therein, but not affixed thereto, does not pass by a sale of the real property, under a mortgage foreclosure, where it is not mentioned or deemed a part of the sale. *Blue v. Gunn* (Tenn.)

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2. A mortgage of a lot on which stands a partially completed building will pass cut stone and structural iron prepared for the building and located on the lot mortgaged and that adjoining, if the intention of the parties is that the building shall be speedily completed with the material at hand. *Byrne v. Werner* (Mich.)

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NOTES AND BRIEFS.

Fixtures; are things placed on land with the intention of annexing them fixtures, where they are never actually attached?—(I.) Introduction; (II.) actual annexation; (III.) constructive annexation; (IV.) mere intention to annex: (a) machinery or parts thereof; (b) materials for use, repair, or reconstruction of railroads; (c) building materials; (d) fencing materials; (e) fertilizers; (V.) conclusion.

892

What constitute; things placed on property with intention of annexing them, but

which are not actually attached; effect of mortgage foreclosure. 893

Things placed on property with intent to affix, but never attached, as; controlling effect of intent of parties; effect of foreclosure of mortgage on land. 900

FORECLOSURE.

Estoppel to Plead Limitations as Defense to, see ESTOPPEL, 7.

FORFEITURE.

Estoppel of Tenant to Deny, see ESTOPPEL, 5.

Of Lease, see LANDLORD AND TENANT, 2.

On Breach of Condition Subsequent, see REAL PROPERTY, 3-8.

FORGERY.

Of Draft, see BANKS, 3-9.

FRAUD.

Damages for Fraudulent Representations, see DAMAGES, 10.

Misrepresentation of the price paid for property by the vendor or others does not constitute actionable deceit, in the absence of fiduciary relations between the parties, or other facts or circumstances giving rise to an express or implied agreement that the price paid should determine the price in the contract. *Beare v. Wright* (N. D.) 409

FREEDOM OF SPEECH.

As Limitation on Exercise of Right to Privacy, see PRIVACY, 2.

The publication of one's picture, without his consent, as part of an advertisement, is in no sense an exercise of the liberty of speech or of the press, within the meaning of those terms as used in the Constitution. *Pavesich v. New England L. Ins. Co.* (Ga.) 101

GAMING.

Effect of Permitting Gambling Transactions on Board of Trade's Right to Protection of Price Quotations, see INJUNCTION, 4.

Property Right in Price Quotations by Board of Trade Engaging in Gambling Transactions, see PROPERTY.

Playing pool under an agreement among the players that the one losing the game shall pay for the use of the table is betting at a pool table, within the meaning of Ga. Pen. Code 1895, § 401, providing that "if any person shall . . . bet . . . at any . . . pool table, he shall be guilty of a misdemeanor;" and the fact that the state imposes a specific tax on the keeper of a pool table does not affect the question *Hopkins v. State* (Ga.) 117
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NOTES AND BRIEFS.

Gaming; what constitutes: playing for price of game as. 117

GIFT.

By Wife to Husband of Part of Profits from Partnership between Latter and Third Person, see PARTNERSHIP, 4.

GRAND JURY.

Right to Prosecute without Indictment by, see CRIMINAL LAW, 4. 5.

GROSS NEGLIGENCE.

What Constitutes, see NEGLIGENCE, 1, 2.

GUARDIAN AND WARD.

Law Governing Marriage of Ward. see CONFLICT OF LAWS, 3, 4.

Guardian's Right to Separate Ward from Wife, see GUARDIAN AND WARD.

One appointed guardian of another because of his lack of discretion to manage his estate has no authority over the person of his ward, which will entitle him to separate him from his wife. *Ex parte Chace* (R. I.) 493

GUESTS.

See INNKEEPERS.

HABEAS CORPUS.

The wife of one illegally restrained of his liberty may maintain a petition for a writ of habeas corpus to obtain his release. *Ex parte Chace* (R. I.) 493

HIGHWAYS.

Appropriation to Aid Counties in Construction of, see APPROPRIATIONS.

Punitive Damages for Cutting Trees in. see DAMAGES, 14.

Right to Open, over Property, as Encumbrance. see VENDOR AND PURCHASER, 4.

Title, use, and obstruction.

1. Authority given to a municipal corporation to permit the erection of telegraph and electric-light wires and poles in the streets does not include power to violate private rights. *Brown v. Asheville Electric Co.* (N. C.) 631

2. Municipal authority to place poles for the support of electric-light wires upon the sidewalk of a certain street does not relieve the one so doing from liability to the owner of the fee for the value of trees removed to make room for the poles. *Id.*

3. No power to permit the use of its streets for the purposes of a street fair is given a city by a charter giving the city council pow-

er when, in its opinion, a street or any part thereof has ceased to be of public utility, to declare it vacant and abandoned as a street, and donate the same to any use which, in its opinion, will be of advantage to the commercial interests of the city. *Augusta v. Reynolds* (Ga.) 564

4. A fair occupying 75 or 80 feet in width and 4 blocks in length of an important business street in a city, and consisting of numerous tents inclosing shows and exhibitions, in front of which are stationed men blowing horns and talking through megaphones to attract attention, together with various other stands, booths, Ferris wheels, merry-go-rounds, and other devices for amusement of the public and profit to the owners; which fair a company of the state militia is permitted to station on the street for a week,—is a public nuisance. *Id.*

Liability for defects and obstructions in.

Municipal Liability for Injury by Fall of Bill Board Placed Near Edge of Street, see MUNICIPAL CORPORATIONS, 6, 7.

5. Placing a conductor pipe so as to lead water from the roof of a building adjoining a sidewalk and empty it upon the walk in the manner customary in the community is not a nuisance *per se*, where it does not ordinarily interfere with travel; and the property owner cannot be held liable to one who is injured by ice formed upon the walk many years after the construction of the pipe, as the result of a severe and unusual storm. *New Castle v. Kurtz* (Pa.) 488

6. Owners of property in possession of tenants are not bound to keep watch to see that ice dangerous to travel does not form on the walks in front of it which are properly constructed and in proper repair, where their negligent construction of their buildings does not contribute to its formation; and therefore they cannot be held liable for injuries to a traveler by falling upon ice of the existence of which they have no notice. *Id.*

7. A horse block or stepping stone of ordinary size, placed on the edge of the sidewalk to facilitate access to and egress from carriages in the street, is not an obstruction to the walk, so as to render the municipality liable for injuries caused by a traveler falling over it. *Wolff v. District of Columbia* (D. C. App.) 83

8. A municipal corporation is not liable for injuries caused to a traveler by falling over a horse block on the sidewalk because sufficient light is not maintained near it to render it visible to passers-by. *Id.*

9. A municipal corporation which has imposed the duty upon property owners of

keeping the sidewalks in front of their property free from ice under penalty, and has provided that, in case of their neglect to remove the ice, it will be removed by the city at their expense, assumes the duty of keeping the walks clear; and, in case it is held liable for injury to one falling upon the walk, it cannot recover over against the property owner on the theory that he was primarily liable for the injury. *New Castle v. Kurtz* (Pa.) 488

NOTES AND BRIEFS.

Highways; carriage block on sidewalk as unlawful obstruction; duty of municipality to cause removal of; liability for injury thereby; duty of traveler on sidewalk. 84

Right to use automobiles on. 346

Duty of abutting property owner to keep sidewalk in repair; right of municipality paying judgment for injuries sustained through defective walk to recover over against property owner; conductor pipe leading water from roof of building upon sidewalk as nuisance; liability of owner of property in possession of tenants for condition of walk; liability of city for failure to enforce; liability of city for defect not occasioned by its own act. in absence of notice; ordinance imposing on property owners duty of keeping sidewalks free from ice; provision that, in case of failure to do so, it will be removed at owner's expense; effect of provision on city's liability for injury. 489

Partial obstruction of; what obstructions and encroachments amount to nuisance, authority of city over its streets; use of, for street fair; injunction to prevent such use. 565

Injury to traveler on, by fall of billboard on abutting property; liability of city for. 618

Cutting or removal of trees in; under authority of city; to make room for electric poles and wires; electric poles as additional servitude. 632

HOMESTEAD.

Estoppel of Wife to Set Up Invalidity of Contract for Sale of, see ESTOPPEL, 2.

NOTES AND BRIEFS.

Homestead; statutes as to conveyance and abandonment of, regarded as rules of evidence merely; alienation by husband alone. 585

Effect of conveyance of, by husband to wife. 379

HOMICIDE.

Misleading Instruction as to, see TRIAL, 19.

1. A police officer who kills a person whom he is attempting to arrest is guilty of a criminal offense if he uses more force than is reasonably necessary to effect his purpose. *State v. Coleman* (Mo.) 381

2. Mere failure of a person to submit to arrest does not give the officer the right to take his life, although the officer has good reason to believe that he has authority to make the arrest; and, if the officer acts in malice and with premeditation because the one he is attempting to arrest does not remove his hand from his pocket upon command, the officer will be guilty of murder in the second degree. *Id.*

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Homicide; necessity of instruction as to law on circumstantial evidence on prosecution for. 193, 205

HORSE BLOCK.

Liability for Injury by Falling over, see HIGHWAYS, 7, 8.

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HUSBAND AND WIFE.

Law Governing Marriage, see CONFLICT OF LAWS, 3, 4.

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Marriage as Valuable Consideration for Contract, see CONTRACTS, 2.

Effect of Conveyance by Husband to Wife, see CURTESY.

Power of Courts over Land in Other State, in Divorce Proceeding, see COURTS, 3.

Estoppel of Married Woman, see ESTOPPEL, 2.

Wife's Right to Petition for Husband's Release, see HABEAS CORPUS.

Condonation of Adultery as Justification for Filing Bill to Review Divorce Decree, see REVIEW, 3.

Divorce as Revocation or Lapse of Legacy to Wife, see WILLS, 3, 4.

Sufficiency of Service on Defendant in Divorce Suit, see WRIT AND PROCESS.

Liability for wife's support.

1. The common-law liability of a husband to support his wife cannot be extended by implication from the written law as to the support of other persons; it can only be extended by a statute plainly so intended. *Richardson v. Stuesser* (Wis.) 820
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2. The common-law liability of a husband to support his wife does not extend to supporting her outside the matrimonial home reasonably chosen by him, unless he refuses to do so there, or she resides away therefrom by his consent. *Id.*

3. A husband is not liable for the support of his wife at an asylum for the insane, to which she has been removed by due process of law, in the absence of a statute expressly imposing such liability. *Id.*

4. There is no refusal of a husband to support his wife at the matrimonial home, or consent by him to her absence therefrom, within the common-law rule rendering him liable for her support outside of such home, where the wife, as a charity to her and protection to others, is by due process of law taken from the matrimonial home and confined in an asylum for the insane, and the husband submits, or even takes the initiatory proceedings to secure for her the benefit of the public charity. *Id.*

Wife's separate estate.

5. A conveyance of land from husband to wife in the usual form, for a valuable consideration, though without words disclosing an intent to do so, vests in her a separate estate which she may transfer without his joinder or consent. *Barnum v. Le Master* (Tenn.) 353

Partnership between.

See also PARTNERSHIP, 3-5.

6. Husband and wife may lawfully transact business as copartners, and therefore there may be a subpartnership between a husband and wife in reference to the husband's share of the profits of a business in which the husband is a partner. *Morrison v. Dickey* (Ga.) 87

NOTES AND BRIEFS.

Husband and wife; right of wife to rents of land settled on her as separate estate; effect of conveyance by husband to wife; rule as to gifts of personalty not applicable to gifts of real estate; husband's right in wife's real estate; validity of deed of married woman alone. 353

Effect of conveyance by husband to wife:—(I.) At common law: (a) transfers of real estate; (b) gifts of personalty; (II.) in equity: (a) conveyances upheld; (b) conditions upon which conveyances are upheld; (c) necessity of trustees; (d) effect of conveyance; (III.) effect of statutes: (a) in general; (b) exception of conveyances from husband; (c) exemption from husband's debts; (d) permitting revocation; (IV.) conveyance by third person at instance of husband; (V.) consideration; (VI.) does conveyance create separate estate; (VII.)

remaining interest of husband: (a) in general; (b) curtesy; (VIII.) rights against husband's heirs; (IX.) homestead and community; (X.) effect of divorce; (XI.) form and provisions of conveyance. 353

Curtesy right of husband in land which he has conveyed to his wife's sole and separate use; curtesy interest in land devised to wife during joint and several lives of herself and husband; curtesy interest where estate of wife was a conditional or determinable fee; where condition has happened. 370

Effect of condonation on right to divorce; decree void for lack of jurisdiction. 398

Necessity of strict compliance with statute as to alienation of wife's real estate; specific performance of contract by husband and wife where possession has been delivered; effect of taking deed in wife's name to make property her separate estate; property acquired during marriage as community property; burden of proving that it is wife's separate property. 568

Estoppel of married woman; how wife may be divested of her estate; release of wife from common-law disability. 585

Nature of decree for divorce as proceeding *in rem* or *in personam*. 673

Husband not relative of wife; common-law liability of husband for support of wife; liability for support while confined in insane asylum. 830

Effect of divorce to revoke gift by will. 940

Impeachability of widow as life tenant for waste; interest in minerals or oil under land; widow's estate is equal to children's in all of its uses. 986

ICE.

On Sidewalk, see HIGHWAYS, 5, 6, 9.

IDENTITY.

Of Religious Corporation, see RELIGIOUS SOCIETIES, 1.

IMPAIRMENT OF OBLIGATION.

See EMINENT DOMAIN, 10.

IMPLIED WARRANTY.

On Sale of Machine, see SALE.

IMPRISONMENT.

For Giving Liquor to Minor, see CRIMINAL LAW, 6.

IMPROVEMENTS.

A recovery for improvements to the extent that they may have permanently enhanced the rental or usable value of the life estate may be allowed to the vendee, with his purchase money, interest thereon, and 69 L. R. A.

taxes paid, on breach of a covenant of seisin made by an outstanding contingent remainder, when his recovery in equity is conditioned on his restoration of possession to the vendor, and his accounting for his use of the premises. *Brannon v. Curtis* (Tenn.) 760.

IMPUTED NEGLIGENCE.

See NEGLIGENCE, 8, 9.

INCOMPETENT PERSONS.

Husband's Liability for Wife's Support at Asylum, see HUSBAND AND WIFE, 3, 4.

See also HUSBAND AND WIFE, NOTES AND BRIEFS.

Liability for support.

1. An action to enforce an order of a county judge requiring a person to pay a certain sum per week for the support of another in the county asylum for the insane must be commenced in the name of the county, in some court having jurisdiction of such civil actions. The county court does not possess such jurisdiction in the absence of special authorization. *Richardson v. Stuesser* (Wis.) 829

2. An order of a county judge requiring a person to pay a certain sum for the support of an insane person in the county asylum for the insane may be enforced by contempt proceedings or by an action in the name of the county, under Wis. Rev. Stat. 1898, § 1504, as to enforcing private liability for the support of a poor person, which by § 604e is made applicable to the support of insane persons. *Id.*

3. To establish the liability of anyone for the support of a person at the county asylum for the insane, who refuses to perform his duty in that regard, the trustees of the asylum should proceed in harmony with Wis. Rev. Stat. 1898, § 1502, as to support of poor persons, by petition to the county judge; and the amount that must be paid and the time of payment must be determined in harmony with § 1504, as to the poor, under § 604e, negating the liability of the state to any county for the support of any insane person at its county asylum for the insane who is not a public charge, and making §§ 1500-1505, as to the support of the poor, applicable to the support of insane persons. *Id.*

4. The incorporation into Wis. Rev. Stat. § 604e, negating any liability of the state to any county for the support in its county asylum for the insane of any person who is not a public charge, of §§ 1500-1505, which provide that the father, mother, or children of any poor person unable to sup-

- port himself shall be liable for his support, if of sufficient ability, requires that the proceedings to enforce the private liability for the support of a person committed to the county insane asylum must be under such sections, so far as they are applicable thereto. *Id.*

INDEMNITY.

From Abutting Owner to City Held Liable for Injury on Highway, see **HIGHWAYS**, 9.

Conclusiveness of Judgment against Debtor on One Contracting to Indemnify, see **JUDGMENT**, 3.

INDICTMENT AND INFORMATION.

Raising Question of Invalidity on Appeal, see **APPEAL AND ERROR**, 9.

Necessity of, see **CRIMINAL LAW**, 4, 5.
Judicial Notice of Authority of Official Signing, see **EVIDENCE**, 2, 3.

Signing of.

1. Whenever required by the governor to appear and prosecute criminal proceedings in any county, the attorney general becomes prosecuting attorney of that county in those proceedings, and as such may sign indictments presented by the grand jury. *State v. Bowles* (Kan.) 176

2. The regularity of the appointment of the deputy district attorney who signed an information cannot be challenged by merely alleging that the information was not found, indorsed, or presented as required by law. *State v. Guglielmo* (Or.) 466

3. In the absence of evidence to the contrary, a deputy district attorney who signs the name of the district attorney to the information will be presumed to have possessed plenary power in the premises, and to have been authorized to examine witnesses to enable him intelligently to charge persons with the commission of crimes, to prepare informations, sign the name of the district attorney thereto, and file them in court. *Id.*

4. A district attorney who insists that one accused of crime shall plead to the information thereby ratifies the subscription of his name to the information by his deputy. *Id.*

Oath to.

5. The omission of the recital that an information for murder is upon the oath of the prosecuting attorney is fatal to its validity. *State v. Coleman* (Mo.) 381

6. The official oath of the officer filing an information charging one with crime is sufficient to comply with a constitutional provision that no warrant shall issue but upon probable cause supported by oath, without

the necessity of verifying each particular information filed. *State v. Guglielmo* (Or.) 466

7. The fact that the record shows that a warrant was ordered to be issued upon an information filed by the deputy district attorney in the absence of his chief does not show that it was in fact issued without the support of the oath required by the Constitution, where it further appears that the district attorney was present in court when accused first appeared, and ratified the information, so that his oath of office supported the warrant if it was not actually issued until after he had appeared and assumed control of the proceedings. *Id.*

Leave of court for filing of.

8. Leave of court is not necessary to the filing of an information by the district attorney charging the commission of crime. *Id.*

NOTES AND BRIEFS.

Indictment; authority of attorney general to sign; necessity that indictment be signed by prosecuting attorney; effect of failure of foreman to indorse and sign. 176

Sufficiency of information where words, "on his oath aforesaid," are omitted. 382

Necessity that indictment be signed by district attorney; sufficiency of his signature when made by his deputy; necessity that information be verified by affidavit. 467

INFANTS.

Punishment for Giving Liquor to, see **CRIMINAL LAW**, 6.

Written Consent for Sale of Liquor to, see **INTOXICATING LIQUORS**.

INFORMATION.

Right to Prosecute by, see **CRIMINAL LAW**, 4, 5.

See also **INDICTMENT AND INFORMATION**.

INJUNCTION.

Against Subsequent Suit in Different Court, see **COURTS**, 9.

Water rights.

1. The owner of property bordering on a mill pond cannot enjoin the owner of the dam and water privilege from drawing the water down to its natural level when it becomes necessary for the utilization of the power, although a portion of the bottom of the pond is thereby uncovered and exposed to the sun, rendering it unhealthful and injurious to the abutting owner. *Witt v. Bissell* (Conn.) 933

Against illegal or tortious acts.

2. A court of equity will interpose by injunction to prevent the several members of an illegal combination from enforcing an illegal agreement to the hurt and injury of one engaged in competitive business. *Employing Printers' Club v. Dr. Blosser Co.* (Ga.) 90

3. A court of equity has jurisdiction, at the instance of the solicitor general, to restrain by injunction the erection of a public nuisance. *Augusta v. Reynolds* (Ga.) 564

4. The fact that a board of trade permits gambling transactions within its exchange hall does not deprive it of the right to resort to equity to prevent wrongful dissemination of the quotations of prices at which sales are made, gathered and sent out by it. *Board of Trade v. L. A. Kinsey Co.* (C. C. App. 7th C.) 59

As to legal proceedings.

See also **LIMITATION OF ACTIONS, 2.**

5. An injunction should issue to stay an action at law upon a promissory note for the purchase price of land until an equitable defense of reduction for partial failure of consideration is allowed, whenever the remedy at law is less certain, prompt, and efficient to attain the ends of justice. *Williams v. Neely* (C. C. App. 8th C.) 232

6. Any fact which renders it against conscience to enter or execute a judgment at law, and which is not available to the defendant at law, confers jurisdiction upon a court of equity to enjoin the proposed entry or execution. *Id.*

7. A judgment of a justice of the peace, rendered within less than the time prescribed by statute after service of summons, is not so far void that its execution can be enjoined; but the defendant must take the proper steps to obtain a review on appeal. *Kerr v. Murphy* (S. D.) 499

NOTES AND BRIEFS.

Injunction; to protect property right in stock quotations; where gaming transactions are permitted in exchange hall. 63

To restrain action at law to enforce claim to which an equitable defense exists. 235

To restrain execution upon void or voidable judgment. 499

To enjoin obstruction of public street; to abate private nuisance; to prevent multiplicity of suits and irreparable mischief. 565

Affecting real property in other state; jurisdiction of equity to issue. 689
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Right of party specially injured by act to enjoin. 934

INNKEEPERS.

1. Innkeepers are not insurers of the safety of the persons of their guests; the limit of their liability is for the exercise of reasonable care for the safety, comfort, and entertainment of their visitors. *Clancy v. Barker* (C. C. App. 8th C.) 653

2. In receiving a guest into his hotel, a hotel keeper impliedly undertakes that such guest shall be treated with due consideration for his comfort and safety. *Clancy v. Barker* (Neb.) 642

3. A trespass committed upon a guest in a hotel by a servant of the proprietor, whether actively engaged in the discharge of his duties at the time, or not, is a breach of the implied undertaking that the guest shall be treated with due consideration for his comfort and safety, for which the proprietor is liable in damages. *Id.*

4. It is the duty of a hotel keeper to protect his guests, while in his hotel, against the assaults of employees who assist in the conduct of the hotel and in the care and accommodation of the guests. If damages result from such assault, the hotel keeper is liable therefor. *Id.*

5. Innkeepers do not contract to insure the safety of their guests against injuries which are inflicted upon them by the negligent or wilful acts of their servants beyond the scope and course of their employment; and for such acts they are not liable in damages when they have exercised reasonable care to prevent them. *Clancy v. Barker* (C. C. App. 8th C.) 653

6. A hotel keeper is not liable for an injury inflicted by a servant on a six-year-old boy while a guest at the hotel, where the boy wandered out of the room assigned to him, and into a room in which a bell boy was playing a harmonica for his own amusement, and the latter, either accidentally or wilfully, shot the former with a pistol; since the bell boy was not acting within the scope, or apparent scope, of his employment at the time of the shooting. *Id.*

7. It is not within the scope of the authority of a hired manager of a hotel to bind his employer by admissions concerning a trespass committed by him upon a guest after it has been committed. *Clancy v. Barker* (Neb.) 642

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Innkeepers; liability for injury to guest by servant. 42

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See INCOMPETENT PERSONS.

INSOLVENCY.

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Master's Duty as to, see MASTER AND SERVANT, 9.

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Right of, to Protection from Negligence, see NEGLIGENCE, 4.

INSTRUCTION.

See APPEAL AND ERROR, 23-26; TRIAL, 11-19.

INSURANCE.

Failure to Credit Overdue Premium Note on Policy, see APPEAL AND ERROR, 19.

Beneficiary's Right to Treat Original Contract as Rescinded, see BENEVOLENT SOCIETIES.

Exemption of Proceeds of Insurance Policy, see LEVY AND SEIZURE, 1, 2.

Powers of agents.

1. Where a nonresident fire insurance company appoints a local agent in Louisiana, and supplies him with blank policies signed by the president and secretary of the company, to be filled up, countersigned, and issued as occasion may require, such agent will be considered as having the powers of a general agent as to policies issued by him under such circumstances. *Richard v. Springfield F. & M. Ins. Co. (La.)* 278

2. An agent authorized to issue policies binds the company by all waivers, representations, or other acts within the scope or requirements of his business, unless the insured has notice of the limitation of his power. *Id.*

3. An insurance agent having power to issue and renew policies, to make waivers, and grant permits or privileges, has apparent power to waive, prior to a loss, a breach of the iron-safe clause by him attached to the policy, resulting from the failure of the insured, through illness, to make a complete inventory of stock within thirty days from the date of the issuing of the policy. *Id.*

Who may be beneficiaries.

4. A niece of a former wife of a man is not a relative of his child by a subsequent one, within the meaning of a statute permitting certificates of mutual benefit societies to be taken in favor of relatives. *Smith v. Supreme Tent K. of M. (Iowa)* 174

5. Naming a person as beneficiary in a 69 L. R. A.

mutual benefit certificate does not make her a legatee, within the meaning of a statute permitting such certificates to be issued in favor of legatees. *Id.*

Estoppel or waiver.See also *supra*, 2, 3.

6. Retaining and attempting to collect an overdue premium note on an insurance policy will waive a provision in the policy that nonpayment of the note at maturity will terminate the contract. *Union C. L. Ins. Co. v. Spinks (Ky.)* 264

Arbitration of loss.

7. An open mortgage clause attached to a policy of fire insurance, which merely provides that loss, if any, shall be paid to a mortgagee as his interest may appear, does not create any contract relations between the mortgagee and insurer, or give the mortgagee a right to participate in arbitration proceedings to fix the amount of loss; and, therefore, he will be bound by the award, although he was given no opportunity to be heard. *Collinsville Sav. Soc. v. Boston Ins. Co. (Conn.)* 924

Limitations as to time for suit.

8. A provision of a life insurance policy that suit shall be brought on it within a period less than that fixed by the statute of limitations is void as against public policy. *Union C. L. Ins. Co. v. Spinks (Ky.)* 264

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Insurance; statute exempting proceeds of policy from execution; effect to exempt from claims against beneficiary. 67

Provision that nonpayment of premium note at maturity shall terminate contract: waiver of, by attempting to collect overdue note; estoppel to set up termination of contract by retention of overdue premium note; provision that action shall be brought within one year. 264

Knowledge of agent authorized to issue and deliver policies and collect premiums, imputed to company; acceptance by agent of premium with knowledge of breach of condition; as waiver of breach; effect of limitation of general agent's authority; who is a general agent; presumption of agent's authority to alter or modify policy orally; duty of insured to keep books of account; burden of proof to establish waiver. 279

Attachment of mortgage clause to; binding effect on mortgagee of arbitration proceedings to which he was not a party. 925

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INTERNAL IMPROVEMENT.

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Internal improvement; what constitutes work of, within meaning of constitutional prohibition against state engaging in. 914

INTOXICATING LIQUORS.

Punishment for Giving Liquor to Minor, see CRIMINAL LAW, 6.

A general consent in writing, by a mother, that liquor may be furnished by the person to whom the writing is addressed, to her minor child, whenever he may desire to do so, will not bar a prosecution of such person for furnishing liquor to minors without the parent's consent, since such consent would frustrate the purpose of the statute. *Pressly v. State* (Tenn.) 291

INTOXICATION.

Effect of, on Degree of Care Required, see NEGLIGENCE, 7.

IRON-SAFE CLAUSE.

See INSURANCE, 3.

JUDGMENT.

Estoppel by; Burden of Proof as to, see EVIDENCE, 4, 5.

Evidence in Opposition to Plea of Estoppel by, see EVIDENCE, 22.

Injunction against Entry or Execution of, see INJUNCTION, 6, 7.

Error in Rendering Judgment on Inconsistent Findings, see TRIAL, 18.

Sufficiency of Service to Authorize Personal Judgment in Divorce Suit, see WRIT AND PROCESS.

1. A decree of distribution by the probate court holding that a testator devised certain land to his widow for life, and the remainder thereof and all his other real estate to his children, share and share alike, and ordering that the estate be assigned to the devisees according to the terms of the last will and testament of the deceased, must be construed as assigning the entire estate in the property of the deceased to the persons therein named, to wit, a life estate to the widow and a vested remainder to the children, share and share alike. *Ladd v. Weiskopf* (Minn.) 785

Who bound by.

2. A decree of a probate court having jurisdiction, assigning the residue of the estate of a deceased person, is conclusive upon all persons interested in the estate, whether then in being or not. It is in the 69 L. R. A.

nature of a judgment *in rem*, which binds all the world. Id.

3. A judgment against a debtor is not binding on one who has contracted to save him harmless from the debt, unless he has been notified to come in and defend. *Busell Trimmer Co. v. Coburn* (Mass.) 821

4. A decree denying the right of a corporation to have bonds secured by mortgage on its property surrendered by a pledgee who was seeking to foreclose its lien on the bonds against the pledgee, on the ground that the bonds had been wrongfully put upon the market and had never been rightfully negotiated, is no bar to a subsequent suit against the corporation to foreclose the mortgage by which they are secured, since the latter question could not have been determined in the former action. *Ruckman v. Union Ry.* (Or.) 480

NOTES AND BRIEFS.

Judgment; conclusiveness in subsequent action or suit upon same cause; essential qualities of *res judicata*. 481

Effect of defective service on validity of: injunction to restrain enforcement. 499

Conclusiveness of decree of distribution by probate court on unborn devisees; on heirs or devisees not personally served or present; right of court to revise decree: conclusiveness of judgment of probate court; inadvertent mistake by probate judge in naming a conclusion of fact what is really a conclusion of law; impairment of legal effect of judgment by. 785

As presumptive evidence of liability of judgment debtor. 821

JUDICIAL NOTICE.

See EVIDENCE, 1-3.

JUDICIAL SALE.

A court order annulling a judicial sale, and directing a resale of the property, without accepting the bid, or directing any proceedings against the bidder, or any confirmation of the sale, relieves him from all liability upon his bid. *Cowper v. Weaver* (Ky.) 33

NOTES AND BRIEFS.

Judicial sale; relief of purchaser upon annulling judicial or execution sale:—(I.) Release from bid; (II.) release from bid and return of deposit; (III.) relief by reimbursement or subrogation: (a) generally; (b) reimbursement; (c) subrogation: (1) generally; (2) out of proceeds of resale; (d) probate, guardians' and administrators' sales: (1) guardians' sales;

(2) administrators' sales; (e) statutory relief; (f) proceeding against nonresidents; (g) fraudulent sales; (IV.) relief by action against the debtor; (V.) relief by action against the creditor; (VI.) relief by action against the sheriff; (VII.) summary. 33

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Excuse of Competent Juror, see APPEAL AND ERROR, 17.

JUSTICE OF THE PEACE.

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LACHES.

See LIMITATION OF ACTIONS, 1, 2.

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Taking Right to Fish in, under Power of Eminent Domain, see EMINENT DOMAIN, 2.

LANDLORD AND TENANT.

Liability of Trustee in Bankruptcy for Rent, see BANKRUPTCY, 2-4, 6.

Estoppel to Claim Invalidity of Landlord's Entry, see ESTOPPEL, 5.

Landlord's Duty as to Keeping Sidewalk Free from Ice, see HIGHWAYS, 6.

Liability of Occupants of Lower Floors for Injury Due to Blocking of Stairway, see NEGLIGENCE, 5.

1. The retaking of the premises by a lessor releases the lessee from payment of all subsequent accruing rents, unless the contract expressly provides otherwise. *Watson v. Merrill* (C. C. App. 8th C.) 719

2. A tenant cannot be relieved from forfeiture of his term because of breach of his covenant to pay taxes after the premises have been sold because of his default, since he can no longer perform his covenant, or make compensation for the breach, so as to entitle himself to equitable relief. *Gordon v. Richardson* (Mass.) 867

NOTES AND BRIEFS.

Landlord and tenant; effect of adjudication in bankruptcy of tenant to terminate lease. 720

Condition giving right of re-entry for breach of covenant; enforcement of condition where compensation in money can be made; breach of covenant to pay taxes; waiver by landlord of breach of condition; effect of landlord's releasing premises before re-entry for condition broken. 867

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Assumption of Risk of Danger from, see MASTER AND SERVANT, 13.

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Larceny; necessity of instruction as to law on circumstantial evidence on prosecution for. 195, 206

LAST CLEAR CHANCE.

See NEGLIGENCE, 10, 11; STREET RAILWAYS, 9.

LEASE.

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LEAVE OF COURT.

To Filing of Information, see INDICTMENT AND INFORMATION, 8.

To File Bill of Review, see REVIEW, 4.

LEGATEE.

Who is, see INSURANCE, 5.

LEGISLATURE.

Expulsion of Member as Bill of Attainder, see ATTAINDER.

Power to Create and Destroy Counties, see COUNTIES.

Relation of Judicial Department to, see COURTS, 4, 5.

1. A member of the legislature has, in the absence of constitutional provision, no right to a trial and opportunity to be heard upon charges made, before being expelled therefrom. *French v. Senate* (Cal.) 556

2. A member of the state legislature is not protected by the Federal Constitution from the exercise by that body of its constitutional right to remove him therefrom. *Id.*

3. The state legislature has power to adopt any procedure for the expulsion of members, and to change it at pleasure. *Id.*

4. The constitutional power of the state legislature to expel a member is not restricted by the further provision that a member who accepts a bribe is guilty of felony, upon conviction of which he shall be forever disqualified from holding any of office or public trust; and therefore conviction is not a prerequisite to his expulsion from the legislative body. *Id.*

5. Allegations in a petition by persons expelled from a state legislature to secure reinstatement, that they were expelled without hearing or opportunity for defense, will not be taken as true, even against a demurrer, where the record of the proceedings, of which the court takes judicial notice, shows that charges were preferred referred to a committee which reported an

investigation, and that the charges were true and that the report was taken up and considered by the body, at which time petitioners had an opportunity to be heard in their own behalf. Id.

NOTES AND BRIEFS.

Legislature; powers and privileges of; right to expel member; exercise of power beyond control of judiciary. 557

LEVY AND SEIZURE.

What property exempt.

1. The deposit by the beneficiary of the proceeds of a life-insurance policy, which are exempt from execution for her debts, in a bank, does not destroy the exemption. *Holmes v. Marshall* (Cal.) 67

2. The exemption from execution of the proceeds of insurance policies is not limited to claims against the insured, but extends to those against the beneficiary, under a statute providing that all moneys, benefits, privileges, or immunities accruing, or in any manner growing out of, life insurance, are exempt from execution; and the same rule applies where the policy is payable to the estate of the assured, and, being exempt from his debts, the proceeds are distributed to his widow under the statute as his next of kin. Id.

Setting aside levy.

3. The court may set aside the levy of an attachment upon exempt property. Id.

NOTES AND BRIEFS.

Levy and seizure; of growing crops. 827

LIBEL AND SLANDER.

1. Words which are harmless in themselves may be libelous in the light of extrinsic facts. *Pavesich v. New England L. Ins. Co.* (Ga.) 101

2. A publication of an advertisement of an insurance company, containing a person's picture and a statement that the person has policies of insurance with the company and is pleased with his investment, when in fact he has no such policies, is libelous as having a tendency to create the impression among those who know the facts that the person whose picture is reproduced has told a wilful falsehood, either gratuitously or for a consideration. Id.

NOTES AND BRIEFS.

Libel and slander; in charging one with doing what the law authorizes to be done; definition of libel; innuendo to change natural meaning of words. 102
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LIBERTY.

See FREEDOM OF SPEECH.

LIBERTY OF SPEECH OR PRESS.

As Limitation on Exercise of Right to Privacy, see PRIVACY, 2.

LICENSE.

Of Attorney; Revocation, see ATTORNEYS, 2.

Authority of Municipality as to, see MUNICIPAL CORPORATIONS, 1.

Necessity of Ophthalmologist Procuring, see PHYSICIANS.

1. A license is a personal privilege to do certain acts upon the lands of another, but creates no estate therein, is revocable at will, and may rest in parol; while an easement is an estate in real property, and its grant falls within the statute of frauds. *Howes v. Barmon* (Id.) 568

2. Unless the evidence be clearly to the contrary, a court will presume that a parol agreement to impress real property with a servitude was made with a knowledge of the provisions of the statute of frauds, and was therefore intended as a license only, and not as an easement. Id.

3. A license, revocable by the licensor, and not an easement, is created by oral permission to use a stairway on the outside of a building to reach the second story of an adjoining building, in consideration that those to whom such permission is given will allow the owner of the stairway to erect a porch at the back end of his building, on a strip of vacant land owned by the other parties. Id.

NOTES AND BRIEFS.

License; upon private property; definition of; revocation. 568

LIENS.

Remedy for Enforcing, see ACTION OR SUIT, 1.

LIFE TENANTS.

1. The life estates created by statute, giving a surviving husband or wife one-third interest for life in the real estate of the other, are subject to the incidents of common-law life estates, although they are not the same as the common-law estates; and the life tenant is therefore impeachable for waste. *Swayne v. Lone Acre Oil Co.* (Tex.) 986

2. One entitled to an undivided life estate under a statute giving a surviving husband or wife a one-third interest in the real estate of the other cannot demand absolutely any part of the production of

oil wells subsequently opened upon the property by the remainder-men, but is entitled only to the income upon one third of the oil produced. *Id.*

Right to dividends.

3. The rule that cash dividends on corporate stock go to life tenants, and stock dividends to the remainder-men, will not yield whenever an investigation might appear to indicate its failure in a given case to accomplish what might be conceived to be exact justice, upon the basis of some theoretical view of the ultimate rights of persons asserting conflicting successive stock interests. *Smith v. Dana* (Conn.) 76

4. Withdrawal from certain incidental branches of business which a corporation has been carrying on does not make the distribution of the money invested in them as dividends a partial liquidation which will carry the dividends to the remainder-men as against life tenants, where the capital stock is not impaired, and its value remains above par, and practically the same after the dividends as before. *Id.*

5. Cash dividends upon corporate stock belong to the life tenants notwithstanding they were derived from the sale of permanent property in which profits had been invested. *Id.*

6. Investment of the profits of a corporation in permanent works does not capitalize them, so that upon the sale of the works the directors cannot distribute them as a cash dividend, which will belong to life tenants, and not to remainder-men, of the stock. *Id.*

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Life tenants; respective rights of life tenants and remainder-men in stock dividends. 76

Interest of life tenant in mines under land; where life tenant is widow whose estate is created by statute; right to oil produced from wells drilled by remainder-men; to what life estates doctrine of waste applies; what constitutes waste. 980

LIGHT.

Municipal Liability for Falling over Horse Block from Lack of, see HIGHWAYS, 8.

LIMITATION OF ACTIONS.

Estoppel to Plead, see ESTOPPEL, 7.

Invalidity of Short Limitation for Suit on Policy, see INSURANCE, 8.

Time for Filing Bill of Review, see REVIEW, 2.

1. Under ordinary circumstances a suit in equity will not be stayed for laches before L. R. A.

fore, and will be stayed after, the time fixed by the analogous statute of limitations at law; but, if unusual conditions make it inequitable to allow the prosecution of a suit after a briefer, or to forbid its maintenance after a longer, period than that fixed by the statute, the chancellor will not be bound by the statute, but will determine the extraordinary case in accordance with the equities which condition it. *Williams v. Neely* (C. C. App. 8th C.) 232

Equitable remedies; laches.

2. It is not culpable laches for one who has an equitable defense or reduction to a promissory note which has been and is the subject of pending litigation in another court, and which, if available at law, would survive as long as the cause of action upon the note existed, to wait until an affirmative action at law upon the subject of the defense is barred, and until the equitable defense is rejected in an action at law upon the note, before invoking the aid of a court of equity to enjoin the prosecution of the latter action until his equitable defense is allowed. *Id.*

Effect of bar of other claim or remedy.

3. The defense of reduction or recoupment, which arises out of the same transaction as a promissory note or claim, survives as long as a cause of action upon the promissory note or claim exists, although an affirmative action upon the subject of the defense may be barred by the statute of limitations. *Id.*

4. A note given for interest on another note which is secured by mortgage is itself so secured, and the mortgage may be foreclosed to satisfy it, although the prior note is barred by the statute of limitations. *Kleis v. McGrath* (Iowa) 260

When statute runs.

5. Under a stipulation in a mortgage securing a series of notes due at intervals of one year, that nonpayment of any one of them, together with nonpayment of taxes due on the mortgaged premises, shall mature the entire debt, failure to pay the first note at its maturity and taxes due at that time, which default continues until all the notes are due, starts the running of the statute of limitations in favor of the whole debt. *Snyder v. Miller* (Kan.) 250

Removal of bar.

6. Giving a note for interest upon a larger note already barred by the statute of limitations, which does not mention or in any way refer to the earlier note, does not revive it under a statute providing that causes of action founded on contract are revived by an admission in writing, signed by the party to be charged, that the debt

is unpaid, or by a like new promise to pay the same. *Kleis v. McGrath* (Iowa) 260

7. Payment of the taxes due on mortgaged premises by one who purchased the property subject to the mortgage, but did not assume its payment, does not suspend the running of limitations against the right to foreclose the mortgage, which had been started by failure of the mortgagor to pay at maturity the first of a series of notes secured by the mortgage and taxes due at that time, the mortgage providing that nonpayment of any one of the notes, together with nonpayment of taxes due on the premises, should mature the entire debt. *Snyder v. Miller* (Kan.) 250

NOTES AND BRIEFS.

Limitation of actions: running of, against defense arising out of same transaction as claim sued on. 235

Provision in mortgage that whole debt shall become due upon failure to pay interest and taxes; suspension of operation of statute by subsequent payment of taxes; where payment is made by subsequent grantee of land. 250

Giving note to secure interest accrued on note previously given as acknowledgment of continued indebtedness upon latter; statement in writing by debtor that specific amount is due as admission of balance of claim over such amount. 261

LIMITATION OF LIABILITY.

See CARRIERS, 7.

LIVERY-STABLE KEEPER.

Liability as Carrier, see CARRIERS, 1, 2.

LOGS.

Right to Maintain Replevin for. see REPLEVIN, 4-6.

LOTTERY.

The fact that each member is entitled to trade out of the amount he has paid in whenever he chooses to withdraw from the club does not prevent a suit club, which is a scheme by which a certain number of persons pay a small sum per week, and choose by lot each week one of the number who shall receive a suit of clothes worth much more than such weekly payment, upon receipt of which he ceases to be a member of the club, from being a lottery. *People v. McPhee* (Mich.) 505

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MANDAMUS.

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Mandamus; to compel court to proceed with trial: where party is in contempt. 312

To compel courts and judges to approve and accept bonds; to compel performance of act by officer who pleads authority of unconstitutional act for nonperformance. 428

To restore to membership one expelled from state legislature; mandamus from one branch to co-ordinate branch; not issued when not effectual or beneficial; to control discretion of lawmaking branch of government. 557

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MASTER AND SERVANT.

Liability for Maliciously Procuring Breach of Contract of Employment, see CASE.

Damages for Breach of Contract of Employment, see DAMAGES, 5.

Question for Jury as to Contributory Negligence of Brakeman, see TRIAL, 8.

Master's duty as to appliances.

Proximate Cause of Injury to Servant by Fall of Derrick, see PROXIMATE CAUSE, 3.

See also TRIAL, 20.

1. There is no distinction between the construction of the appliances furnished for the use of a servant and their maintenance, so far as the right of the master is concerned to absolve himself from liability for injuries by furnishing suitable materials to a competent person, to be used for that purpose. *Rincicotti v. John J. O'Brien Contracting Co.* (Conn.) 936

2. Failure of an engineer to observe a custom of the road, when cars are being coupled together, to stop his engine immediately when the cars come together and hold it stationary until signaled by the brakemen making the coupling to move it again, is negligence rendering the company liable for injury to a brakeman in consequence thereof. *Schus v. Powers-Simpson Co.* (Minn.) 887

3. An employer without the necessary

technical knowledge to enable him to determine whether or not a boiler furnished by him is safe may rely upon the statement of the official city boiler inspector, so far as his duty towards his employees is concerned. *Service v. Shoneman* (Pa.) 792

4. Negligence by an employer in furnishing an unsafe boiler is rebutted, so as to absolve him from liability for injuries to employees by its explosion, where, before its purchase, he made extended inquiries as to which boiler was best, and purchased the one recommended after its superiority was pointed out, paying a larger price than was asked for others; and it had been used in his establishment three years before the accident without complaint, and was exclusively used and favored by the owners. *Id.*

5. That a boiler furnished by an employer for the use of his employees contains an unsafe device will not render him liable for injuries to them by reason of such defect, if he procured it in the exercise of business prudence, and it was one in ordinary use. *Id.*

6. The failure to box or otherwise protect a rapidly revolving upright shaft coming up through the floor in an alley or passageway where an inexperienced girl is required to sweep, and who is not warned of the danger, may be found by the jury to constitute negligence which will render the employer liable for injuries to her when her clothing is caught and wound upon the shaft. *American Tobacco Co. v. Strickling* (Md.) 909

7. Mere knowledge of an employee of a contractor for the setting of the stone work of a building, of a custom that the scaffolding shall be furnished by the brick contractors, does not amount to a waiver of his right to hold his employer responsible for the safety of a scaffold furnished for him to work upon. *McBeath v. Rawle* (Ill.) 697

Master's duty to be present.

8. The mere fact that a place where a servant is working is rendered temporarily unsafe in the execution of the details of the service does not, alone, make it the duty of the master to be present in person, or by representative, to protect the servant from harm. *Dill v. Marmon* (Ind.) 163

Duty to inspect.

9. The master is bound to make reasonable inspection of appliances used to aid his servants in their work, and he cannot relieve himself from the consequences of his failure to do so by delegating the duty to competent employees. *Rincicotti v. John J. O'Brien Contracting Co.* (Conn.) 936

Assumption of risk.

10. A servant engaged in assisting in shifting cars to be loaded at a mill assumes the risk of the foreman giving a negligent com-

mand relative to the handling of the cars. *Dill v. Marmon* (Ind.) 163

11. After a master has exercised due care in the selection of servants, the danger arising from the negligence of a fellow servant is one which is voluntarily assumed by a person going into the service of the master; it being a risk for which satisfactory compensation is presumed to have been rendered by the larger wages he can earn in such service than in other employments. *Louisville & N. R. Co. v. Dillard* (Tenn.) 746

12. A direction by a foreman to an employee assisting in shifting cars to be loaded at a mill, to push a car put in motion by the impact of another before it has lost its momentum, is not such a change in his work, although he has never done that particular act before, as to authorize him to proceed at the master's risk. *Dill v. Marmon* (Ind.) 163

13. A railroad engineer who obeys, although reluctantly, an order to take his train through a mountainous region on its regular trip at a time of heavy rains, when land slides are anticipated, assumes the risk of such slides, and cannot hold the company responsible in case his train is carried from the track by a slide which comes upon it so suddenly that there is no time to escape, and the danger of which was not observed by a track inspector, who had passed the spot just before the train reached there: since it must be regarded as pure accident. *Kinzel v. Atlanta, K. & N. R. Co.* (C. C. App. 6th C.) 757

Fellow servants.

Imputing Engineer's Negligence to Conductor, see **NEGLIGENCE**, 8.

Receiver's Liability for Injury by Fellow Servant's Negligence, see **RECEIVERS**.

Sufficiency of Title of Statute as to, see **STATUTES**, 5.

Special Legislation as to, see **STATUTES**, 7.

See also **COMMERCE**, 2; **CONSTITUTIONAL LAW**, 5, 6.

14. A master is not liable to a servant for injuries caused by negligence of a foreman in directing work where the master has otherwise performed his duty. *Dill v. Marmon* (Ind.) 163

15. An employer is not liable to an employee for injuries caused by negligence in the handling of a boiler upon the premises by a coemployee, an engineer who is conceded to have been competent. *Service v. Shoneman* (Pa.) 792

16. The conductor of a passenger train cannot be regarded as in a separate department of service from a brakeman of a

freight train, so as to render the railroad company liable for injury to the latter by his negligence. *Louisville & N. R. Co. v. Dillard* (Tenn.) 746

17. A servant employed to assist in shifting cars to be loaded at a mill cannot hold the master liable for an injury caused by the negligence of the foreman in charge of the two or three men engaged in such work, but who is not at the head of a department of the work, in directing him to push a car after it has been set in motion by the momentum of another car, or in failing to stop the latter after the servant, in attempting to obey the order, has slipped and fallen in such a way that he will be injured in case it is not stopped. *Dill v. Marmon* (Ind.) 163

18. The doctrine of fellow service will not defeat the liability of a steamship company for death of a member of the crew through the sinking of the vessel, although the cause of the accident was the negligence of the master and pilot, where the loss of life was due to inability to launch the boats because of insufficiency of the crew in that they could not understand the language of the officers, and had not been drilled in lowering the boats. *Re Pacific Mail S. S. Co.* (C. C. App. 9th C.) 71

19. An employee injured by the negligence of another while both are acting in the line of duty as employees of a corporation has a right of action against the company, under the Indiana employer's liability act of 1893. *Pittsburgh, C. C. & St. L. R. Co. v. Montgomery* (Ind.) 875

20. Negligence of a superior servant of a railroad company, causing injury to an employee under his control, renders the employer liable under Ohio act April 2, 1890, although the negligence was in respect of the performance of work of the kind done by the injured person, and not in the performance of any duty imposed by law on the master personally. *Peirce v. Van Dusen* (C. C. App. 6th C.) 705

21. An action against a receiver of a railroad corporation is within the provisions of Ohio act April 2, 1890, making railroad companies liable in certain cases for the negligence of fellow servants or employees who have power or authority to direct or control the one injured. *Id.*

22. A corporation operating a "logging railroad," not as a common carrier, but exclusively for its own private business, is subject to the provisions of a statute making railroad corporations liable for injuries to servants caused by the negligence of fellow servants, since its employees engaged in the operation of the road are exposed to the

same dangers and risks as are employees of railroad corporations engaged in the business of a common carrier. *Schus v. Powers-Simpson Co.* (Minn.) 887

23. A statute making void a contract by a corporation for the release or relief from liability to an employee for negligence of a fellow servant is not unconstitutional. *Pittsburgh, C. C. & St. L. R. Co. v. Montgomery* (Ind.) 875

24. An agreement by a railroad employee that the acceptance of benefits from a relief fund shall operate as a release of all claims against the railroad company is void, under the employer's liability act of 1893, although the release is only conditional. *Id.*

Liability to third persons for servant's acts.

To guest at Hotel, see **INNKEEPERS**, 3-7.

25. The relation of master and servant does not render the master liable for the torts of the servant, unless connected with his duties as such servant or within the scope of his employment. *Clancy v. Barker* (Neb.) 642

NOTES AND BRIEFS.

See also **INNKEEPERS**.

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Assumption of risk; duty to furnish safe place to work; safe railroad bed and track; contributory negligence of servant; in absence of full knowledge of danger. 757

Assumption by brakeman of risk of coupling cars; action to recover; necessity of proving what particular precaution defendant should have taken, but did not; negligence of engineer in failing to keep engine stationary until coupling is made; contributory negligence of brakeman; abrogation of fellow servant doctrine as to railroads; what is a "railroad." 888

Duty to furnish safe appliances; measure of care; furnishing appliances in ordinary use; where there are safer appliances; liability for error in judgment in selecting appliances; right to rely on inspection of appliances by public officials. 797

Defective appliances; when servant may recover for injury caused by; duty of inspection; negligent construction of scaffold; where scaffold erected by independent contractor; liability of master for safety of machinery and appliances furnished and built by other contractor; duty to furnish safe place to work; delegation of duty of inspection; choice of methods of doing work by employee; employee's knowledge of danger. 697

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Who are vice principals; statute making railroad companies liable for injury to employee by superior servant; applicability to private railroads; liability of receiver of railroad for injury to employee; question whether person is fellow servant one of general, and not local, law. 706

Test as to whether one is vice principal or fellow servant; delegation of master's duty to agent; duty of master to inspect instrumentalities; right of servant to rely on performance of duty; delegation of duty of inspection; assumption of risk by servant of defects in instrumentalities. 937

Validity of statute abrogating fellow servant rule as to corporations. 876

Liability of innkeepers and carriers for injuries to guests and passengers by servants; liability of proprietors of theaters, saloons, stores, etc.; servant not acting within scope of duty. 643

MAXIMS.

1. "Every man's house is his castle."
Pavesich v. New England L. Ins. Co. (Ga.) 101

2. He who seeks equity must do equity.
Campbell v. Justices of Superior Court (Mass.) 311

3. Nemo debet bis vexari pro eadem causa
Hunt v. Darling (R. I.) 497

4. Nullus videtur dolo facere qui suo jure utitur. Ex parte Chace (R. I.) 493

5. Qui facit per alium facit per se. Stato v. Guglielmo (Or.) 466
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6. Respondeat superior. Clancy v. Barker (C. C. App. 8th C.) 653

7. Sic utere tuo ut alienum non lada.
Youghioghenny River Coal Co. v. Allegheny Nat. Bank (Pa.) 637

8. Ubi jus ibi remedium. Pavesich v. New England L. Ins. Co. (Ga.) 101

9. Volenti non fit injuria. Dill v. Marmion (Ind.) 163

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Rights of Life Tenant in Oil Wells, see LIFE TENANTS, 2.

The leaving of surface supports is not within a provision in a sale by the owner of coal in place of the vein, which is held subject to the duty of supporting the surface, by which he undertakes to indemnify the purchaser for any liability for any damage which may result to the surface "by reason of the skilful and careful mining and taking away of the coal," but the words refer solely to the manner of working the vein. Youghioghenny River Coal Co. v. Allegheny Nat. Bank (Pa.) 637

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Mines; grant or reservation of lands and minerals; right of surface owner to support. 637

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Rights of Mortgagee under Policy, see **INSURANCE**, 7.

Right to Foreclose Mortgage to Satisfy Outlawed Note for Interest on Note Secured by the Mortgage, see **LIMITATION OF ACTIONS**, 4.

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Rights and Liabilities as to Highway, see **HIGHWAYS**.

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Authority to license.

As to Automobiles, see **AUTOMOBILES**.

1. Authority given to a municipal corporation to regulate includes authority to license as a means of regulation when it cannot be otherwise accomplished. *People v. Schneider* (Mich.) 345

Ordinances.

Prohibiting Storage of Explosive Oils within Corporate Limits, see **CONSTITUTIONAL LAW**, 10.

2. An ordinance which applies alike to all persons, firms, or corporations engaged in the business legislated against is not discriminatory. *Crowley v. Ellsworth* (La.) 276

3. An ordinance is not informal or illegal

because the cause or reasons of its enactment are not given, nor because it punishes as a nuisance what neither by it nor by another ordinance is expressly declared to be such. Id.

4. Authority to a municipal corporation to regulate the storage of combustible and inflammable materials includes authority to prohibit the storage of refined and other explosive oils within the corporate limits; and an ordinance so providing is not unreasonable. Id.

5. A special ordinance granting to a particular person permission to store refined oils within the corporate limits of a town is repealed by a subsequent general ordinance, applicable to all persons alike, making such storage of oils a criminal offense. Id.

Liability for injuries.

In Highway, see **HIGHWAYS**, 5-9.

6. A municipal corporation has no right to prevent the use by its owner, in a lawful way, of a paved strip between the street line and a building set a few feet back from the street, where there is nothing to show that the strip has ever become a part of the highway, or that the municipality has so treated it. *Temby v. Ishpeming* (Mich.) 618

7. A municipal corporation is not liable for injuries to a traveler upon a sidewalk through the fall of a billboard insecurely placed by an abutting owner upon his own property near the edge of the street, under a statute requiring it to keep its streets reasonably safe and fit for travel. Id.

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Of Depositor in Bank, see **BANKS**, 8, 9.

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Proximate Cause of Injury or Loss, see **PROXIMATE CAUSE**.

Of Railroad Company, see **RAILROADS**.

Of Street Railways, see **STREET RAILWAYS**.

1. Gross negligence does not include ordinary negligence, and proof of the former does not prove, but rather disproves, the latter. *Rideout v. Winnebago Traction Co.* (Wis.) 601

2. The term "gross negligence" signifies wilfulness; it involves intent, actual or constructive, which is a characteristic of criminal liability. *Id.*

3. The term "negligence" by itself suggests only inadvertence or want of ordinary care, and, however great may be the degree of such want of care, so long as the element of inadvertence remains, wilfulness is excluded. *Id.*

4. A government inspector whose duty it is to see that work is properly done by a dredge employed on a government contract is entitled to protection from negligent acts of those in charge of it, when upon it, even in the intervals when there is no occasion for him to be actually engaged in any immediate active duty. *Steam Dredge No. 1* (C. C. App. 1st C.) 293

Dangerous premises.

5. The occupant of the lower floors of a building, who blocks the stairway leading 60 L. R. A.

from the upper floor to the ground so that a tenant of such floor, in seeking to escape a fire, is compelled to drop a considerable distance to reach the ground, is liable for the injury resulting to him therefrom. *Cohn v. May* (Pa.) 800

Contributory negligence.

6. The mere act of one rightfully on board a vessel, of leaning against, or wholly sitting upon, a bitt around which runs a line used in shifting the position of the vessel, is not negligence on his part. *Steam Dredge No. 1* (C. C. App. 1st C.) 293

7. Intoxication does not relieve a man from the degree of care required of a sober man under the same circumstances. *Vizacchero v. Rhode Island Co.* (R. I.) 188

Imputed negligence.

8. Negligence of a locomotive engineer, which results in a collision, is not imputable to the conductor in charge of his train, so as to prevent a recovery for injuries thereby caused to the latter, where the conductor could not have controlled the action of the engineer at the time of the accident, or have prevented its occurrence. *St. Louis & S. F. R. Co. v. McFall* (Ark.) 217

9. The owner of a wagon, seated beside the driver whom he employs, is chargeable with the driver's negligence in attempting to cross a street car track in front of an approaching car which is in plain sight. *Markowitz v. Metropolitan Street R. Co.* (Mo.) 389

Last clear chance.

See also **STREET RAILWAYS**, 9.

10. No peculiar rule which can be deduced from the doctrine of last clear chance, as originated in *Davies v. Mann*, can be applied in an admiralty case. *Steam Dredge No. 1* (C. C. App. 1st C.) 293

11. To make applicable the doctrine of last clear chance, it must clearly appear that the negligence of one person was subsequent to that of the other. *Id.*

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For Failure to Insert Certain Facts in Special Verdict, see TRIAL, 21.

1. A claim that the jury in a criminal case was prejudiced by a report of a grand jury as to the enforcement of criminal law, 69 L. R. A.

which was read before them, comes too late on a motion for a new trial. *Beason v. State* (Tex. Crim. App.) 193

2. The admission of evidence of the age, at the time of death, of the parents of one killed by accident, for the purpose of showing his expectation of life, although erroneous because of remoteness, is not ground for new trial. *Rincicotti v. John J. O'Brien Contracting Co.* (Conn.) 936

3. A new trial must be granted where the facts found in a special verdict are insufficient to support the judgment for plaintiff by reason of the absence of findings on matters in dispute essential to the complete determination of the issues. *Beare v. Wright* (N. D.) 409

NOISE.

From Chicken House as Nuisance, see NUISANCES.

NOMINAL DAMAGES.

See DAMAGES, 2.

NONRESIDENTS.

Discrimination against, see CONSTITUTIONAL LAW, 7.

NUISANCES.

Arrest of Motorman to Abate, see FALSE IMPRISONMENT.

Street Fair as, see HIGHWAYS, 3. 4.

Conductor Pipe Emptying on Sidewalk as, see HIGHWAYS, 5.

Injunction against, see INJUNCTION, 3.

The characteristic noises and odors issuing from a chicken house and yard which are maintained in a cleanly manner and cared for so as not injuriously to affect the health of any normal person in the neighborhood are not a nuisance, although they may make neighboring property uncomfortable as a residence for invalids. *Wade v. Miller* (Mass.) 820

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Nuisance; what constitutes. 818

Right of person coming to live near alleged nuisance; what constitutes. 934

Power of municipality to abate. 350

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Liability for False Imprisonment, see
FALSE IMPRISONMENT, 2.

Homicide by, While Making Arrest,
see HOMICIDE.

Removal of Member of Legislature,
see LEGISLATURE.

Waiver of Right of Privacy by, see
PRIVACY, 4.

The title to a public office is held sub-
ject to the constitutional provision giving
the right of removal. *French v. Senate*
(Cal.) 556

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Officers; implication of all incidental
powers necessary for due exercise of power
expressly granted; right of attorney gen-
eral to sign indictments found by grand
jury; presumption in favor of due exe-
cution of acts of official nature; offer by
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able offense. 176

Individual criminal liability of officer or
agent of corporation. 276

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What force may be used to make an ar-
rest. 382

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ing of, within City Limits, see
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See MUNICIPAL CORPORATIONS, 2-5.

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Of Attorney; Effect, see ATTORNEYS, 1.

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Condemnation of Land for, see EMI-
NENT DOMAIN, 4-6, 9.

Sufficiency of Title of Statute as to,
see STATUTES, 3, 4.

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Parks; parkways as essential part of
park system; condemnation of land for
parks and park ways. 750

Forbidding use of land near park for
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advertising purposes; as a taking for
which compensation must be paid. 817

PAROL EVIDENCE.

See EVIDENCE, 12-15.

PARTITION.**NOTES AND BRIEFS.**

Partition; of land in other state or coun-
try; jurisdiction of equity to decree. 692

PARTNERSHIP.

Discharge of One Partner in Bank-
ruptcy; Effect, see BANKRUPTCY,
7, 8.

Between Husband and Wife, see HUS-
BAND AND WIFE, 6.

When partnership exists.

1. A partner may make an agreement
with a third person for a division of the
profits coming to him from the partner-
ship enterprise, and, if the character of
the agreement is such as to disclose the
essentials necessary to a partnership, a sub-
partnership is thereby formed between the
partner and the third person; but such
person does not become a member of the
first partnership, nor is he liable for the
debts of that partnership. *Morrison v.*
Dickey (Ga.) 87

2. Mutual confidence being the founda-
tion of the partnership relation, the mere
fact that a member of a partnership is not
the owner of property which he has em-
barked in the partnership enterprise—the
same belonging to a third person, who has
consented that it may be so used for his
benefit, but whose interest is not disclosed
to the other member of the partnership—
does not cause a partnership relation to
arise between the other partner and the
concealed principal of his copartner. *Id.*

**Rights and liabilities as between
partners.**

3. A woman whose husband is carrying
on a partnership business with her money
under an agreement that she shall receive
all of his share of the profits of the busi-
ness, is liable to account to him for the
amount for which he has rendered himself
liable on account of the purchase of a ma-
chine by him and his partner for use in the
business, although she has given him spe-
cial instructions not to purchase the ma-
chine, if the machine is in fact necessary
or proper for the conduct of the business.
Id.

4. In case of a subpartnership between
husband and wife in reference to the hus-
band's share of the profits of a business in
which he is a partner, a gift by the wife to

the husband of a portion of her interest in the profits which the husband would derive from the first partnership is valid; and the use by him, or by his copartner, of such profits to discharge a debt of the husband does not render his partner liable to the wife on account of having used her money for the purpose of paying her husband's debt.

Id.

5. Where a business owned by a married woman was conducted by her husband in his name, and a third person, in ignorance of the wife's interest, bought a half interest therein, and later, upon discovering the wife's interest, recognized her as a partner and offered to buy her share in the business, the wife became liable, upon an accounting as to the affairs of the partnership, for half of the purchase price of a machine previously bought by her husband and his partner before her relation to the business was discovered, although she had given her husband special instructions not to purchase the machine, it appearing that it was actually purchased and used in carrying on the business of the partnership.

18.

NOTES AND BRIEFS.

Partnership; relation a purely contractual one; subpartnership between one partner and his wife as to his share of the profits; liability of concealed partner for debts of firm; creation of partnership by agent without authority; ratification. 88

Good faith required of partners. 574

Discharge of partnership liability in individual bankruptcy proceedings. 771

Effect on partnership debt of discharge in bankruptcy of individual partner; attempt to withdraw debts from jurisdiction of bankruptcy courts by attempted dissolution; right of creditors of, to dividend where there is no joint estate and no surplus of separate estate after paying separate debts; assignment, under insolvency laws, of one partner as dissolution of firm. 772

PASS BOOK.

See BANKS.

PAYMENT.

NOTES AND BRIEFS.

Payment; right to recover, though made voluntarily, where parties not on equal terms: what constitutes compulsory payment. 803

PERSON.

Railroad Company as, see CONSTITUTIONAL LAW, 4.

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PERSONAL INJURIES.

Damages for, see DAMAGES, 8, 9.

PERSONAL LIABILITY AND SECURITY.

See CONSTITUTIONAL LAW, 2, 3; PRIVACY, 1.

PHYSICIANS.

An ophthalmologist who prefixes to his name the letters "Dr." on his sign, and on notices in which he undertakes to correct certain diseased conditions by the fitting of glasses to the eyes, comes within the terms of a statute providing, that, when a person shall append the title "Dr.," in a medical sense, to his name, he shall be regarded as practising medicine, within the meaning of the statute which requires a license as a condition precedent to doing so. *State v. Yegge* (S. D.) 504

PICTURE.

Publication of, without Consent, see FREEDOM OF SPEECH.

Publication of, as Part of Advertisement, as Violation of Right to Privacy, see PRIVACY, 4.

PLEADING.

Error in Refusing Leave to Amend, see APPEAL AND ERROR, 10.

Mode of Testing Sufficiency of Answer, see APPEAL AND ERROR, 15.

Time for objections; waiver.

1. Error in overruling a demurrer is not available to defendant after a voluntary default and hearing in damages thereon, unless the complaint is bad in substance. *Richards v. New York, N. H. & H. R. Co.* (Conn.) 929

2. The right to move to strike paragraphs of answer is not waived by filing demurrers, where, after the demurrers are filed, the petition is amended, and the answer is then amended to meet the new matter in the petition. *Wisconsin Lumber Co. v. Greene & W. Teleph Co.* (Iowa) 968

Sufficiency of plaintiff's pleadings.

Requiring Election between Different Theories, see TRIAL, 1.

Allegations as to Expulsion from Legislature, see LEGISLATURE, 5.

3. A complaint using language to describe defendant's fault appropriate to both gross negligence and ordinary negligence, as if they occurred at one and the same time, and that one included the other, is indefinite and uncertain. *Rideout v. Winnebago Traction Co.* (Wis.) 601

4. A grantor who has reclaimed the property because of breach of certain conditions

subsequent, which the conveyance stipulated should cause the title to revert to him, need not, when invoking judicial remedies in respect thereto, plead the evidentiary facts showing title in him notwithstanding the paper title in the grantee, but may plead his title in general terms the same as if that title were dependent upon any other circumstances. *Maginnis v. Knickerbocker Ice Co.* (Wis.) 833

5. A plaintiff who sues to recover punitive damages for a particular wrongful act, and relies, as evidencing the animus with which that act was committed, upon the commission of a wholly independent act, done at a different time and place, must by his pleadings advise the defendant of the case he is expected to meet. *Central of Ga. R. Co. v. Augusta Brokerage Co.* (Ga.) 119

NOTES AND BRIEFS.

Pleading; allegation that deed was delivered under terms of written contract; proof that it was delivered under oral contract. 572

Right to recover for ordinary negligence under allegation of gross, wilful, or wanton negligence, or *vice versa*:—(I.) Introduction; (II.) allegation of wilful or gross negligence; (III.) allegation of reckless or wanton negligence or both; (IV.) recovery on allegation of ordinary negligence, on proof of wilful or gross negligence; (V.) under statute or ordinance; (VI.) conclusion. 601

Inconsistent allegations. 606

Allegation of several grounds of action; right to recover where only one is proved; amendment of pleading by introducing new cause of action. 801

PLEDGE AND COLLATERAL SECURITY.

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Pledge; right to sell collaterals governed by terms of contract; when purchaser has valid title to pledged property. 480

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In Highway, see HIGHWAYS, 2.

POOL.

Playing Pool as Betting, see GAMING.

POSTOFFICE.

Contract by Mail, see CONFLICT OF LAWS, 2.

PRAYER.

Offering of, in School, see SCHOOLS, 1, 2. 69 L. R. A.

PREMIUM NOTE.

Failure to Allow Credit for, in Action on Policy, see APPEAL AND ERROR, 19.

Waiver of Provision for Termination of Policy, by Nonpayment of, see INSURANCE, 6.

PREMIUMS.

To Building and Loan Association, see BUILDING AND LOAN ASSOCIATIONS, 2.

PRESIDENT.

Of Corporation, see CORPORATIONS, 7.

PRINCIPAL AND ACCESSORY.

In Crime Committed in Two Counties; Place for Trial of, see COURTS, 2.

PRINCIPAL AND AGENT.

Parol Evidence of Signing Memorandum as Agent for Purchaser, see EVIDENCE, 15.

Insurance Agent, see INSURANCE, 1-3.

Partnership between Undisclosed Principal of One Partner and Other Member of Firm, see PARTNERSHIP, 2.

NOTES AND BRIEFS.

Principal and agent; law of concealed agency; creation of partnership by agent without authority; ratification by principal. 88

Notice to agent as notice to principal. 279

Agent profiting by transaction at principal's expense; question whether transaction is void or voidable; ratification by principal; what constitutes; sufficiency of repudiation; effect of custom or usage on agent's powers; liability of one doing business through agent for acts and omissions of latter. 667

PRINCIPAL AND SURETY.

Liability as Surety on Notes, see BILLS AND NOTES, 1.

Law Governing Married Woman's Liability as Surety, see CONFLICT OF LAWS, 5, 6.

PRIVACY.

1. The right of privacy is embraced within the absolute rights of personal security and personal liberty. *Pavesich v. New England L. Ins. Co.* (Ga.) 101

2. Liberty of speech and of the press, when exercised within the bounds of the constitutional guaranties, are limitations upon the exercise of the right of privacy. Id.

3. The publication of a picture of a person, without his consent, as a part of an advertisement, for the purpose of exploiting the publisher's business, is a violation of the right of privacy of the person whose picture is reproduced, and entitles him to recover, without proof of special damage.

Id.

Waiver of right of.

4. One who seeks or holds a public office, or any person who claims from the public approval or patronage, waives his right of privacy to such an extent that he cannot restrain or impede the public in any proper investigation into the conduct of his private life which may throw light upon the question of his fitness for the office which he seeks or holds, or as to whether the public should bestow upon him the office which he seeks, or accord to him the approval or patronage which he asks.

Id.

5. The right of privacy may be waived, either expressly or by implication, except as to those matters which law or public policy demands shall be kept private; but a waiver authorizes an invasion of the right only to such an extent as is necessarily to be inferred from the purpose for which the waiver is made. Waiver for one purpose, and in favor of one person or class, does not authorize an invasion for all purposes, or by all persons and classes.

Id.

NOTES AND BRIEFS.

Privacy; right of. 103

PROHIBITION.

To Stay Inferior Court, see **COURTS**, 7.

PROPERTY.

A property right in price quotations gathered by a board of trade is not destroyed by the facts that a large percentage of the business done under its auspices consists of gambling transactions, or that the news is susceptible of bad, as well as good, uses. *Board of Trade v. L. A. Kinsey Co.* (C. C. App. 7th C.) 59

PROVABLE CLAIMS.

See **BANKRUPTCY**, 3.

PROXIMATE CAUSE.

1. The negligence of a carrier in failing to forward promptly goods delivered for transportation is the proximate cause of their loss, where, because of such delay, they are overtaken in transit and destroyed by an act of God, even though the act of God cannot reasonably be anticipated. *Bibb Broom Corn Co. v. Atchison, T. & S. F. R. Co.* (Minn.) 500
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Of personal injury.

2. The proximate cause of the accident was the striking of the horse by the boy, where a farmer left a team of eleven-year-old horses drawing a wagon loaded with about a ton's weight, fastened to a hitching rail in front of a store while engaged in unloading his wagon, as he had been frequently in the habit of doing, and while the team was standing quietly a boy, in turning over the hitching rail near the head of the team, struck one of them on the nose, which frightened the team, causing them to break the halter, which was apparently in good condition, and run away, causing damage. *Stephenson v. Corder* (Kan.) 246

3. The proximate cause of the injury of a servant by the fall of a derrick because of the breaking of a spliced rope is not the failure to insert thimbles into the loops of the splice, but the failure to inspect the rope for the purpose of determining its condition, and to repair it after it has become chafed and worn by use, where there is nothing to show that the splice is not sufficiently strong, without the thimbles, to do the work required of it, but fails because of the wear due to continued use. *Rincicotti v. John J. O'Brien Contracting Co.* (Conn.) 936

NOTES AND BRIEFS.

Proximate cause; of injury; what constitutes. 246

Of accident; what constitutes. 801

PUBLIC IMPROVEMENTS.

See **DRAINS AND SEWERS**.

NOTES AND BRIEFS.

Public improvements; validity of assessment for construction or cleaning of sewers; giving resident landowners on line of ditch right to demand cleaning or repair; nonresident owners not considered; conferring upon auditor power to order improvement upon petition. 807

PUBLIC WATER SUPPLY.

See **WATERS**, 3-5.

PUNITIVE DAMAGES.

See **DAMAGES**, 14.

QUESTION FOR JURY.

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QUOTATIONS.

NOTES AND BRIEFS.

Quotations; gathered by board of trade; property right in. 63

RAILROAD RELIEF ASSOCIATION.

Invalidity of Agreement for Release of Railroad Company by Accepting Fund, see **MASTER AND SERVANT**, 24.

RAILROADS.

Equal Protection of, see **CONSTITUTIONAL LAW**, 4, 6.

Due Process in Taxation of, see **CONSTITUTIONAL LAW**, 8.

Establishment of, under Power of Eminent Domain, see **EMINENT DOMAIN**, 1, 3.

Liability for Injury to Employee, see **MASTER AND SERVANT**, 21.

Taxation of, see **TAXES**.

Question for Jury as to Cause of Fire, see **TRIAL**, 6.

1. Failure of railway employees to take charge of and care for a man who, while trespassing on the track, was struck and injured by a moving car attached to an engine in their charge, but without any fault on their part, is not the violation of a legal duty for which the company can be held liable. *Union P. R. Co. v. Cappier (Kan.)* 513

2. The duty to sound warnings when trains approach a trestle over a highway depends upon the dangerous character of the place, which is a question for the determination of the jury. *Louisville & N. R. Co. v. Sawyer (Tenn.)* 662

NOTES AND BRIEFS.

Railroads; failure to look for train at instant of stepping on crossing. 300

Taxation of; statute providing for valuation and assessment as a unit, and distribution of value on mileage basis to different taxing districts. 449

Duty to care for trespasser injured on track; in absence of negligence by railroad employees; duty of employees to extinguish fire found on right of way. 514

Duty to avoid injury to persons in helpless position on track. 523

Duty to look and listen before crossing track; negligence in walking on track. 606

Validity of statute making railroad companies liable for injury to employees by superior servants; scope of; liability of receiver for injury to employee. 706

Binding effect on, of condition subsequent in deed to; exercise of eminent domain to establish private railroad. 843

What constitutes a "railroad" within meaning of act making railroad corporation 69 L. R. A.

liable for injury to employees by fellow servant; application of act to logging railroads. 888

RAPE.**NOTES AND BRIEFS.**

Rape; necessity of instruction as to law on circumstantial evidence on prosecution for. 204

RATES.

For Water; Burden of Showing Unreasonableness of, see **EVIDENCE**, 6.

For Water, see **WATERS**, 3-5.

REAL PROPERTY.

Power of Court in Other State over, see **COURTS**, 3.

Rule in Shelley's Case.

1. The rule in *Shelley's Case* is part of the common law of Iowa. *Doyle v. Andis (Iowa)* 953

2. A fee simple is vested in the first taker under the rule in *Shelley's Case* by a conveyance to one "during his natural life, and then to his heirs." *Id.*

Conditions subsequent; forfeiture.

Sufficiency of Allegations as to, see **PLEADING**, 4.

See also **EQUITY**, 2.

3. The beneficiary of a condition in a conveyance of property, for the breach of which the title thereto may revert to him, may lose the benefit thereof by conduct rendering it inequitable for him to insist upon the forfeiture as stipulated. *Maginnis v. Knickerbocker Ice Co. (Wis.)* 833

4. Mere silence will not operate as a waiver of the benefit of a condition, in case of an intentional breach thereof, though the conditional grantee incur expense which would operate to his prejudice if the grant or were thereafter permitted to insist upon the forfeiture. *Id.*

5. Mere silence is not sufficient to waive a forfeiture because of breach of a condition in a conveyance of property; but silence by the grantor, and conduct in good faith relying thereon by the grantee, whereby he is placed in such a situation that he will be greatly damaged if the apparent attitude of his conditional grantor be changed effectively, will bind such grantor as a waiver of the benefit of the condition. *Id.*

6. Equity will not prevent forfeiture of an estate for breach of a condition subsequent, where the performance of the condition was made of the very essence of the contract, and the damages for the breach cannot be measured in money, while the fail

ure to perform was not caused by mistake, nor the result of mere negligence. *Id.*

7. Re-entry by a grantor for the purpose of enforcing a forfeiture of the property for breach of certain conditions subsequent, which the conveyance stipulated should cause title to revert to the grantor, or the doing of something equivalent thereto for the purpose of reclaiming the property pursuant to the terms of the conveyance, causes the title to revert in the grantor as absolutely as if no conveyance had been made, in the absence of any equity preventing the legal effect of such acts. *Id.*

8. If a railway corporation takes possession of land for a private purpose, its right to do so resting in a grant by the owner thereof, and it subsequently loses that right by forfeiture to such owner, and cannot thereafter defy such owner, and continue to enjoy his property, because it might successfully proceed in good faith to acquire it for a public purpose. *Id.*

NOTES AND BRIEFS.

Real property; conversion of estates tail into fee-simple estates by statute. 370

Necessity that "way" be created by deed or other writing; right of way as interest in lands. 568

Freehold never in abeyance. 786

What constitutes an encumbrance. 790

Rule in *Shelley's Case*; as part of common law of Iowa; what comes within rule; rule as one of property, and not of construction; statute *de donis*. 953

RECEIVERS.

Of Railroad Company; Liability of, for Injury to Fellow Servant, see MASTER AND SERVANT, 21; RECEIVERS.

A receiver of a Federal court in charge of a railroad company, who, by act Cong. March 3, 1887, chap. 373, corrected by act August 13, 1888, chap. 866, is required to manage and operate the property according to the requirements of the valid laws of the state in which it is situated, in the same manner as the owner or possessor thereof would be bound to do if in possession, is subject to any rule prescribed by the state imposing on railroad corporations a liability for the negligence of employees having superior authority over other employees. *Peirce v. Van Dusen* (C. C. App. 6th C.) 705

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Receivers; of railroad; liability for injury to employee. 796
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In Appellate Court, see APPEAL AND ERROR, 1-6.

Of Prior Conviction; Admissibility of, see EVIDENCE, 11.

RE-ENTRY.

By Grantor to Enforce Forfeiture, see REAL PROPERTY, 7.

REGISTRATION.

Of Automobiles, see AUTOMOBILES, 2.

RELATIVE.

Niece of Man's Former Wife as, see INSURANCE, 4.

RELEASE.

Invalidity of Agreement for Release of Employer by Accepting Benefits from Railroad Relief Fund, see MASTER AND SERVANT, 24.

Question for Jury as to, see TRIAL, 4.

NOTES AND BRIEFS.

Release; of liability for tort. 888

RELIGIOUS SOCIETIES.

1. A religious corporation is not bound by the act of its minister in making use of the membership roll of a former corporation, the title to whose property it acquired through a foreclosure sale, so as to make such act significant upon the question of the identity of the two corporations. *Allen v. North Des Moines M. E. Church* (Iowa) 255

Rights of creditors of.

2. In the absence of fraud, a creditor of a religious corporation has no right to enforce his claim against property formerly belonging to it after it has been sold on mortgage foreclosure, the corporation dissolved, a new corporation organized out of the old members and new ones, and the property bought from the purchaser at the foreclosure sale, although the new corporation proceeds to carry on the work of the old one at the old location, and maintains the same relation as the old one to the general religious denomination. *Id.*

3. A creditor of a religious corporation has no right of action against the individual members of it as such. *Id.*

NOTES AND BRIEFS.

Religious societies; liability of member of, for its debts:—(I.) Scope; (II.) early rule in Massachusetts, Connecticut, and Maine; (III.) incorporated societies; (IV.) unincorporated societies; (V.) *résumé*. 255

Liability of religious corporation for debts of predecessor. 256

REMAINDER-MEN.

See LIFE TENANTS.

RENT.

Liability of Trustee in Bankruptcy for, see BANKRUPTCY, 2-4, 6.

See also LANDLORD AND TENANT.

REPEAL.

Of Ordinance, see MUNICIPAL CORPORATIONS, 5.

REPLEVIN.

Federal Court Not Bound by State Decisions in, see COURTS, 11.

Estoppel of Plaintiff in, see ESTOPPEL, 3, 4.

Right of Plaintiff in, to Claim Salvage, see SALVAGE.

1. An entry, under a champertous deed, upon land of which another is in possession, does not confer upon the one making it the right, when sued in replevin for timber taken from the property, to force the former occupant to prove his title. *Wheeler v. Clark* (Tenn.) 732

2. The deeds under which plaintiff in replevin claims possession of property from which the chattels were taken may be looked at for the purpose of defining plaintiff's possession, although the question of the ultimate title to the land cannot be gone into. Id.

Right of action.

3. Replevin lies for growing strawberry plants, although they are attached to the soil, since they are fruits of industry, and must be treated as chattels. *Cannon v. Mathews* (Ark.) 827

4. The rule that one in adverse possession under color of title of a tract of land is entitled to maintain replevin for logs cut thereon by one claiming to be the true owner, regardless of the true location of the ultimate title to the land, applies where the spot from which the logs were cut is annexed to the actual possession of a portion of the tract because within the boundaries of the paper title. *Wheeler v. Clark* (Tenn.) 732

5. That logs for which replevin is brought were not all cut from plaintiff's land is immaterial, where the one from whose land they were cut transferred all his right to plaintiff before the bringing of the action. Id.

6. That one suing to recover logs cut from real estate is shown to have deeded away a portion of the land, and that the grant is not shown not to have included the logs, are immaterial, where the grantee is joined as plaintiff in the action. Id. 69 L. R. A.

Defenses.

7. That the title to property for which replevin is brought is shown to be in one of the plaintiffs is sufficient to sustain the action; and defendant cannot take advantage of the fact that other plaintiffs are not shown to have a right to the possession of any interest therein. Id.

NOTES AND BRIEFS.

Replevin; duty to preserve and return property seized under writ of:—(I.) Loss or destruction of the property: (a) in general; (b) emancipation of slaves; (II.) depreciation of the property. 283

Right to maintain by or against one in adverse possession of land for things severed: (I.) The general rule: (a) in general; (b) reason of the rule; (II.) nature of the adverse possession: (a) in general; (b) incidental trial of title; (III.) replevin of *fructus industriales*. 732

For growing crops. 827

RES GESTÆ.

See EVIDENCE, 17-19.

RESIDENCE.

See DOMICIL.

RÉSUMÉ.For *Résumé* of contents of book, see p. 993.**REVIEW.**

1. The object of a bill of review is to procure the reversal, alteration, or explanation of a decree in a former suit, and it must rest on error in law upon the face of the decree, fraud in procuring the decree, or new or newly discovered matter which could not have been used before the decree was made. *Watkinson v. Watkinson* (N. J. Err. & App.) 397

2. Although there is no express statutory limitation as to the filing of bills of review, the analogous limitation of the right of appeal should govern; and a bill of review cannot be filed after the lapse of three years from the final decree, except in case of new or newly discovered matter. Id.

3. Condonation of the adultery on which a decree for divorce was based will not justify the granting of leave to file a bill of review. If intended to be interposed, it should have been pleaded and proved in the original suit. Id.

Obtaining leave of court for.

4. When it is sought to reverse a decree upon the discovery of some new matter, leave of the court must first be obtained by petition, supported by affidavit that the ev-

idence is not only new, but could not have been discovered by reasonable diligence before the hearing. Id.

REVOCATION.

Of Legacy, see WILLS, 3.

ROBBERY.

NOTES AND BRIEFS.

Robbery; necessity of instruction as to law on circumstantial evidence on prosecution for. 203

RULES.

Of Savings Bank, see BANKS.

SALE.

Implied warranty.

Parol Evidence as to, see EVIDENCE, 14.

1. An implied warranty that an article will be fit for a particular purpose may be inferred from a contract to make or furnish it to accomplish that specific purpose, because the accomplishment of the purpose is the essence of the contract. *Davis Calyx Drill Co. v. Mallory* (C. C. App. 8th C.) 973

2. No implied warranty of the fitness of an article for a particular purpose arises out of a contract to make or supply a described and definite article, although the seller knows that the purchaser is purchasing it to accomplish the specific purpose, because the essence of the contract is the delivery of the specific article, and not the accomplishment of the purpose. Id.

3. An implied warranty of the fitness of a machine to do a particular work does not include a warranty that it will do the work as rapidly or economically as some other specified machine; such a covenant can be introduced by express contract only. Id.

4. There is no implied warranty that a drill and its machinery are suitable to bore holes through a particular strata of land, where a contract in writing, containing no reference to a warranty, is made with a manufacturer to buy one class F3 drill made by the latter and described in his catalogue, and certain other specific machinery and tools, for an agreed price, although before the contract is made the purchaser informs the seller that he wants the drill and machinery to bore holes through certain described strata of land, and the manufacturer assures him that its class F3 drill will do this work as rapidly and economically as a diamond drill. Id.

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show parol warranty of quality of property; sale of article of particular design or pattern; implied warranty of fitness for particular purpose. 975

SALVAGE.

Estoppel to Claim Sale of Replevied Property to Satisfy Claim for, see ESTOPPEL, 4.

A plaintiff in replevin cannot claim salvage for rescuing the replevied property after it had sunk while in his possession, since it was his legal duty to care for and preserve it. *Three States Lumber Co. v. Blanks* (C. C. App. 6th C.) 283

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See BANKS.

SCAFFOLD.

Master's Responsibility for Safety of, see MASTER AND SERVANT, 7.

SCHOOLS.

Offering prayer in.

1. Offering a prayer at the beginning of school each day, asking direction and guidance, which does not represent any peculiar view or dogma of any sect or denomination, does not bring a public school within a provision of the Constitution that no portion of any fund or tax raised for educational purposes shall be used in aid of any sectarian or denominational school. *Hackett v. Brooksville Graded School Dist.* (Ky.) 592

2. A school is not a place of worship, nor is the teacher a minister of religion, within the meaning of a constitutional provision that no person shall be compelled to attend any place of worship or contribute to the support of any minister of religion, although prayer is offered at the opening of sessions of the school. Id.

Reading Bible.

3. The King James translation of the Bible is not a sectarian book within the meaning of a statute providing that no sectarian book shall be used in any common school. *Hackett v. Brooksville Graded School Dist.* (Ky.) 592

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Right to dismiss after Filing Plea of, see **ACTION OR SUIT**, 3.

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To Building and Loan Association, see **BUILDING AND LOAN ASSOCIATIONS**, 1.

County Organization as, see **COUNTIES**, 4.

SPECIFIC PERFORMANCE.

Of Contract for Sale of Homestead, see **ESTOPPEL**, 2.

1. A court of equity will not grant the aid of specific performance where the party invoking its aid has not parted with any consideration or property, and no irreparable L. R. A.

ble damage is suffered, and no fraud is inflicted upon him, and where he is in *statu quo* at the time of the commencement of his action. *Howes v. Barmon* (Id.) 568

2. Specific performance of an oral agreement to make a lease may be decreed where a signed memorandum in writing of the terms, made at the time of the agreement, and a signed but undelivered lease, taken together, show a completed agreement upon the terms of the lease. *Charlton v. Columbia Real Estate Co.* (N. J. Err. & App.) 394

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Specific performance; duty of one seeking, to establish clearly existence of contract and its terms; of parol contract for sale of lands; part performance to take case out of statute of frauds. 568

Of oral contract to convey real estate; where purchaser has taken possession and made improvements. 584

Jurisdiction of equity to decree specific performance of contract affecting real estate in other state or country. 681

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Specific Performance of Oral Agreement, see **SPECIFIC PERFORMANCE**, 2.

STATUTES.

1. A question of the unconstitutionality of a statute as to other corporations cannot be raised by a railroad company as to which the act is valid. *Pittsburgh, C. C. & St. L. R. Co. v. Montgomery* (Ind.) 875

Title.
2. A provision creating a new liability is within the title of a statute, "An Act Regulating Liability of Railroads and Other Corporations." Id.

3. The creation of a park commission and a board of park commissioners is within the purview of a title authorizing the acquisition, maintenance, and improvement of parks. *Memphis v. Hastings* (Tenn.) 750

4. A provision in a statute authorizing the condemnation of land for boulevards to connect parks is covered by a title stating

the object of the statute to be to authorize the acquisition, improvement, and maintenance of parks. *Id.*

5. A prohibition of contracts releasing corporations from their liability to injured employees is within the main subject expressed in the title, which is the regulation of liability in such cases. *Pittsburgh, C. C. & St. L. R. Co. v. Montgomery (Ind.)* 875

6. An amendatory act, whose caption merely recites the title of the original act, without enlarging its scope, is constitutional and valid, providing its purview is germane to the title of the original act. *Memphis v. Hastings (Tenn.)* 750

Special legislation.

7. The employer's liability act changing the law as to the defense in case of negligence of fellow servants of corporations is not within a constitutional provision as to local or special laws "regulating the practice in courts." *Pittsburgh, C. C. & St. L. R. Co. v. Montgomery (Ind.)* 875

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One section of, treating particularly of certain matter, prevails over other sections in which incidental references are made thereto. 177

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Of Suit Commenced after Other Suit Begun in Different Court, see *COURTS*, 9.

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STREET RAILWAYS.

Arrest of Motorman to Abate Nuisance, see *FALSE IMPRISONMENT*.

Negligence of motorman.

Question for Jury as to, see *TRIAL*, 5.

1. The speed of an electric car running along a sparsely settled country road in the space between intersecting crossroads in the dark is to be governed, not by the ability of the motorman to stop his car after discovering an object on the track by the aid of his headlight, but by the ability of persons on the track conveniently to leave it after seeing the light and hearing or understanding the signals given by the approaching car. *Vizacchero v. Rhode Island Co. (R. I.)* 188

2. Failure to anticipate the presence of a man on his hands and knees on the track in front of an electric car on a dark night, and to run the car so as to provide for that contingency, is not negligence on the part of the motorman. *Id.*

3. A motorman in charge of a street car, upon seeing a wagon approaching the track, has the right to presume that the driver will use his senses to avoid driving onto the track in front of the car. *Markowitz v. Metropolitan Street R. Co. (Mo.)* 389

4. One in charge of an electric street car approaching a public crossing must anticipate that any person approaching the junction from either side may turn his team into the cross street, and must exercise all due care to have his car under such control as to be able to stop it at the crossing, if necessary, to avoid an accident. *Marden v. Portsmouth, K. & Y. Street R. Co. (Me.)* 300

Contributory negligence.

Question for Jury as to, see *TRIAL*, 9.

Imputing Owner's Negligence to Driver of Wagon, see *NEGLIGENCE*, 9.

5. It is negligence to attempt to drive across a street car track in dangerous proximity to an approaching car which is in plain sight, whether the car is actually seen or not. *Markowitz v. Metropolitan Street R. Co. (Mo.)* 389

6. Failure to look and listen before crossing a street car track at a public crossing cannot be said, as matter of law, to be negligence *per se*. *Marden v. Portsmouth, K. & Y. Street R. Co. (Me.)* 300

7. One about to drive across a street car track at a public street crossing is not required to look along the whole length of visible track to see if a car is coming, but only far enough to warrant an ordinarily

careful and prudent man, having in mind his own safety, under like circumstances, to conclude that no car is in such proximity as if properly managed, to endanger his safety in crossing. **Id.**

Liability where both parties are negligent.

8. To hold a street car company liable for the results of a collision with a team attempting to cross the track in front of a car notwithstanding the negligence of the driver, those in charge of the car must have been guilty of gross negligence, or reckless and wanton conduct. *Markowitz v. Metropolitan Street R. Co. (Mo.)* 389

9. The negligence of a man in crawling on his hands and knees towards an approaching electric car in the dark after the appearance of the headlight, which can be seen 800 feet away, is continuing, so as not to entitle his personal representative to hold the company liable for his death on the theory of last clear chance, because the speed of the car is so great that it cannot be stopped after his presence on the track is discovered. *Vizacchero v. Rhode Island Co. (R. I.)* 188

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Of Insane Person. see **INCOMPETENT PERSONS.**

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Invalidity of Statute Requiring Execution of Official or Fiduciary Bond by, see **BONDS.**

SURFACE SUPPORT.

Duty of One Mining Coal to Leave, see **MINES.**

SURFACE WATER.

See **WATERS**, 1, 2.

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Forfeiture of Lease for Nonpayment of, see **LANDLORD AND TENANT**, 2.

Effect of Payment of, by Purchaser of Mortgaged Premises, on Running of Limitations against Right to Foreclose. see **LIMITATION OF ACTIONS**, 7.

Power to exempt from taxation.

1. The legislature has no power partially to exempt from taxation the property of corporations engaged in maritime commerce and navigation where the Constitution requires a uniform rule of taxation. *Teagan Transp. Co. v. Detroit Bd. of Assessors (Mich.)* 431

Where taxable; situs of property.

2. A statute making all the property of corporations engaged in maritime commerce or navigation taxable only at the place designated in their charters as their general office for business violates a constitutional provision requiring a uniform rate of taxation. **Id.**

3. The holding of annual stockholders' and directors' meetings at the place named in the articles of incorporation as the home of the corporation is not its principal business, so as to make it taxable there, where substantially all the business for which it is organized is transacted and its funds kept at another place, under a statute providing that a corporation shall be taxable where its office is located by its charter, provided its business is actually transacted there, but that, if it shall establish its principal office in another place, then the place where it transacts its principal business shall be deemed its residence for purposes of taxation. **Id.**

4. In determining the situs of personal property for taxation, the legislature must regard the constitutional requirement of uniformity. Id.

5. The valuation and assessment of the property of a railway company, by one assessing body, as an entirety, and the distribution of the value thus ascertained upon a mileage basis over the entire line of such railway, as provided by statute, do not operate as a changing of the situs of the property assessed. *State ex rel. Morton v. Back* (Neb.) 447

6. In the assessment of railway property for taxation, it is competent for the legislature to classify such property, and provide for the assessment of the same as personalty, and to fix the situs of the property assessed by providing for the valuation of the property as an entirety, and the distribution of the total value to each taxing district according to the number of miles of main track located therein. Id.

Mode of assessment; valuation and equalization.

Due Process in Assessing Railroad Property, see CONSTITUTIONAL LAW, 8.

See also *supra*, 5, 6.

7. The assessment, for municipal purposes, of railroad property according to the plan prescribed by a statute requiring the valuation and assessment of railroad property by one assessing body as a unit, and the distribution of the aggregate value on a mileage basis for all purposes of taxation to the various counties, cities, and towns through which the road runs, does not violate the provisions of the fundamental law requiring uniformity and equality in the valuation and assessment of property for the purpose of taxation. Id.

8. It is competent for the legislature to provide for the valuation and assessment of the property of railway companies, such as is required to be listed and scheduled with the auditor of public accounts by Neb. Comp. Stat. 1901, chap. 77, art. 1, §§ 39, 40, by one assessing body, and for ascertaining the value of the whole of such property of any one railway corporation subject to taxation in the state as a unit or as an entirety and for distributing the value as thus found over the main line or track of such railway company and to the different taxing districts, municipalities, etc., on a mileage basis. Id.

9. In the assessment for municipal purposes of railway property situated in cities of the metropolitan class, such as is required to be listed with and assessed by the state board of equalization for general revenue purposes, under the provisions of Neb. 69 L. R. A.

Comp. Stat. 1901, chap. 77, art. 1, §§ 39, 40, as existing prior to the revenue act of 1903 (Cobbey's Anno. Stat. 1903, chap. 49), it is made the duty of the tax commissioner or assessor of such city to accept the values of the fractional part of such railroad property situated in the municipality as the same is valued and assessed by the state board of equalization, and apportioned to such city in accordance with the provisions of said act. Id.

10. The proportional share of railway property as valued and assessed by the state board of equalization under a statute requiring railway property to be assessed as a unit, and the aggregate value to be distributed to the different counties, cities, and towns through which the road runs, on a mileage basis, belonging to and situated in a city and subject to taxation for municipal purposes, may be equalized by the proper authorities of such city by lowering or raising the values of the same as thus ascertained, so as to bring about uniformity of valuation in respect of all property subject to taxation within the municipality. Id.

NOTES AND BRIEFS.

Taxes; situs, for taxing purposes, of tangible personal property of domestic corporations in the United States:—(I.) Scope of note; (II.) essentials of jurisdiction; (III.) localization of corporations; (IV.) principal office as domicile: (a) in general; (b) of railroads; (V.) effect of certificate of incorporation on the question of domicile; (VI.) legislative power to fix the situs of property for taxation; (VII.) personal property physically present in the taxing jurisdiction; (VIII.) tangible property outside the state; (IX.) particular classes of property: (a) railroad rolling stock; (b) water craft; (X.) conclusion. 431

Constitutional requirement of uniformity; power of legislature to change railroad company's real estate into personalty and shift location for purposes of taxation; statute requiring assessment of railroad as a unit, and distribution on mileage basis to the various taxing districts. 449

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Effect of tax sale to create encumbrance, rather than to divest title. 868

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Law Governing Contract and Damages for Breach, see CONFLICT OF LAWS, 1.

Measure of Damages for Failure to Deliver, see DAMAGES, 12.

Burden of Proving Loss from Delay in Delivering, see EVIDENCE, 7.

TENDER.

That a written tender is not kept good as required by statute will not defeat a judgment directing the repurchase of stock according to contract, if the shares were produced in court at the trial, and filed with the clerk. *Wisconsin Lumber Co. v. Greene & W. Teleph. Co.* (Iowa) 968

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TRESTLE.

Duty to Sound Warnings when Train Approaches, see RAILROADS, 2.

TRIAL.

Excuse of Competent Juror, see APPEAL AND ERROR, 17.

Error in Remarks by Court or Counsel, see APPEAL AND ERROR, 20-22.

Right to Proceed with Trial in Contempt of Court, see CONTEMPT.

New Trial for Insufficiency of Special Verdict, see NEW TRIAL, 3.

 Election between different theories.

1. Where a complaint is indefinite and uncertain because of the pleader's confusing 69 L. R. A.

the elements of advertence with that of inadvertence and ordinary negligence with gross negligence, and the attention of the trial court is called thereto, though not in the most approved manner, it should compel the plaintiff to proceed upon one theory or the other, if both theories can be reasonably spelled out of the pleadings, or give such permissible construction to the pleadings as to confine plaintiff's claim to one species of wrongdoing. *Rideout v. Winnebago Traction Co.* (Wis.) 601

Questions for jury.

Master's Liability for Injury by Unguarded Shaft, see MASTER AND SERVANT, 6.

Failure to Sound Warnings when Train Approaches Trestle, see RAILROADS, 2.

2. The credibility and value of the testimony of a lawyer of another state as to what the rule upon a certain subject is in that state may be submitted to the jury. *Hancock v. Western U. Teleg. Co.* (N. C.) 403

3. Whether the end sought to be attained by a taking of property by eminent domain is a public use is a question to be determined by the court. *Albright v. Sussex County L. & P. Com.* (N. J. Err. & App.) 768

4. Whether a sum of money paid by a railroad company to an injured brakeman was paid in satisfaction of his damages, as the company contended, or as a donation, as the brakeman claimed, and whether a release of the company from liability was executed by him for the purpose of discharging the company, or was obtained by fraud, are questions for the jury; and their finding will not be disturbed. *Schus v. Powers-Simpson Co.* (Minn.) 887

5. The jury must decide whether or not, under all the circumstances of the case, a street car company is guilty of negligence in approaching a street crossing at an unreasonable speed, which results in a collision with a vehicle using the highway. *Marden v. Portsmouth, K. & Y. Street R. Co.* (Me.) 300

6. If the particular engine which caused a fire near a railroad track is not identified, the jury may, in determining the question of the negligence of the railroad company, consider evidence that fires were set out at about the time the loss occurred, by engine belonging to the defendant, which are not claimed to have started the fire in question. *Manchester Assur. Co. v. Oregon R. & Nav. Co.* (Or.) 475

7. The questions of the provision of a reasonably safe and accessible exit from a

railroad terminal, and of the negligence of a passenger injured by attempting to use a stile over a wire fence for that purpose. are for the jury, where the evidence shows that there was an opening through the fence 40 rods away, and another 400 or 500 feet away, not in sight, which might have been closed on the day of the accident. *Cotant v. Boone Suburban R. Co. (Iowa)* 982

8. The question of the contributory negligence of a brakeman injured in attempting to couple two cars loaded with lumber so placed that the ends projected over the ends of the cars, so that he could not enter between the cars in an erect position, but was compelled to do so in a stooping position,—is for the jury. *Schus v. Powers-Simpson Co. (Minn.)* 887

9. The court will not, as a matter of law, say that it is negligence for one driving a team to attempt to cross a street car track at a public crossing, after looking along the track 244 feet without seeing a car when he is only 20 feet from the track; but the question is for the jury. *Marden v. Portsmouth, K. & Y. Street R. Co. (Me.)* 300

10. Whether or not a savings bank is negligent in failing to preserve the signatures of depositors for comparison, in paying money on forged orders without comparing the signatures, and in issuing a duplicate book without requiring adequate proof of the destruction of the original one, are questions for the jury. *Chase v. Waterbury Sav. Bank (Conn.)* 329

Instructions.

11. An instruction contained in the general charge need not, at the instance of the parties, be repeated in special instructions. *State v. Coleman (Mo.)* 381

12. A plea of guilty of the theft to commit which a burglary is alleged to have been committed does not, where the fact of burglary itself depends on circumstantial evidence, relieve the court of the necessity of instructing the jury as to the law governing convictions on circumstantial evidence. *Beason v. State (Tex. Crim. App.)* 193

13. The jury should not be instructed as to the law upon abstract propositions wholly disconnected with the issues of fact they are called on to determine. *Central of Ga. R. Co. v. Augusta Brokerage Co. (Ga.)* 119

14. Instructions predicated on facts which do not exist are properly refused. *State v. Coleman (Mo.)* 381

15. Instructing the jury not to consider evidence withdrawn by the party who offered it is proper, when requested by the 69 I. R. A.

other party. *Pittsburgh, C. C. & St. L. R. Co. v. Montgomery (Ind.)* 875

16. An instruction by the court that the jury must not consider the failure of the defendant to become a witness in his own behalf, in arriving at a verdict, is not erroneous. *State v. Currie (N. D.)* 405

17. A charge to the jury that in a decision on one branch of the case on trial the supreme court had held that plaintiff's petition set forth a cause of action is erroneous. *Central of Ga. R. Co. v. Augusta Brokerage Co. (Ga.)* 119

18. Where a complaint has a double aspect rendering it indefinite and uncertain, because it charges both gross negligence and ordinary negligence, it is error to submit the cause to the jury upon both aspects; and, in case error is committed in that regard, resulting in a verdict in favor of the plaintiff upon the ground of gross negligence and ordinary negligence as well, it is error to render judgment thereon because of inconsistency in the findings. *Rideout v. Winnebago Traction Co. (Wis.)* 601

19. It is misleading to charge that municipal ordinances do not justify the shooting of a person by an officer in attempting to arrest him for their violation, in connection with a charge that the ordinances are admissible to prove the good faith of the officer in attempting to effect the arrest. *State v. Coleman (Mo.)* 381

Direction of verdict.

20. It is error to direct a verdict for defendant in an action by a servant against his master to recover damages for personal injuries, where there is some evidence tending to show that the injury was caused by defective machinery. *Dill v. Marmon (Ind.)* 163

Correcting verdict.

21. The court may properly refuse to require the jury to return to their room and insert specified facts in their special verdict; but the remedy, if any, is by motion for a new trial. *Pittsburgh, C. C. & St. L. R. Co. v. Montgomery (Ind.)* 875

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Trial; necessity of instruction as to law on circumstantial evidence:—(I.) Introductory; (II.) when evidence is entirely circumstantial: (a) in general: (1) homicide; (2) larceny; (3) burglary; (4) other crimes; (b) possession of stolen property; (III.) when the evidence of guilt of accused is direct: (a) by positive testimony: (1) homicide; (2) larceny; (3) robbery; (4) rape; (5) other crimes; (b) by proof of the confession of accused: (1) homicide; (2)

larceny; (3) burglary; (4) other crimes; (c) plea of insanity; (IV.) where evidence is both direct and circumstantial; (V.) where instruction, or request to charge, simply states abstract proposition; (VI.) testimony of accomplice; (VII.) necessity of request for instruction; or exception; (VIII.) refusal of request, the substance of which is elsewhere charged; (IX.) accused in juxtaposition to main or inculpatory fact; (X.) as to question of intent; (XI.) miscellaneous cases. 193

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Question of due care of plaintiff in action for personal injury as one for jury; question of negligence of defendant, and whether it was proximate cause of injury, for jury. 301

Negligence of bank in making payment to one who has stolen pass book as question for jury. 342

Question whether or not a paper writing constitutes a will, for jury. 424

Question for jury as to safety of appliances furnished by master; where testimony is conflicting; duty to submit question of master's negligence to jury. 798

Question for jury as to negligence of engineer in moving engine while coupling is being made. 888

Propriety of motion to strike out answer as method of testing sufficiency of matters of defense presented. 969

TRUSTS.

1. Mere unfriendliness of a *cestui que trust* toward a trustee is not sufficient ground for the removal of the latter. *Polk v. Linthicum* (Md.) 920

2. The removal of the widow as trustee of a fund provided for the benefit of testator's daughter is required, where she elected to take her dower rights in opposition to the will, thereby depleting the trust estate, and destroying a very important part of the scheme of the testator, remarried within a short time, became estranged from the *cestui que trust* and her cotrustees so that no intercourse could subsist between them, and kept the estate in needless litigation. *Id.*

NOTES AND BRIEFS.

Trusts; duty of trustee; removal of 69 L. R. A.

trustee because of strained relations with *cestui que trust*; because of strained relations with cotrustee; renunciation of trust. effect of election by widow named in will as trustee for benefit of testator's daughter to take dower rights in opposition to will; in interference with testator's judgment in appointing trustee. 920

USURY.

By Building and Loan Association, see BUILDING AND LOAN ASSOCIATIONS. 1.

VENDOR AND PURCHASER.

Defect of Title as Defense *Pro Tanto* to Purchase-Money Note, see BILLS AND NOTES, 3.

Measure of Damages for Breach of Covenant of Seisin, see DAMAGES. 6.

Damages for Breach of Covenant to Convey, see DAMAGES, 7.

Recovery for Improvements on Breach of Covenant of Seisin, see IMPROVEMENTS.

Stay of Action on Purchase-Money Note, see INJUNCTION, 5.

Outstanding Contingent Remainder as Breach of Covenant, see COVENANT.

Right to marketable title.

1. A vendee is entitled to a title that is marketable, as well as good in fact, under a contract calling for a "good" title; and the rule is the same whether an action is brought by the vendor to compel specific performance, or by the vendee to recover back his earnest money. *Ladd v. Weiskopf* (Minn.) 785

2. A title is not unmarketable so as to entitle a vendee to rescind his contract and recover back the earnest money paid, where no question of fact is involved, but only one of law, arising exclusively upon the construction of a record muniment of title, and all parties interested are before the court, so that its decision will be a final determination of the matter. *Id.*

3. A doubt as to the construction of a decree of distribution by a probate court, which is conclusive upon all parties interested in the estate, does not render a title unmarketable so as to entitle a vendee to rescind his contract and recover back the earnest money paid. *Id.*

4. Payment of the money cannot be enforced under a contract to purchase real estate which stipulates that the property shall be clear of all encumbrances, if the title has not been accepted, and there is an existing right on the part of a municipality to open a platted street over the property, which will destroy the buildings without

making compensation for them. *Taylor v. Evans* (Pa.) 790

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Vendor and purchaser; breach of covenant as to title because of encumbrances; duty of vendee to pay off encumbrances before seeking relief. 235

Covenant of seisin; broken when vendor has not good title; effect of vendee's obtaining rescission of contract as restoration to vendor; judgment after breach of covenant; as precluding vendee from asserting right to property. 761

Right of vendee to title in fee simple absolute; right to marketable title; what is marketable title. 785

Stipulation against encumbrances; what constitutes encumbrance; right of city to open platted street through property as encumbrance; sufficiency of notice of encumbrance. 790

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VERDICT.

Direction of, see *TRIAL*, 20.

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VERIFICATION.

Of Indictment, see *INDICTMENT AND INFORMATION*, 5-7.

VOTERS AND ELECTIONS.

A statute permitting the use of a voting machine which assures secrecy, free choice of candidates, a correct record of the vote, and a correct record and announcement of the total vote given for each candidate, does not contravene a constitutional requirement that all votes at elections shall be given by ballot. *People ex rel. Detroit v. Board of Inspectors* (Mich.) 184

NOTES AND BRIEFS.

Voters and elections; meaning of word "ballot" in Constitution requiring votes at election to be by ballot; validity of statute permitting use of voting machines. 184

VOTING MACHINES.

Constitutionality of Statute Permitting Use of, see *VOTERS AND ELECTIONS*.

WAIVER.

Of Right to Have Entire Damages for Taking of Land Assessed, see *EMINENT DOMAIN*, 11.

By Insurance Company, see *INSURANCE*, 6.

Of Right to Have Paragraphs of Answer Stricken out, see *PLEADING*, 2.

Of Right of Privacy, see *PRIVACY*, 4.

Of Benefit of Condition in Conveyance of Land, see *REAL PROPERTY*, 4, 5.

The basis of waiver is estoppel, and where there is no estoppel there is no waiver. *Williams v. Neely* (C. C. App. 8th C.) 232

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Waiver; of forfeiture of lease; by acceptance of rent after; where landlord denies intent to waive. 867

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WATERS.

Taking Right to Fish in Lake under Power of Eminent Domain, see *EMINENT DOMAIN*, 2.

Right of Recovery for Constructing Embankment across Mouth of Cove, see *EMINENT DOMAIN*, 7-14.

Injunction to Protect Rights in, see *INJUNCTION*, 1.

Surface water.

1. Surface waters which by natural drainage collect in a natural basin or depression upon the premises of a dominant tenement, and escape therefrom only by percolation or evaporation, forming thereby a lake or pond permanent in its character, when so collected and coming to rest lose the character of surface water, and may not by artificial means, other than that incident to the cultivation of the soil, be drained to the damage of a servient tenement, without liability in damages for such act. *Davis v. Fry* (Okla.) 460

2. Owners of improved property located adjacent to an adequate sewer or drainage system in a city are required to connect therewith the water gutters and spouts upon their buildings, and not to permit the rain water to collect and discharge at a point in a public alley, where, by reason of the volume and force thus attained, it enters adjoining premises, provided such connection with the drainage system can reasonably be made. *Ginter v. St. Mark's Church* (Minn.) 621

Public water supply.

Burden of Showing Unreasonableness of Rates, see EVIDENCE, 6.

3. The fact that the construction of waterworks is a public use to be paid for by taxation does not require the basing of all rates upon the amount of water used in each instance, and on nothing else. *Souther v. Gloucester* (Mass.) 309

4. Owners of summer cottages in outlying districts, who desire to use water from a city system during part of the year only, may be required to pay the same amount for such water as owners of property in the city are required to pay for service during the whole year, where the laying of special pipes and the construction of an additional reservoir are necessary to enable the city to furnish the water, which facts create special circumstances justifying a discrimination in rates between the two classes of consumers; and they cannot complain that the rule requiring payment in advance is applied to them. *Id.*

5. Owners of cottages in outlying districts of a city cannot complain that some discrimination is made in rates between them and consumers in the heart of the city, where special circumstances exist which justify it. *Id.*

NOTES AND BRIEFS.

Waters; how expense of municipal supply of water paid; when higher rate may be charged certain consumers; necessity that rates be reasonable; injunction to restrain unreasonable rates; duty to supply all on reasonable terms; necessity of uniformity of rates; how question of reasonableness of rates determined; reasonableness of regulation that every taker shall pay rent for the whole year and make payment in advance, whether he uses water for that length of time or not. 309

Surface waters; general rule as to; right to drain land of surface waters by artificial means; effect of collection of surface waters in natural basin having no outlet, to destroy their original character. 462

Surface water as common enemy; duty of city as to. 621

Maintenance of drainage ditches. 805

What constitutes unreasonable use of mill pond; injunction to restrain lowering of water in mill pond to natural level. 933

Power of Congress to authorize construction of bridges across navigable streams; power of legislature to authorize railroad company to place permanent bridge over navigable waters; construction of embankment across mouth of cove; right of riparian owner on cove to damages; right of riparian owner on navigable stream to access; right to wharf out; obstruction of navigable stream as nuisance. 929

ian owner on cove to damages; right of riparian owner on navigable stream to access; right to wharf out; obstruction of navigable stream as nuisance. 929

WHARVES.**NOTES AND BRIEFS.**

Wharves; right of riparian owner to wharf out; compensation for interference with right. 929

WILLS.**Signing of.**

1. In an action to contest a will on the sole ground that it was not signed at the end thereof as required by Ohio Rev. Stat. § 5916, its construction or interpretation is not a subject for the consideration of the court or the jury, the only question being whether the will has been executed in substantial compliance with the formalities prescribed by the statute. *Irwin v. Jacques* (Ohio) 422

2. A will is not signed at the end as required by statute, where the body of it is written on horizontal lines of several pages of paper, so that all its items and provisions are in consecutive order to the end on the last page, under which the testator's signature appears, but there is written in the margin of the last page, to the left of and separated from the body of the instrument, a dispositive clause, extending lengthwise of the page from near the bottom to near the top thereof, and in no manner connected with the body of the instrument by any words, mark, or character to indicate where the marginal matter is to be read in relation to the other provisions, and it is established by the testimony that the marginal matter was written after all the other provisions, at the request of the testator, and before he attached his signature under the body of the will. *Id.*

Revocation of legacy.

3. The granting of an absolute divorce does not revoke by implication a legacy in the will of the husband in favor of the wife. *Re Jones* (Pa.) 940

Lapse of legacy.

4. The procuring, by the legatee, of an absolute divorce subsequent to the execution of the will, does not cause the lapse of a legacy which testator creates for his "wife" by name. *Id.*

NOTES AND BRIEFS.

Wills; when signed at end within meaning of statute; right to make will. 424

Devising remainder to children surviving

at death of testator's wife; jurisdiction of probate court to reform will; when remainder is vested. 785

Effect of divorce to revoke gift by will:—
(I.) Introductory; (II.) when status mentioned in will controls: (a) in general; (b) when legatee is mentioned by name; (III.) effect of lapse of time between divorce and testator's death; (IV.) effect of property settlement. 940

WITNESSES.

NOTES AND BRIEFS.

Witnesses; right to refresh memory from 69 L. R. A.

memoranda; when memoranda not made by himself or under his direction. 476

WRIT AND PROCESS.

Service upon defendant in a divorce suit by delivering him a copy of the bill and giving him notice of the suit at his residence in another state will give the court no jurisdiction to enter a personal judgment against him for alimony and attorney's fees. Proctor v. Proctor (III.) 673

NOTES AND BRIEFS.

Writ and process; sufficiency of service on party out of state. 674

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